

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - James G. Watt

Office of Hearings and Appeals - - James Limb, Director

Office of the Solicitor - - - William H. Coldiron, Solicitor

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

EDITED BY

BETTY H. PERRY

RACHAEL CUBBAGE



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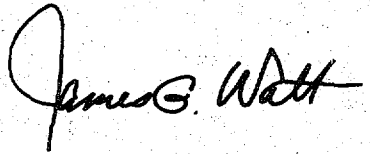
Washington, D.C. 20402

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1981 to December 31, 1981. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable James G. Watt, served as Secretary of the Interior during the period covered by this volume; Mr. Donald P. Hodel served as Under Secretary; Messrs. G. Ray Arnett, Garrey E. Carruthers, Daniel Miller, Pedro A. Sanjuan, Kenneth L. Smith, J. Robinson West served as Assistant Secretaries of the Interior; Mr. William H. Coldiron, served as Solicitor. Mr. James Limb, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "88 I.D."

A handwritten signature in dark ink, reading "James G. Watt". The signature is written in a cursive style with a large, stylized initial "J".

Secretary of the Interior.

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ERRATA:

Page 261—Title of case at bottom of right col. change to read: Aimee Marion *Bowen*.

Also, running headings of this case should be changed to read: *Bowen*.

Page 265—In the left col., line 10, footnote 3, change to read: *Contrary* to the

Page 319—Left col., third para. of footnote 5, 1st line, change to read: "A *virtue* of the

Page 347—Left col., line 23 change to read: *Burglin v. Secretary*.

Page 410—Left col., 1st para., line 6: change to read: 54 Stat. 746.

Page 410—Right col., 1st para., line 12 change to read: July 8, 1940.

Page 564—Left col., next to last line, change to read: that the matter is *not* properly before

Page 569—Right col., 3d line from top of page, change to read: groups. The *Sailto* opinion is internally

Page 695—Footnote 1, last line, change to read: 1192-5-78 (June 29, 1979), 86 I.D. 349, 357

Page 889—Right col, line 5, change to read: 2653.5. BLM declared that regula-

Page 906—Footnote 3, 2d para., 1st line, change to read: See also Atchison, Topeka and Santa Fe R.R.

Page 908—Left col., 2d para., line 8, change to read: nessee Valley Authority v. Hill, 437

Page 928—Footnote 4, 1st line, change to read: Until United States v. O'Leary, 63 I.D. 341

Page 939—Right col., line 7, change to read: involved in an appeal. See 43 CFR

Page 1009—Right col., 2d para., 3d line from bottom, change to read: 95-554, 92 Stat. 2073 ("1978 Act")

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The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given, if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

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Kaiser Steel Corp. v. Office of Surface Mining & Enforcement, Civil No. 80-656-M, D.N.M. Suit pending.

Estate of San Pierre Kilkaken (Sam E. Hill), 1 IBIA 299; 79 I.D. 583 (1972), 4 IBIA 242 (1975), 5 IBIA 12 (1976)

Christine Sam & Nancy Judge v. Thomas Kleppe, Secretary of the Interior, Civil No. C-76-14, E.D. Wash. Dismissed with prejudice.

Aquita L. Klunter et al., A-30483, Nov. 18, 1965

See *Bobby Lee Moore et al.*

Leo J. Kottas, Earl Lutzenhiser, 73 I.D. 123 (1966)

Earl M. Lutzenhiser and Leo J. Kottas v. Stewart L. Udall et al., Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; aff'd, 432 F.2d 328 (9th Cir. 1970); no petition.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

Max Krueger v. Fred A. Seaton, Civil No. 3106-58. Complaint dismissed by plaintiff, June 22, 1959.

Marlin D. Kuykendall v. Phoenix Area Director & Yavapai-Prescott Tribe, 8 IBIA 76, 87 I.D. 189 (1980)

Yavapai-Prescott Indian Tribe v. Cecil D. Andrus, Secretary of the Interior, et al., Civil No. CIV-80-464 PCT-CLH, D. Ariz. Suit pending.

W. Dalton La Rue, Sr., 69 I.D. 120 (1962)

W. Dalton La Rue, Sr. v. Stewart L. Udall, Civil No. 2784-62. Judgment for defendant, Mar. 6, 1963; *aff'd*, 324 F.2d 428 (1963); *cert. denied*, 376 U.S. 907 (1964).

L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. U.S., Ct. Cl. No. 393-67. Dismissed, 410 F.2d 782 (1969); no petition.

Charles Lewellen, 70 I.D. 475 (1963)

Bernard E. Darling v. Stewart L. Udall, Civil No. 474-64. Judgment for defendant, Oct. 5, 1964; appeal voluntarily dismissed, Mar. 26, 1965.

Administrative Appeal of Ruth Pinto Lewis v. Superintendent of the Eastern Navajo Agency, 4 IBIA 147; 82 I.D. 521 (1975)

Ruth Pinto Lewis, Individually & as the Administratrix of the Estate of Ignacio Pinto v. Thomas S. Kleppe, Secretary of the Interior, & U.S., Civil No. CIV-76-223 M, D.N.M. Judgment for plaintiff, July 21, 1977; no appeal.

Milton H. Lichtenwalner et al., 69 I.D. 71 (1962)

Kenneth McGahan v. Stewart L. Udall, Civil No. A-21-63, D. Alaska. Dismissed on merits, Apr. 24, 1964; stipulated dismissal of appeal with prejudice, Oct. 5, 1964.

Merwin E. Liss et al., 70 I.D. 231 (1963)

Hope Natural Gas Co. v. Stewart L. Udall, Civil No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall et al., Civil No. 2109-63. Judgment for defendant, Sept. 20, 1965; per curiam dec., *aff'd*, Apr. 28, 1966; no petition.

Bess May Lutey, 76 I.D. 37 (1969)

Bess May Lutey et al. v. Dept. of Agriculture, BLM, et al., Civil No. 1817, D. Mont. Judgment for defendant, Dec. 10, 1970; no appeal.

Appeal of Carmel J. McIntyre, 4 ANCAB 24, 86 I.D. 24, 86 I.D. 663 (1979)

Carmel J. McIntyre v. Cecil D. Andrus, Secretary of the Interior, Frank Gregg, Dir., BLM, Curtis V. McVee, Alaska State Dir., BLM, Alaska Native Claims Appeal Board, Eklutna, Inc. & Cook Inlet Region, Inc., Civil No. A79-391 CIV, D. Alaska. Suit pending.

Elgin A. McKenna Executrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. Udall, Civil No. 2001-67. Judgment for defendant, Feb. 14, 1968; aff'd, 418 F.2d 1171 (1969); no petition.

Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al., Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

A. G. McKinnon, 62 I.D. 164 (1955)

A. G. McKinnon v. U.S., Civil No. 9433, D. Ore. Judgment for plaintiff, 178 F. Supp. 913 (1959); rev'd, 289 F.2d 908 (9th Cir. 1961).

Estate of Elizabeth C. Jensen McMaster, 5 IBIA 61; 83 I.D. 145 (1976)

Raymond C. McMaster v. U.S. Dept. of the Interior, Secretary of the Interior & Bureau of Indian Affairs, Civil No. C76-129T, W.D. Wash. Dismissed, June 29, 1978.

Wade McNeil et al., 64 I.D. 423 (1957)

Wade McNeil v. Fred A. Seaton, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion); rev'd, 281 F.2d 931 (1960); no petition.

Wade McNeil v. Albert K. Leonard et al., Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, Apr. 16, 1962.

Wade McNeil v. Stewart L. Udall, Civil No. 678-62. Judgment for defendant, Dec. 13, 1963 (opinion); aff'd, 340 F.2d 801 (1964); *cert. denied*, 381 U.S. 904 (1965).

Marathon Oil Co., 81 I.D. 447 (1974), *Atlantic Richfield Co., Marathon Oil Co.*, 81 I.D. 457 (1974)

Marathon Oil Co. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-179, D. Wyo.

Marathon Oil Co. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-180, D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. C 74-181, D. Wyo.

Actions consolidated; judgment for plaintiff, 407 F. Supp. 1301 (1975); aff'd, 556 F.2d 982 (10th Cir. 1977).

Salvatore Megna, Guardian, Philip T. Garigan, 65 I.D. 33 (1958)

Salvatore Megna, Guardian etc. v. Fred A. Seaton, Civil No. 468-58. Judgment for plaintiff, Nov. 16, 1959; motion for reconsideration denied, Dec. 2, 1959; no appeal.

Philip T. Garigan v. Stewart L. Udall, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered Sept. 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

Meva Corp., 76 I.D. 205 (1969)

Meva Corp. v. U.S., Ct. Cl. No. 492-69. Judgment for plaintiff, 511 F.2d 548 (1975).

Duncan Miller, Louise Cuccia, 66 I.D. 388 (1959)

Louise Cuccia & Shell Oil Co. v. Stewart L. Udall, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, 70 I.D. 1 (1963)

Duncan Miller v. Stewart L. Udall, Civil No. 931-63. Dismissed for lack of prosecution, Apr. 21, 1966; no appeal.

Duncan Miller, Samuel W. McIntosh, 71 I.D. 121 (1964)

Samuel W. McIntosh v. Stewart L. Udall, Civil No. 1522-64. Judgment for defendant, June 29, 1965; no appeal.

Duncan Miller, A-30546 (Aug. 10, 1966), A-30566 (Aug. 11, 1966), & 73 I.D. 211 (1966)

Duncan Miller v. Udall, Civil No. C-167-66, D. Utah. Dismissed with prejudice, Apr. 17, 1967; no appeal.

Bobby Lee Moore et al., 72 I.D. 505 (1965) *Anquita L. Kluenter et al.*, A-30483 (Nov. 18, 1965)

Gary Carson Lewis, etc., et al. v. General Services Administration et al., Civil No. 3253, S. D. Cal. Judgment for defendant, Apr. 12, 1965; aff'd, 377 F.2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan et al., 65 I.D. 369 (1958)

Henry S. Morgan v. Stewart L. Udall, Civil No. 3248-59. Judgment for defendant, Feb. 20, 1961 (opinion); aff'd, 306 F.2d 799 (1962); cert. denied, 371 U.S. 941 (1962).

Morrison-Knudsen Co., Inc., 64 I.D. 185 (1957)

Morrison-Knudsen Co. v. U.S., Ct. Cl. No. 239-61. Remanded to Trial Comm'r, 345 F.2d 833 (1965); Commr's report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F.2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on Oct. 6, 1969; judgment for plaintiff, Feb. 17, 1970.

Glenn Munsey v. Smitty Baker Coal Co., Ralph Baker, Smitty Baker, & P Coal Co., 84 I.D. 336 (1977)

Glenn Munsey v. Cecil D. Andrus, No. 77-1619, United States Ct. of Appeals, D.C. Cir. Suit pending.

Navajo Tribe of Indians v. State of Utah, 80 I.D. 441 (1973)

Navajo Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior, Civil No. C-308-73, D. Utah. Dismissed with prejudice, Jan. 4, 1979.

Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 4181-60. Dismissed, Nov. 15, 1963; case reinstated, Feb. 19, 1964; remanded, Apr. 4, 1967; rev'd & remanded with directions to enter judgment for appellant, 389 F.2d 974 (1968); *cert. denied*, 392 U.S. 909 (1968).

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. 760-63, D. Alaska. Withdrawn Apr. 18, 1963.

Superior Oil Co. v. Robert L. Bennett, Civil No. A-17-63, D. Alaska. Dismissed, Apr. 23, 1963.

Native Village of Tyonek v. Robert L. Bennett, Civil No. A-15-63, D. Alaska. Dismissed, Oct. 11, 1963.

Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alaska. Dismissed, Oct. 29, 1963 (oral opinion); *aff'd*, 332 F.2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. Stewart L. Udall, Civil No. A-39-63, D. Alaska. Dismissed without prejudice, Mar. 2, 1964; no appeal.

Oil Resources, Inc., 28 IBLA 394; 84 I.D. 91 (1977)

Oil Resources, Inc. v. Cecil D. Andrus, Secretary of the Interior, Civil No. C-77-0147, D. Utah. Suit pending.

Old Ben Coal Co., 81 I.D. 428, 81 I.D. 436, 81 I.D. 440 (1974)

Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals et al., Nos. 74-1654, 74-1655, 74-1656, United States Court of Appeals for the 7th Cir. Board's decision *aff'd*, 523 F.2d 25 (7th Cir. 1975).

Old Ben Coal Co., 82 I.D. 355 (1975)

United Mine Workers of America v. U.S. Interior Board of Mine Operations Appeals, No. 75-1852, United States Court of Appeals, D.C. Cir. Vacated & remanded with instructions to dismiss as moot, June 10, 1977.

Old Ben Coal Co., 84 I.D. 459 (1977)

United Mine Workers of America v. Cecil D. Andrus, No. 77-1840, United States Court of Appeals, D.C. Cir. Suit pending.

Appeal of Ounalashka Corp., 1 ANCAB 104; 83 I.D. 475 (1976)

Ounalashka Corp., for & on behalf of its Shareholders v. Thomas Kleppe, Secretary of the Interior & his successors & predecessors in office, et al., Civil No. A76-241 CIV, D. Alaska. Suit pending.

D. E. Pack, 30 IBLA 166, 84 I.D. 192 (1977); *On Reconsideration*, 38 IBLA 23, 85 I.D. 408 (1978)

John S. Runnells v. Cecil Andrus, Secretary of the Interior, et al., Civil No. C-77-0268, D. Utah. Rev'd & remanded to Bureau of Land Management for issuance of the leases, Feb. 19, 1980; no appeal.

Jack W. Parks v. L & M Coal Corp., 83 I.D. 710 (1976)

Jack W. Parks v. Thomas S. Kleppe, No. 76-2052, United States Court of Appeals, D.C. Cir. Voluntary dismissal, May 4, 1977.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. U.S., Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, Dec. 19, 1958.

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. U.S., Ct. Cl. 129-66. Judgment for plaintiff, May 24, 1968.

Curtis D. Peters, 80 I.D. 595 (1973)

Curtis D. Peters v. U.S., Rogers C. B. Morton, as Secretary of the Interior, Civil No. C-75-0201 RFP, N.D. Cal. Judgment for defendant, Dec. 1, 1975; no appeal.

City of Phoenix v. Alvin B. Reeves et al., 81 I.D. 65 (1974)

Alvin B. Reeves, Genevieve C. Rippey, Leroy Reeves & Thelma Reeves, as heirs of A. H. Reeves, Deceased v. Rogers C. B. Morton, Secretary of the Interior & The City of Phoenix, a municipal Corp., Civil No. 74-117 PHX-WPC, D. Ariz. Dismissed with prejudice, Aug. 9, 1974; reconsideration denied, Sept. 24, 1974; no appeal.

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. Stewart L. Udall, Civil No. 1351-62. Judgment for defendant, Aug. 2, 1962; aff'd, 317 F.2d 573 (1963); no petition.

Earl W. Platt, 43 IBLA 41, 86 I.D. 458 (1979)

Barbara Garcia v. Cecil Andrus, Secretary of the Interior, Earl W. & Buena Platt, Civil No. CIV-80-382 PCT, D. Ariz. Suit pending.

Pocahontas Fuel Co., 83 I.D. 690 (1976)

Howard Mullins v. Cecil D. Andrus, No. 77-1087, United States Court of Appeals, D.C. Cir. Reversed & remanded, Dec. 31, 1980.

Pocahontas Fuel Co., 84 I.D. 489 (1977)

Pocahontas Fuel Co., Div. of Consolidation Coal Co. v. Cecil D. Andrus, No. 77-2239, United States Court of Appeals, 4th Cir. Suit pending.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. U.S., Civil No. 6205, W.D. Wash. Dismissed with prejudice, Dec. 7, 1964.

Estate of John S. Ramsey (Wap Tose Note) (Nez Perce Allottee No. 853, Deceased), 81 I.D. 298 (1974)

Clara Ramsey Scott v. U.S. & Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. 3-74-39, D. Idaho. Dismissed with prejudice, Aug. 11, 1975; no appeal.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co. v. U.S., Ct. Cl. 51-66. Judgment for plaintiff, Dec. 13, 1968; subsequent Contract Officer's dec., Dec. 3, 1969; interim dec., Dec. 2, 1969; Order to Stay Proceedings until Mar. 31, 1970; dismissed with prejudice, Aug. 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412), 1 IBIA 326; 79 I.D. 621 (1972)

George Reed, Sr. v. Rogers Morton et al., Civil No. 1105, D. Mont. Dismissed June 14, 1973; no appeal.

Reliable Coal Corp., 1 IBMA 97; 79 I.D. 139 (1972)

Reliable Coal Corp. v. Rogers C. B. Morton, Secretary of the Interior et al., No. 72-1477, United States Court of Appeals, 4th Cir. Board's decision aff'd, 478 F.2d 257 (4th Cir. 1973).

Republic Steel Corp., 82 I.D. 607 (1975)

Republic Steel Corp. v. Interior Board of Mine Operations Appeals, No. 76-1041, United States Court of Appeals, D.C. Cir. Rev'd & remanded, Feb. 22, 1978.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. Fred A. Seaton, Civil No. 3820-55. Dismissed without prejudice, Mar. 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), reconsideration denied by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. Stewart L. Udall, Civil No. 2615-65. Remanded, June 28, 1966.

Estate of William Cecil Robedaux, 1 IBIA 106, 78 I.D. 234 (1971), 2 IBIA 33, 80 I.D. 390 (1973)

Oneta Lamb Robedaux et al. v. Rogers C. B. Morton, Civil No. 71-646, D. Okla. Dismissed, Jan. 11, 1973.

Houston Bus Hill v. Rogers C. B. Morton, Civil No. 72-376, W.D. Okla. Judgment for plaintiff, Oct. 29, 1973; amended judgment for plaintiff, Nov. 12, 1973; appeal dismissed, June 28, 1974.

Houston Bus Hill & Thurman S. Hurst v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 73-528-B, W.D. Okla. Judgment for plaintiff, Apr. 30, 1975; corrected judgment, May 2, 1975; per curiam dec., vacated & remanded, Oct. 2, 1975; judgment for plaintiff, Dec. 1, 1975.

Roberts Brothers Coal Co., 2 IBSMA 284, 87 I.D. 439 (1980)

Roberts Brothers Coal Co. v. Cecil D. Andrus et al., Civil No. 80-016900 (G), W.D. Ky. Suit pending.

Estate of Clark Joseph Robinson, 7 IBIA 74; 85 I.D. 294 (1978)

Rene Robinson, by & through her Guardian Ad Litem, Nancy Clifford v. Cecil Andrus, Secretary of the Interior, Gretchen Robinson & Trixi Lynn Robinson Harris, Civil No. CIV-78-5097, D.S.D. Suit pending.

Rosebud Coal Sales Co., 37 IBLA 251; 85 I.D. 396 (1978)

Rosebud Coal Sales Co. v. Cecil D. Andrus, Secretary of the Interior, Frank Gregg, Director, Bureau of Land Management, & Maria B. Bohl, Chief, Land & Mining, Bureau of Land Management, Wyo., Civil No. C78-261, D. Wyo. Judgment for plaintiff, Oct. 17, 1979. No appeal.

Richard W. Rowe, Daniel Gaudiane, 82 I.D. 174 (1975)

Richard W. Rowe, Daniel Gaudiane v. Stanley K. Hathaway, in his official capacity as Secretary of the Interior, Civil No. 75-1152. Judgment for defendant, July 29, 1976.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. Stewart L. Udall, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); *aff'd sub nom. S. Jack Hinton et al. v. Stewart L. Udall*, 364 F.2d 676 (1966); *cert. denied*, 385 U.S. 878 (1966); supplemented by M-36767, Nov. 1, 1967.

Seal and Co., 68 I.D. 94 (1961)

Seal & Co. v. U.S., Ct. Cl. 274-62. Judgment for plaintiff, Jan. 31, 1964; no appeal.

Administrative Appeal of Sessions, Inc. (A Cal. Corp.) v. Vyola Olinger Ortnier (Lessor), Lease No. PSL-33, Joseph Patrick Patencio (Lessor), Lease No. PSL-36, Larry Olinger (Lessor), Lease No. PSL-41, 81 I.D. 651 (1974)

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3589 LTL, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3591 MML, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al., Civil No. CV 74-3590 FW, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Steve Shapiro v. Bishop Coal Co., 83 I.D. 59 (1976)

Bishop Coal Co. v. Thomas S. Kleppe, No. 76-1368, United States Court of Appeals, 4th Cir. Suit pending.

Shell Oil Co., A-30575 (Oct. 31, 1966), *Chargeability of Acreage Embraced in Oil & Gas Lease Offers*, 71 I.D. 337 (1964)

Shell Oil Co. v. Udall, Civil No. 216-67. Stipulated dismissal, Aug. 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

Sinclair Oil & Gas Co. v. Stewart L. Udall, Secretary of the Interior, et al., Civil No. 5277, D. Wyo. Judgment for defendant, *sub nom. Atlantic Richfield Co. v. Walter J. Hickel*, 303 F. Supp. 724 (1969); *aff'd*, 432 F.2d 587 (10th Cir. 1970); no petition.

Charles T. Sink, 82 I.D. 535 (1975)

Charles T. Sink v. Thomas S. Kleppe, Secretary of the Interior—Mining Enforcement & Safety Administration (MESA), No. 75-1292, United States Court of Appeals, 4th Cir. Vacated without prejudice to plaintiff's rights, 529 F.2d 601 (4th Cir. 1975).

Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. Walter J. Hickel, Secretary of the Interior, Civil No. S-1274, D. Cal. Judgment for defendant, Dec. 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 77 I.D. 177 (1970), 20 IBLA 365 (1975)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, heirs of George H. Wedekind, Deceased v. Rogers C. B. Morton et al., Civil No. R-2858, D. Nev. On June 20, 1974, remanded for further agency proceedings as originally ordered in 77 I.D. 177; Dist. Ct. reserves jurisdiction; supplemental complaint filed, Aug. 1, 1975; judgment for defendant, Nov. 29, 1976; appeal filed, Jan. 27, 1977.

Southwest Welding & Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. U.S., Civil No. 68-1658-CC, C.D. Cal. Judgment for plaintiff, Jan. 14, 1970; appeal dismissed, Apr. 6, 1970.

Southwestern Petroleum Corp. et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 5773, D.N.M. Judgment for defendant, Mar. 8, 1965; *aff'd*, 361 F.2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. Walter J. Hickel et al., Civil No. A-159-69, D. Alaska. Judgment for plaintiff, 317 F. Supp. 1192 (1970); *aff'd sub nom. Standard Oil Co. of Cal. v. Rogers C. B. Morton et al.*, 450 F.2d 493 (9th Cir. 1971); no petition.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. Secretary of the Interior, Civil No. 5729, D.N.M. Judgment for plaintiff, Jan. 21, 1965; no appeal.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman et al. v. Stewart L. Udall, Civil No. 1852-62. Judgment for defendant, Nov. 1, 1962 (opinion); rev'd, 324 F.2d 411 (1963); *cert. granted*, 376 U.S. 961 (1964); Dist. Ct. aff'd, 380 U.S. 1 (1965); *rehearing denied*, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. Secretary of the Interior, Civil No. 446-68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); aff'd in part & remanded, 437 F.2d 636 (1970); aff'd in part & remanded, July 19, 1972.

Texas Construction Co., 64 I.D. 97 (1957), *reconsideration denied*, IBCA-73 (June 18, 1957)

Texas Construction Co. v. U.S., Ct. Cl. No. 224-58. Stipulated judgment for plaintiff, Dec. 14, 1961.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 & Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

Joe Hayes v. Fred A. Seaton, Secretary of the Interior, Civil No. 859-581. Judgment for defendant, Sept. 18, 1958; aff'd, 270 F.2d 319 (1959); *cert. denied*, 364 U.S. 814 (1960); *rehearing denied*, 364 U.S. 906 (1960).

Thor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, Civil No. 5343, D.N.M. Dismissed with prejudice, June 25, 1963.

See also:

Thor-Westcliffe Development, Inc. v. Stewart L. Udall et al., Civil No. 2406-61. Judgment for defendant, Mar. 22, 1962; aff'd, 314 F.2d 257 (1963); *cert. denied*, 373 U.S. 951 (1963).

Richard K. Todd et al., 68 I.D. 291 (1961)

Bert F. Duesing v. Stewart L. Udall, Civil No. 290-62. Judgment for defendant, July 17, 1962 (oral opinion); aff'd, 350 F.2d 748 (1965); *cert. denied*, 383 U.S. 912 (1966).

Atwood et al. v. Stewart L. Udall, Civil Nos. 293-62—299-62, incl. Judgment for defendant, Aug. 2, 1962; aff'd, 350 F.2d 748 (1965); no petition.

Appeal of Toke Cleaners, 81 I.D. 258 (1974)

Thom Properties, Inc., d/b/a Toke Cleaners & Launderers v. U.S., Department of the Interior, Bureau of Indian Affairs, Civil No. A3-74-99, D.N.D. Stipulation for dismissal & order dismissing case, June 16, 1975.

Estate of Phillip Tooisgah, 4 IBIA 189; 82 I.D. 541 (1975)

Jonathan Morris & Velma Tooisgah v. Thomas S. Kleppe, Secretary of the Interior, Civil No. CIV-76-0037-D, W.D. Okla. Suit pending.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969)

The Superior Oil Co. et al. v. Stewart L. Udall, Civil No. 1521-68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd, 409 F.2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

Union Oil Co. of California, 71 I.D. 287 (1964)

Union Oil Co. of California v. Stewart L. Udall, Civil No. 2595-64. Judgment for defendant, Dec. 27, 1965; no appeal.

Union Oil Co. of California et al., 71 I.D. 169 (1964); 72 I.D. 313 (1965)

Penelope Chase Brown et al. v. Stewart Udall, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F.2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

Equity Oil Co. v. Stewart L. Udall, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Harlan H. Hugg et al. v. Stewart L. Udall, Civil No. 9252, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Barnette T. Napier et al. v. Secretary of the Interior, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F.2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

John W. Savage v. Stewart L. Udall, Civil No. 9458, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

The Oil Shale Corp. et al. v. Secretary of the Interior, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F.2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dis. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

The Oil Shale Corp. et al. v. Stewart L. Udall, Civil No. 9465, D. Colo. Order to Close Files & Stay Proceedings, Mar. 25, 1967.

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Union Oil Co. of California v. Stewart L. Udall, Civil No. 3042-58. Judgment for defendant, May 2, 1960 (opinion); aff'd, 289 F.2d 790 (1961); no petition.

Union Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming & Gulf Oil Corp. v. Stewart L. Udall, etc., Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); aff'd, 379 F.2d 635 (10th Cir. 1967); *cert. denied*, 389 U.S. 985 (1967).

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Alonzo A. Adams et al. v. Paul B. Witmer et al., Civil No. 1222-57-Y, S.D. Cal. Complaint dismissed, Nov. 27, 1957 (opinion); rev'd & remanded, 271 F.2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berri-man denied, 271 F.2d 37 (9th Cir. 1959)

U.S. v. Alonzo Adams, Civil No. 187-60-WM, S.D. Cal. Judgment for plaintiff, Jan. 29, 1962 (opinion); judgment modified, 318 F.2d 861 (9th Cir. 1963); no petition.

U.S. v. E. A. & Esther Barrows, 76 I.D. 299 (1969)

Esther Barrows, as an individual & as Executrix of the Last Will of E. A. Barrows, Deceased v. Walter J. Hickel, Civil No. 70-215-CC, C.D. Cal. Judgment for defendant, Apr. 20, 1970; aff'd, 447 F.2d 80 (9th Cir. 1971).

U.S. v. J. L. Block, 80 I.D. 571 (1973)

J. L. Block v. Rogers Morton, Secretary of the Interior, Civil No. LV-74-9, BRT, D. Nev. Judgment for defendant, June 6, 1975; rev'd & remanded with instructions to remand to the Secretary of the Interior, Mar. 29, 1977; no petition.

U.S. v. Lloyd W. Booth, 76 I.D. 73 (1969)

Lloyd W. Booth v. Walter J. Hickel, Civil No. 42-69, D. Alaska. Judgment for defendant, June 30, 1970; no appeal.

U.S. v. Alice A. & Carrie H. Boyle, 76 I.D. 61, 318 (1969), *reconsideration denied*, Jan. 22, 1970

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U.S. v. R. W. Brubaker et al., A-30636 (July 24, 1968); 9 IBLA 281, 80 I.D. 261 (1973)

R. W. Brubaker, a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a Barbara A. Brubaker, & William J. Mann, a/k/a W. J. Mann v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 73-1228 EC, C.D. Cal. Dismissed with prejudice, Aug. 13, 1973; *aff'd*, 500 F.2d 200 (9th Cir. 1974); no petition.

U.S. v. Brubaker-Mann, Inc., R. W. Brubaker a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a Barbara A. Brubaker & William J. Mann, a/k/a W. J. Mann, Civil No. 74-742-JWC, C.D. Cal. Stipulated agreement dated Jan. 30, 1975, and accepted by the defendants on Feb. 3, 1975; final judgment entered May 7, 1975.

U.S. v. Henrietta & Andrew Julius Bunkowski, 5 IBLA 102; 79 I.D. 43 (1972)

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U.S. v. Ford M. Converse, 72 I.D. 141 (1965)

Ford M. Converse v. Stewart Udall, Civil No. 65-581, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); *aff'd*, 399 F.2d 616 (9th Cir. 1968); *cert. denied*, 393 U.S. 1025 (1969).

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Everett Foster et al. v. Fred A. Seaton, Civil No. 344-58. Judgment for defendants, Dec. 5, 1958 (opinion); *aff'd*, 271 F.2d 836 (1959); no petition.

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Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. Rogers C. B. Morton, Civil No. J-12-72, D. Alaska. Judgment for defendant, Feb. 25, 1974; motion to vacate judgment denied, May 6, 1974; aff'd, 542 F.2d 1364 (9th Cir. 1976).

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- Brady v. Southern Pacific R.R. Co. (5 L.D. 407 and 658); overruled, 20 L.D. 259 (1895).
- Brandt, William W. (31 L.D. 277); overruled, 50 L.D. 161 (1923).
- Braucht v. Northern Pacific Ry. Co. (43 L.D. 536, 538); modified, 44 L.D. 225 (1915).
- Brayton, Homer E. (31 L.D. 364); overruled so far as in conflict, 51 L.D. 305 (1925).
- Brick Pomeroy Mill Site (34 L.D. 320); overruled, 37 L.D. 674 (1909).
- Brown v. Cagle (30 L.D. 8); vacated, 30 L.D. 148 (1900) (See 47 L.D. 406).
- Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 31 L.D. 222 (1902) (See 35 L.D. 399).
- Browning, John W. (42 L.D. 1); overruled so far as in conflict, 43 L.D. 342 (1914).
- Bruns, Henry A. (15 L.D. 170); overruled so far as in conflict, 51 L.D. 454 (1926).
- Bundy v. Livingston (1 L.D. 152); overruled, 6 L.D. 280, 284 (1887).
- Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472 (1913).
- Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321 (1913).
- Burkholder v. Skagen (4 L.D. 166); overruled, 9 L.D. 153 (1889).
- Burnham Chemical Co. v. United States Borax Co. (54 I.D. 183); overruled in substance, 58 I.D. 426, 429 (1944).
- Burns, Frank (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454 (1926).
- Burns v. Bergh's Heirs (37 L.D. 161); vacated, 51 L.D. 268 (1925).
- Buttery v. Sprout (2 L.D. 293); overruled, 5 L.D. 591 (1887).
- Cagle v. Mendenhall (20 L.D. 447); overruled, 23 L.D. 533 (1896).
- Cain v. Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62 (1899).
- California and Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453 (1898).
- California, State of (14 L.D. 253); vacated, 23 L.D. 230 (1896).
- California, State of (15 L.D. 10); overruled, 23 L.D. 423, 31 L.D. 335 (1902).
- California, State of (19 L.D. 585); vacated, 28 L.D. 57 (1899).
- California, State of (22 L.D. 428); overruled, 32 L.D. 34 (1903).

- California, State of (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499 and 46 L.D. 396).
- California, State of (44 L.D. 118); overruled, 48 L.D. 97, 98 (1921).
- California, State of (44 L.D. 468); overruled, 48 L.D. 97, 98 (1921).
- California, State of *v. Moccettini* (19 L.D. 359); overruled, 31 L.D. 335 (1902).
- California, State of *v. Pierce* (9 C.L.O. 118); modified, 2 L.D. 854.
- California, State of *v. Smith* (5 L.D. 543); overruled, 18 L.D. 343 (1894).
- Call *v. Swain* (3 L.D. 46); overruled, 18 L.D. 373 (1894).
- Cameron Lode (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518 (1897).
- Camplan *v. Northern Pacific R.R. Co.* (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550 (1900).
- Case *v. Church* (17 L.D. 578); overruled, 26 L.D. 453 (1898).
- Case *v. Kupferschmidt* (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406 (1920).
- Castello *v. Bonnie* (20 L.D. 311); overruled, 22 L.D. 174 (1896).
- Cate *v. Northern Pacific Ry. Co.* (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60 (1914).
- Cawood *v. Dumas* (22 L.D. 585); vacated, 25 L.D. 526 (1897).
- Centerville Mining and Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17 (1921).
- Central Pacific R.R. Co. (29 L.D. 589); modified, 48 L.D. 58 (1921).
- Central Pacific R.R. Co. *v. Orr* (2 L.D. 525); overruled, 11 L.D. 445 (1890).
- Chapman *v. Willamette Valley and Cascade Mountain Wagon Road Co.* (13 L.D. 61); overruled, 20 L.D. 259 (1895).
- Chappell *v. Clark* (27 L.D. 334); modified, 27 L.D. 532 (1898).
- Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453 (1913).
- Childress *v. Smith* (15 L.D. 89); overruled, 26 L.D. 453 (1898).
- Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.
- Clafin *v. Thompson* (28 L.D. 279); overruled, 29 L.D. 693 (1900).
- Claney *v. Ragland* (38 L.D. 550) (See 43 L.D. 485).
- Clark, Yulu S. (A-22852) Feb. 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).
- Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51 (1925).
- Cline *v. Urban* (29 L.D. 96); overruled, 46 L.D. 492 (1918).
- Clipper Mining Co. (22 L.D. 527); no longer followed in part, 67 I.D. 417 (1960).
- Clipper Mining Co. *v. Eli Mining and Land Co.* (33 L.D. 660); no longer followed in part, 67 I.D. 417 (1960).
- Cochran *v. Dwyer* (9 L.D. 478) (See 39 L.D. 162, 225) (1910)).
- Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153 (1927).
- Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51 (1925).
- Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408 (1889).
- Computation of Royalty Under Sec. 15, 51 L.D. 283 (1925), overruled, Solicitor's Opinion—Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause, M—36888 (Oct. 4, 1976), 84 I.D. 54 (1977).
- Condict, W. C. (A-23366) June 24, 1942, unreported; overruled so far as in conflict, 59 I.D. 258-260 (1946).
- Continental Oil Co., 68 I.D. 186 (1961); overruled in pertinent part by Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).
- Continental Oil Co., 74 I.D. 229 (1967), distinguished by Solicitor's Opinion, M-36927, 87 I.D. 616 (1980).
- Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 227 (1910)).
- Cooke *v. Villa* (17 L.D. 210); vacated, 19 L.D. 442 (1894).
- Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113 (1897).
- Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27); distinguished insofar as it applies to *ex parte* cases, 39 L.D. 574 (1911).
- Copper Glance Lode (29 L.D. 542); modified so far as in conflict, 55 I.D. 348 (1925).
- Corlis *v. Northern Pacific R.R. Co.* (23 L.D. 265); vacated, 26 L.D. 652 (1898).
- Cornell *v. Chilton* (1 L.D. 153); overruled, 6 L.D. 483 (1888).

- Cowles *v.* Huff (24 L.D. 81); modified, 28 L.D. 515 (1899).
- Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114 (1901).
- Crowston *v.* Seal (5 L.D. 213); overruled, 18 L.D. 586 (1894).
- Culligan *v.* State of Minnesota (34 L.D. 22); modified, 34 L.D. 151 (1905).
- Cunningham, John (32 L.D. 207); modified, 32 L.D. 456 (1904).
- Dailey Clay Products Co. (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656 (1924).
- Dakota Central R.R. Co. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131 (1895).
- Davidson, Robert A., 13 IBLA 368 (1973); overruled to the extent inconsistent, J. Burton Tuttle, 49 IBLA 278, 87 I.D. 350 (1980).
- Davis, E. W., A-29889 (Mar. 25, 1964), no longer followed in part; 80 I.D. 698 (1973).
- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110 (1917).
- Debord, Wayne E., 50 IBLA 216, 87 I.D. 465 (1980); modified, 54 IBLA 61 (1981).
- DeLong *v.* Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54 (1916).
- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300 (1914).
- Dennison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122 (1898).
- Deseret Irrigation Co. *v.* Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27 (1925).
- Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429 (1887).
- Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, Mar. 11, 1909.
- Dixon *v.* Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27 (1925).
- Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128 (1914).
- Dowman *v.* Moss (19 L.D. 526); overruled, 25 L.D. 82 (1897).
- Dudymott *v.* Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561 (1908).
- Dyche *v.* Beleele (24 L.D. 494); modified, 43 L.D. 56 (1914).
- Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188 (1897).
- Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974-75 OSHD par. 18,706 (1974); overruled in part by Alabama By-Products Corp. (On Recon.), 7 IBMA 85, 83 I.D. 574 (1976); overruled in part by Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).
- Eastern Associated Coal Corp., 5 IBMA 185, 82 I.D. 506, 1975-76 OSHD par. 20,041 (1975); set aside in part on reconsideration, 7 IBMA 14, 83 I.D. 425 (1976).
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355 (1900).
- East Tintic Consolidated Mining Co. (On Re-hearing) (41 L.D. 255); vacated, 43 L.D. 80 (1914).
- Elliot *v.* Ryan (7 L.D. 322); overruled, 8 L.D. 10 (1889) (See 9 L.D. 360).
- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199 (1911).
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Eklutna, Appeal of, 1 ANCAB 190, 83 I.D. 619 (1976); modified, Valid Existing Rights under the Alaska Native Claims Settlement Act, Sec. Order No. 3016, 85 I.D. 1 (1978).
- Emblen *v.* Weed (16 L.D. 28); modified, 17 L.D. 220 (1893).
- Epley *v.* Trick (8 L.D. 110); overruled, 9 L.D. 360.
- Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406 (1910).
- Esping *v.* Johnson (37 L.D. 709); overruled, 41 L.D. 289 (1912).
- Esplin, Lee J., 56 I.D. 325 (1938); overruled to extent it applies to 1926 Executive Order to artificially developed water sources on the public lands, by Solicitor's Opinion, M-36914, 86 I.D. 553 (1979), Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management.
- Ewing *v.* Rickard (1 L.D. 146); overruled, 6 L.D. 483 (1888).
- Falconer *v.* Price (19 L.D. 167); overruled, 24 L.D. 264 (1897).

- Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348 (1935).
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 472, 473 (1928).
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183 (1914).
- Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 287, 290 (1935).
- Ferrell v. Hoge (18 L.D. 81); overruled, 25 L.D. 351 (1897).
- Fette v. Christiansen (29 L.D. 710); overruled, 34 L.D. 167 (1905).
- Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 472, 473 (1928).
- Filtrol Co. v. Brittan and Echart (51 L.D. 649); distinguished, 55 I.D. 605 (1936).
- Fish, Mary (10 L.D. 606); modified, 13 L.D. 511 (1891).
- Fisher v. Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217 (1914).
- Fitch v. Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43 (1893).
- Fleming v. Bowe (13 L.D. 78); overruled, 23 L.D. 175 (1896).
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421 (1898).
- Florida Railway and Navigation Co. v. Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237 (1889).
- Florida, State of (17 L.D. 355); reversed, 19 L.D. 76 (1894).
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629 (1890).
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505 (1898).
- Franco Western Oil Co., 65 I.D. 316; modified, 65 I.D. 427 (1958).
- Freeman Coal Mining Co., 3 IBMA 434, 81 L.D. 723, 1974-1975 OSHD par. 19,177 (1974); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63 (1912).
- Freeman v. Summers, 52 L.D. 201 (1927); overruled, United States v. Winegar, Frank W., 16 IBLA 112, 81 I.D. 370 (1974). Reinstated by U.S. v. Bohme (Supp.), 51 IBLA 97, 87 I.D. 535 (1980).
- Freeman v. Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 13, 18 (1888).
- Fry, Silas A. (45 L.D. 20); modified 51 L.D. 581 (1926).
- Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181 (1962).
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57 (1880).
- Gallup v. Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 303, 304 (1920).
- Gariss v. Borin (21 L.D. 542) (See 39 L.D. 162, 225).
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158 (1886).
- Garvey v. Tuiska (41 L.D. 510); modified, 43 L.D. 229 (1914).
- Gates v. California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336, 342 (1882).
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81 (1887).
- Glassford, A. W., 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Gleason v. Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).
- Gohrman v. Ford (8 C.L.O. 6); overruled, 4 L.D. 580 (1886).
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250 (1908).
- Goldstein v. Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88 (1901).
- Goodale v. Olney (12 L.D. 324); distinguished, 55 I.D. 580 (1936).
- Gotego Townsite v. Jones (35 L.D. 18); modified, 37 L.D. 560 (1909).
- Gowdy v. Connell (27 L.D. 56); vacated, 28 L.D. 240 (1899).
- Gowdy v. Gilbert (19 L.D. 17); overruled, 26 L.D. 453 (1898).
- Gowdy v. Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191 (1897).
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495 (1897).
- Gregg v. State of Colorado (15 L.D. 151); vacated, 30 L.D. 310 (1900).
- Grinnel v. Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489 (1896).
- Ground Hog Lode v. Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R. R. Rousseau, 47 L.D. 590 (1920)).

- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399 (1912).
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534 (1894).
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442 (1918).
- Gwyn, James R. (A-26806) Dec. 17, 1953, unreported; distinguished, 66 I.D. 275 (1959).
- Hagood, L.N., 65 I.D. 405 (1958); overruled, Beard Oil Co., 1 IBLA 42, 77 I.D. 166 (1970).
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505 (1912).
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59 (1899).
- Hardee, D.C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698 (1900).
- Hardee v. United States (8 L.D. 391); 16 L.D. 499; overruled so far as in conflict, 29 L.D. 698 (1900).
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233 (1892).
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93 (1910).
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539 (1905).
- Hart v. Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413 (1923)).
- Hastings and Dakota Ry. Co. v. Christenson (22 L.D. 257); overruled, 28 L.D. 572 (1899).
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629 (1922).
- Hayden v. Jamison (24 L.D. 403); vacated, 26 L.D. 373 (1898).
- Haynes v. Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150 (1933).
- Heilman v. Syverson (15 L.D. 184); overruled, 23 L.D. 119 (1896).
- Heinzman v. Letroadec's Heirs (28 L.D. 497); overruled, 38 L.D. 253 (1909).
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110 (1917).
- Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532 (1915).
- Heirs of Stevenson v. Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Heirs of Talkington v. Hempling (2 L.D. 46); overruled, 14 L.D. 200 (1892).
- Heirs of Vradenburg v. Orr (25 L.D. 323); overruled, 38 L.D. 253 (1909).
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472 (1913).
- Helphrey v. Coil (49 L.D. 624); overruled, Dennis v. Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (1914) (See 44 L.D. 112 and 49 L.D. 484).
- Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211 (1910).
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275 (1959).
- Herman v. Chase (37 L.D. 590); overruled, 43 L.D. 246 (1914).
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113 (1897).
- Hickey, M. A. (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17 (1917).
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191 (1914).
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538 (1914).
- Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166 (1899).
- Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436 (1891).
- Holland, William C. (M-27696); decided Apr. 26, 1934; overruled in part, 55 I.D. 215, 221 (1935).
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260 (1919).
- Holman v. Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590 (1920).
- Hon v. Martinas (41 L.D. 119); modified, 43 L.D. 196, 197 (1914).
- Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284 (1899).
- Howard v. Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126 (1899).
- Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225 (1910)).
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204 (1899).
- Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411 (1910)).
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287 (1925).
- Hughes v. Greathead (43 L.D. 497); overruled, 49 L.D. 413 (1923) (See 260 U.S. 427).

Hull v. Ingle (24 L.D. 214); overruled, 30 L.D. 258 (1900).

Huls, Clara (9 L.D. 401); modified, 21 L.D. 377 (1895).

Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316 (1958).

Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65 (1956).

Hurley, Bertha C. (TA-66 (Ir.)), Mar. 21, 1952, unreported; overruled, 62 I.D. 12 (1955).

Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284 (1899).

Hyde, F. A. (40 L.D. 284); overruled, 43 L.D. 381 (1914).

Hyde v. Warren (14 L.D. 576, 15 L.D. 415) (See 19 L.D. 64 (1894)).

Ingram, John D. (37 L.D. 475) (See 43 L.D. 544 (1914)).

Inman v. Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95 (1899).

Instructions (4 L.D. 297); modified, 24 L.D. 45 (1897).

Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson (A-20411), Aug. 5, 1937, unreported (See 59 I.D. 282, 286).

Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36 (1932).

Interstate Oil Corp. & Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228 (1930).

Iowa Railroad Land Co. (23 L.D. 79); (24 L.D. 125); vacated, 29 L.D. 79 (1899).

Jacks v. Belard (29 L.D. 369); vacated, 30 L.D. 345 (1900).

Johnson v. South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 21, 22 (1912).

Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448 (1889).

Jones v. Kennett (6 L.D. 688); overruled, 14 L.D. 429 (1892).

Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 463, 464 (1893).

Kanawha Oil & Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371 (1934).

Keating Gold Mining Co., Montana Power Co., Transferee, 52 L.D. 671 (1929); over-

ruled in part, Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972).

Keller, Herman A., 14 IBLA 188, 81 I.D. 26 (1974); distinguished, Robert E. Belknap, 55 IBLA 200 (1981).

Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419 (1950).

Kemper v. St. Paul & Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101 (1894).

Kilner, Harold E. (A-21845); Feb. 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

King v. Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19 (1900).

Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228 (1930).

Kinsinger v. Peck (11 L.D. 202) (See 39 L.D. 162, 225 (1910)).

Kiser v. Keech (7 L.D. 25); overruled, 23 L.D. 119 (1896).

Knight, Albert B. (30 L.D. 227); overruled, 31 L.D. 64 (1901).

Knight v. Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242 (1914).

Kniskern v. Hastings & Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362 (1883).

Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181 (1914).

Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448 (1898).

Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (1930) (See 280 U.S. 306).

Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715 (1909).

La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331 (1903).

Largent, Edward B. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321 (1913).

Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242 (1914).

Lasselle v. Missouri, Kansas & Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278 (1892).

Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683 (1898).

Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361 (1912).

Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40 (1895).

- Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359 (1920).
- Layne & Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33; overruled insofar as it conflicts with *Schweigert, Inc. v. United States*, Court of Claims, No. 26-66 (Dec. 15, 1967), and *Galland-Henning Manufacturing Company*, IBCA-534-12-65 (Mar. 29, 1968).
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 389 (1898).
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 463, 464 (1893).
- Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil and Gas Leases, 58 I.D. 535 (1943); superseded to extent it is inconsistent with *Solicitor's Opinion—Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act*, M-36896, 84 I.D. 905 (1977).
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299 (1885).
- Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459 (1891).
- Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536 (1914)).
- Liss, Merwin E., Cumberland & Allegheny Gas Co., 67 I.D. 385 (1960); overruled, 80 I.D. 395 (1973).
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550 (1897).
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123 (1898).
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200 (1895).
- Lonergan *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199 (1907).
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157 (1889).
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5 (1898).
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291 (1925).
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291 (1925).
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495 (1897).
- Luse, Jeanette L. (61 I.D. 103); distinguished by *Richfield Oil Corp.*, 71 I.D. 243 (1964).
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102 (1906).
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221 (1914).
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713 (1891).
- Mabel Lode, (26 L.D. 675); distinguished, 57 I.D. 63 (1939).
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448 (1898).
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399 (1907).
- Maginnis, John S. (32 L.D. 14); modified 42 L.D. 472 (1913).
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472 (1913).
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313 (1913).
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244 (1922).
- Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650 (1904).
- Malone Land & Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110 (1914).
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153 (1921).
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181 (1914).
- Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536 (1914).
- Martin, Wilbur, Sr., A-25862 (May 31, 1950); overruled to extent inconsistent, *U.S. v. Flynn*, 53 IBLA 208, 88 I.D. 373 (1981).
- Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 368 (1898).
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111 (1897).
- Mather *v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48 (1894).
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94 (1888).
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 87, 88 (1921).
- McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33 (1927).
- McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277 (1900).
- McCord, W.E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73 (1937).

- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429 (1914).
- McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285 (1908).
- McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (1901) (See 35 L.D. 399).
- McFadden *v.* Mountain View Mining & Milling Co. (26 L.D. 530); vacated, 27 L.D. 358 (1898).
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166 (1899).
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502 (1897).
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148 (1909).
- McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340 (1938).
- McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494 (1893).
- McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317 (1913)).
- McMicken, Herbert (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260 (1942).
- McNamara *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666 (1896).
- McPeck *v.* Sullivan (25 L.D. 281); overruled, 36 L.D. 26 (1907).
- Mead, Robert E., 62 I.D. 111 (1955); overruled, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).
- Mee *v.* Hughart (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 659, 660 (1923).
- Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).
- Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649 (1907).
- Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225 (1910)).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436 (1891).
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371 (1934).
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); rehearing denied (June 20, 1946); overruled to extent inconsistent, 70 I.D. 149 (1963).
- Miller, D., 60 I.D. 161; overruled in part, 62 I.D. 210.
- Miller, Duncan, A-29760 (Sept. 18, 1963); overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (Dec. 2, 1966); overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (Apr. 14, 1967); overruled, 79 I.D. 416 (1972).
- Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181 (1914).
- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448 (1898).
- Milner & North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550 (1897).
- Milwaukee, Lake Shore & Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112 (1899).
- Miner *v.* Mariott (2 L.D. 709); modified, 28 L.D. 224 (1899).
- Minnesota & Ontario Bridge Co. (30 L.D. 77); no longer followed, 50 L.D. 359 (1924).
- Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (1912) (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495 (1897).
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348 (1935).
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 481-2 (1898).
- Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303 (1886).
- Morgan, Henry S., 65 I.D. 369; overruled to extent inconsistent, 71 I.D. 22 (1964).
- Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618 (1909).
- Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382 (1909).
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319 (1908).
- Morrow *v.* State of Oregon (32 L.D. 54); modified, 33 L.D. 101 (1904).
- Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551 (1908).

- Mountain Fuel Supply Co., A-31053 (Dec. 19, 1969); overruled, 79 I.D. 416 (1972).
- Mt. Whitney Military Reservation (40 L.D. 315 (1911)) (See 43 L.D. 33).
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163 (1921).
- Muller, Esbernè K. (39 L.D. 72); modified, 39 L.D. 360 (1910).
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532 (1915).
- Munsey, Glenn, Earnest Scott and Arnold Scott v. Smitty Baker Coal Co., Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509; distinguished, 80 I.D. 251 (1973).
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964); vacated, 72 I.D. 536 (1965).
- National Livestock Co. and Zack Cox, I.G.D. 55 (1938); overruled, United States v. Maher, Charles, 5 IBLA 209, 79 I.D. 109 (1972).
- Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); distinguished, Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).
- Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358 (1899).
- Nebraska, State of v. Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123 (1898).
- Neilsen v. Central Pacific R.R. Co. (26 L.D. 252); modified, 30 L.D. 216 (1900).
- Newbanks v. Thompson (22 L.D. 490); overruled, 29 L.D. 108 (1899).
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364 (1914).
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 97 (1921).
- New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159 (1933).
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188 (1897).
- New York Lode & Mill Site (5 L.D. 513); overruled, 27 L.D. 373 (1898).
- Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. Co. (21 L.D. 412; 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218 (1915); 117 U.S. 435).
- Northern Pacific R.R. Co. v. Bowman (7 L.D. 238); modified, 18 L.D. 224 (1894).
- Northern Pacific R.R. Co. v. Burns (6 L.D. 21); overruled, 20 L.D. 191 (1895).
- Northern Pacific R.R. Co. v. Loomis (21 L.D. 395); overruled, 27 L.D. 464 (1898).
- Northern Pacific R.R. Co. v. Marshall (17 L.D. 545); overruled, 28 L.D. 174 (1899).
- Northern Pacific R.R. Co. v. Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229 (1893).
- Northern Pacific R.R. Co. v. Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550 (1900).
- Northern Pacific R.R. Co. v. Symons (22 L.D. 686); overruled, 28 L.D. 95 (1899).
- Northern Pacific R.R. Co. v. Urquhart (8 L.D. 365); overruled, 28 L.D. 126 (1899).
- Northern Pacific R.R. Co. v. Walters (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391 (1922).
- Northern Pacific R.R. Co. v. Yantis (8 L.D. 58); overruled, 12 L.D. 127 (1891).
- Northern Pacific Ry. Co., (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (1925) (See 52 L.D. 58 (1927)).
- Nunez, Roman C. & Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.
- Nyman v. St. Paul, Minneapolis, & Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750 (1888).
- O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411 (1907).
- Oil and Gas Privilege and License Tax, Ft. Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); overruled by Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Lease of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).
- Olson v. Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382 (1900).
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342 (1908).
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333 (1949).
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (1943) (See 59 I.D. 346, 350).

- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).
- Opinion of Deputy Assistant Secretary (Dec. 2, 1966), affirming Oct. 27, 1966, opinion by Asst Sec.; overruled by, Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act. M-36896, 84 I.D. 905 (1977).
- Opinion of Deputy Solicitor—M-36562, Aug. 21, 1959 (unpublished)—overruled by Solicitor's Opinion—M-36911, 86 I.D. 151 (1979)—Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska.
- Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, Oct. 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96 (1942).
- Opinion of Solicitor, Feb. 7, 1919 (D-44083); overruled, Nov. 4, 1921 (M-6397) (See 58 I.D. 158, 160 (1942)).
- Opinion of Solicitor, Aug. 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402 (1934).
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517 (1934)); overruled in part, Feb. 11, 1957 (M-36410).
- Opinion of Solicitor, M-27690, June 15, 1934, Migratory Bird Treaty Act; overruled to extent of conflict, M-36936, 88 I.D. 586 (1981).
- Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).
- Opinion of Solicitor—55 I.D. 466 (1936)—State of New Mexico, overruled to extent it applies to 1926 Executive Order to artificially developed water sources on public lands, by Solicitor's Opinion—M-36914, 86 I.D. 553 (1979)—Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and Bureau of Land Management.
- Opinion of Solicitor—M-28198, Jan. 8, 1936, finding, *inter alia*, that Indian title to certain lands within the Fort Yuma Reservation has been extinguished, is well founded and is affirmed by Solicitor's Opinion—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within the Boundaries of the Ft. Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1885—but overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Fort Yuma (Now Called Quechan) Indian Reservation.
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567 (1943).
- Opinion of Solicitor, Aug. 31, 1943 (M-33183); distinguished, 58 I.D. 726, 729 (1944).
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).
- Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Solicitor, Mar. 28, 1949 (M-35093); overruled in part, 64 I.D. 70 (1957).
- Opinion of the Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).
- Opinion of Solicitor, M-36051 (Dec. 7, 1950); modified, Solicitor's Opinion, M-36863, 79 I.D. 513 (1972).
- Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled as far as inconsistent with,—Criminal Jurisdiction on Seminole Reservations in Fla., M-36907, 85 I.D. 433 (1978).
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57 (1957).
- Opinion of Solicitor, M-36410, Feb. 11, 1957, Imposition of North Dakota State Fish & Game Laws on Indian Claiming Treaty & Other Rights to Hunt & Fish; overruled to extent of conflict, M-36936, 88 I.D. 586 (1981).
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316 (1958).

- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388 (1958).
- Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366 (1960).
- Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).
- Opinion of Solicitor, 64 I.D. 435 (1957); will not be followed to the extent that it conflicts with these views, M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).
- Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, Aug. 26, 1959 (M-36575); affirmed in pertinent part by Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).
- Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).
- Opinion of Solicitor, M-36767 (Nov. 1, 1967) (supplementing, M-36599), 69 I.D. 195 (1962).
- Opinion of Solicitor, M-36735 (Jan. 31, 1968); reversed and withdrawn, Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).
- Opinion of Solicitor—M-36779 (Nov. 17, 1969), Appeals of Freeport Sulphur Co. & Texas Gulf Sulphur Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D. 661 (1979).
- Opinion of Solicitor—M-36841 (Nov. 9, 1971), Appeal of Amoco Production Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to the present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D. 661 (1979).
- Opinion of Solicitor—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within Boundaries of Ft. Yuma Indian Reservation as Established by Exec. Order of Jan. 9, 1885 is overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Ft. Yuma (Now Called Quechan) Indian Reservation.
- Opinion of Solicitor, M-36910, 86 I.D. 89 (1979), modified, M-36910 (Supp.), 88 I.D. 909 (1981).
- Opinion of Solicitor, M-36905 (Supp.), 88 I.D. 903 (1981) and earlier opinions on cumulative impact analysis have been withdrawn, M-36938, 88 I.D. 903 (1981).
- Opinions of Solicitor, Sept. 15, 1914, and Feb. 2, 1915; overruled, Sept. 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156 (1942)).
- Oregon and California R.R. Co. v. Puckett (39 L.D. 169); modified, 53 I.D. 264 (1931).
- Oregon Central Military Wagon Road Co. v. Hart (17 L.D. 480); overruled, 18 L.D. 543 (1894).
- Owens v. State of California (22 L.D. 369); overruled, 38 L.D. 253 (1909).
- Pace v. Carstarphen (50 L.D. 369); distinguished, 61 I.D. 459 (1954).
- Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518 (1897).
- Page, Ralph, 8 IBLA 435 (Dec. 22, 1972); explained, Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).
- Papina v. Alderson (1 B.L.P. 91); modified, 5 L.D. 256 (1886).
- Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 284 & 624.
- Paul Jarvis, Inc., Appeal of (64 I.D. 285); distinguished, 64 I.D. 388 (1957).
- Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359; overruled, 57 I.D. 63 (1939).
- Paul v. Wiseman (21 L.D. 12); overruled, 27 L.D. 522 (1898).
- Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268 (1894).
- Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66 (1914).
- Perry v. Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 303, 304 (1920).
- Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159 (1963).

- Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854 (1884).
- Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424 (1892).
- Phillips v. Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93 (1910).
- Phillips, Cecil H., A-30851 (Nov. 16, 1967); overruled, 79 I.D. 416 (1972).
- Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973); modified by Vance W. Phillips and Aelisa A. Burnham, 19 IBLA 211 (Mar. 21, 1975).
- Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374 (1914).
- Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).
- Pietkiewicz v. Richmond (29 L.D. 195); overruled, 37 L.D. 145 (1908).
- Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204, 48 L.D. 523 (1922).
- Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204, 48 L.D. 523 (1922).
- Popple, James (12 L.D. 433); overruled, 13 L.D. 588 (1891).
- Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477 (1892).
- Prange, Christ C. & William C. Braasch (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419 (1950).
- Premo, George (9 L.D. 70) (See 39 L.D. 162, 225) (1910)).
- Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287 (1925).
- Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599 (1900).
- Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399 (1907).
- Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409 (1905).
- Pugh, F. M. (14 L.D. 274); in effect vacated, 232 U.S. 452.
- Puyallup Allotment (20 L.D. 157); modified, 29 L.D. 628 (1900).
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2. "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes. "C.L.O." to Copp's Land Owner, vols. 1-18. "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52. "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

SHELL OIL CO.

52 IBLA 15

Decided January 5, 1981

Appeal from a decision of the Acting Director, Geological Survey, upholding the transportation allowance deducted to establish the reasonable value of production from various offshore oil leases for royalty purposes. GS-105-0&G.

Affirmed.

1. Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary of the Interior has discretionary authority to determine the factors to be considered in computing transportation allowances for royalty valuation purposes. Where the Geological Survey applies a formula developed after appropriate research and consultation with affected oil companies and where the appellant does not provide convincing evidence that the 6 percent rate of return used in the formula is unreasonable as applied to appellant's production from 1968 to 1973, the transportation allowance will be upheld.

APPEARANCES: Vernon L. Terrell, Jr., Esq., Shell Oil Co., for appellant.

*OPINION BY
ADMINISTRATIVE JUDGE
BURSKI*

INTERIOR BOARD OF LAND APPEALS

Shell Oil Co. (Shell) has appealed the decision of the Acting Director, Geological Survey (GS), dated July 13, 1978, affirming an order of the Acting Oil and Gas Supervisor for the Gulf of Mexico area setting the transportation allowance to be deducted in determining the reasonable value of production from Shell's offshore oil leases for computing royalties for the period 1968-1973.

Inasmuch as no market price is available for offshore oil at the wellhead in the Gulf of Mexico, GS uses the market price at the first onshore market location less a transportation allowance to determine the value of production for the purpose of computing royalty. Shell built the Pompano and Cobia pipelines (GS Systems 51 and 51.1) to transport oil to shore from its various Outer Continental Shelf (OCS) leases in the Gulf of

88 I.D. No. 1

Mexico.¹ When production began in 1968, GS and Shell agreed to a tentative transportation allowance of 15 cents a barrel with the understanding that the allowance would be readjusted based upon a more sophisticated computation at a later date.

On Feb. 6, 1975, following submission of pertinent data by Shell, the Acting Oil and Gas Supervisor revised the transportation allowance applied to production transported through the Pompano and Cobia pipelines for the years 1968 through 1973. The revised allowance was \$1,312,325 less than the amount Shell had deducted based on the 15 cents-a-barrel rate, resulting in an increase in value for royalty computation by that amount.

Both in its appeal to the GS Director and its appeal to this Board following the Acting Director's decision, Shell has argued that the determination setting the transportation allowance was arbitrary and unreasonable. Shell urges that the formula used by GS is unreasonable and discriminatory because the 6 percent rate of return on investment allowed is unrealistically low and does not reflect a realistic return on its pipeline investment. Shell asserts a more realistic allowance would be based on the transportation charge of 10 cents per barrel that Shell negotiated with

two other oil companies for use of its pipelines.²

In its statement of reasons, Shell also suggests to the Board three standards against which the Board should compare GS's transportation cost allowance for reasonableness. First, Shell notes again that the transportation cost allowance negotiated by Shell with third parties would be more reasonable than the GS formula. Second, Shell urges that the tariff that it would have to pay a common carrier operating the two pipelines by order of the Interstate Commerce Commission (ICC) would be more reasonable. Shell alleges that the ICC considers an after-tax 8 percent annual return on investment as fair and reasonable. Third, Shell urges that the GS allowance be measured against GS's own decisions allowing a 10 percent return on depreciated investment when prescribing royalties to be paid on liquids extracted in onshore gasoline plants operated by lessee operators.

In his decision the Acting Director indicated that the value of production was computed by using a formula that has been consistently applied by the Oil and Gas Super-

¹ The Pompano pipeline services leases OCS-G 1294, 1610, 1614, 1901, 1966, and 1967. The Cobia pipeline services leases OCS-G 1666 and 1667.

² When Shell first brought its appeal these oil companies apparently were paying royalties to the Federal Government based on a value for their oil determined by deducting a transportation allowance equal to the cost for transportation paid by the companies to Shell. Thus, Shell charged that it was being discriminated against since a different formula was being applied to it for its use of the same pipeline. Since then, however, GS has recomputed the allowances of the two other companies using the same formula as is disputed by Shell in this case. We shall not address the charge of discrimination further as it is moot.

visor for 10 years. The formula was described as an "objective rule" which "takes into consideration the pipeline operating costs, an allowance for depreciation, and a fair rate of return on the lessee's investment in the pipeline." The Acting Director indicated that the issue of the appropriate rate of return was researched, that affected oil companies were consulted, and that 6 percent was used based on a reasonable analysis of the issue at the time and would change as required by the economy of the pipeline business. He also stated that GS was unable to confirm the alleged 8 percent ICC rate and nevertheless would not be bound by it if it existed.

[1] The Outer Continental Shelf Lands Act, *as amended*, 43 U.S.C. §§ 1331-1343 (1976), requires the payment of a royalty based on a specified percentage in amount or value of production from oil and gas leases on submerged lands of the OCS. Departmental regulation, 30 CFR 250.64, defines value of production as follows:

The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee

from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

In addition, the leases signed by Shell state that the lessee, Shell, expressly agreed that the Secretary may establish reasonable minimum values for purposes of computing royalty * * * due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, or area, to the price received by the Lessee, to posted prices, and to other relevant matters.

One such relevant matter is the cost of transportation for royalty oil to an onshore market where there is no market at the offshore point of production. It has long been considered reasonable with respect to oil produced onshore or offshore to deduct a transportation allowance from the market value of the oil at the nearest open market to determine value at the wellhead where no market exists at the wellhead, the point where the oil would ordinarily be sold and valued. *United States v. General Petroleum Corp.*, 73 F. Supp. 225, 262-63 (S.D. Cal. 1947), *aff'd Continental Oil Co. v. United States*, 184 F.2d 802 (9th Cir. 1950); *C & K Petroleum, Inc.*, 27 IBLA 15 (1976); *Kerr-McGee Corp.*, 22 IBLA 124 (1975); *Shell Oil Co.*, 70 I.D. 393 (1963). The Secretary of

the Interior has discretionary authority to determine the factors to be used in computing such a transportation allowance for royalty purposes. *Superior Oil Co.*, 12 IBLA 212 (1973); *Shell Oil Co.*, *supra*.

There is no dispute in this case as to whether a transportation allowance will be permitted; rather, the dispute concerns the reasonableness of the allowance approved by GS in this instance. Shell contends that the amount allowed does not permit it a reasonable return on its investment. We have examined Shell's arguments and do not find that they provide any basis for holding that GS's 6 percent rate is unreasonable as applied to the years 1968 through 1973.

First, we cannot accept Shell's assertion that the transportation cost negotiated by it with two other oil companies as part of the purchase price of their oil necessarily represents a fair rate of return on investment for royalty valuation purposes. Shell has not indicated what rate of return it actually receives from the transportation cost element of the contracts and, while the rate of return reflected may well be fair with respect to its dealings with the two companies, it may represent more than a minimal fair rate of return generally.

We note that the oil companies had to choose between selling their oil to Shell in the field or selling the oil onshore after obtaining some alternative mode of transporting it to the onshore market. This could have entailed barging the oil or pos-

sibly construction of additional pipelines. So as long as the price charged by Shell was competitive with these alternative transportation options it would be in these oil companies' economic self-interest to pay the Shell price. The ceiling price would not relate to Shell's rate of return. Rather, it would be dependent upon the cost of the alternate methods of transportation. If the alternative transportation costs were significantly more expensive, Shell could calculate a transportation charge with a high rate of return on its investment yet with a cheaper and therefore agreeable result for the other oil companies. Such rate may well result from a fair arm's-length transaction in the market place but not necessarily represent a fair rate of return with respect to the valuation of Shell's own oil for royalty purposes.

Second, Shell urges that the rate of return allowed in computing the transportation allowance be comparable to that allowed in establishing common carrier rates for pipelines. Shell claims that the ICC "has long since determined that an eight percent annual return on investment in such cases is fair and reasonable" and cites an ICC decision entitled, *Reduced Pipe Line Rates and Gathering Charges*, 243 I.C.C. 115 (1940) (hereinafter *Reduced Rates*). Shell also notes that, unlike the GS determination, a fair rate for ICC purposes is an after-tax rate since the ICC has held that Federal corporate income taxes are a part of the cost of operation insofar as calculating a fair rate of re-

turn. *Minnelusa Oil Corp. v. Continental Pipe Line Co.*, 258 I.C.C. 41 (1944).

We have examined the above-noted cases and disagree with Shell as to their applicability to the case before us. It is true that in the *Reduced Rates* case ICC set 8 percent as a fair rate of return on investment for the various pipeline carriers examined in that case and that the 8 percent rate was reapplied in the second case. It is also quite evident, however, that the choice of 8 percent was arrived at after examining all of the circumstances relevant to the pipeline carrier business at the time and that the ICC rates were determined on a case-by-case basis. We find that the determination of the fair rate of return for common carriers in 1940 has little direct applicability to the case at issue.

This view is sustained by the findings of the United States Court of Appeals for the District of Columbia in *Farmers Union Central Exchange v. Federal Energy Regulatory Comm.*, 584 F.2d 408 (1978). In this case the court concluded that there was a lack of viable precedents in the area of pipeline ratemaking and a lack of an established ratemaking theory on which to base a present determination of reasonable rates for pipeline common carriers. With respect to past ICC pipeline rate cases, including the two cited by Shell to support its argument, the court stated:

Second, based on rather detailed analyses of economic conditions facing the industry in the 1940's, the Commission's

1940's decisions determined that oil pipeline rates should allow carriers to recover operating expenses plus no more than either an 8 percent return on value for transmission of crude oil or crude oil plus refined petroleum products * * * or a 10 percent return on value for transmission of gasoline. * * * The ICC pointed out that by 1940's standards these rates of returns were "somewhat larger . . . than . . . would be reasonable to expect would be applied in industries of a more stable character, where the volume of traffic is more accurately predictable." * * *

In the Commission's estimation, these "somewhat larger" rates of return were justified on the one hand by the need to attract capital to the oil pipeline industry despite the higher-than-normal risks faced by carriers of petroleum products, and especially of gasoline, and on the other hand, by the need to keep rates low enough to forestall the dangers of oligopolistic control of the oil pipeline industry by the big producers. Other factors considered by the ICC were the possibility of price fixing and a history of "enormous" profits, the cost-effects of greatly increased taxation during the 1930's, the increased demand for oil products, the improved technology of pipeline transmission precipitated by World War II, and the prediction that economic forces would cause rates to drop regardless of ICC action. Notably, aside from brief discussions of increased labor costs, the ICC's decisions make clear that operating costs other than taxes were relatively free from inflationary (or deflationary) influences from 1937 to 1947.

To the extent that economic conditions facing the oil pipeline industry have changed since 1948—and, in light of the modern onslaught of inflation, petroleum shortages, and reliance on imports, as well as the maturing of the industry itself, we may readily assume they have—the conclusions of the ICC in its earlier cases as to appropriate rates of return are equally as much artifacts of a bygone

era as is its reliance then on a valuation rate base.

* * * * *

We find the ICC's discussion of rate of return equally problematical. Here the total emphasis is on the 1940's precedents: because 8-10 percent was a viable return for carriers of petroleum products from 1940 to 1948; it is said, so must it be today. Even more so than the choice of a reasonable rate base methodology, a "reasonable rate of return" determination must be the product of the economic moment. As noted earlier, the ICC's choice in the 1940's of the 8 and 10 percent figures turned on such "hazards" as the infancy of the gasoline industry, the likelihood of disruptive discoveries of new oil fields and the unidimensional nature of the product market served by pipeline carriers, as well as on such factors as unduly high profits in the past, high taxes, and a rapidly expanding economy relatively free of inflation. * * * Absent some accompanying assessment of how this complex of relevant factors has changed in thirty years, the ICC's reliance on its antiquated precedents in determining a reasonable rate of return differs little from a rule that would require modern automobile accident damages to conform to those awarded by juries in 1940. [Italics added.]

584 F.2d at 415-16, 419-20 (citations and footnotes omitted). In addition, we note that the ICC reopened the *Reduced Rates* case in 1948 and upheld only a 7.6 percent rate of return rather than the original 8 percent rate. 272 I.C.C. 375 (1948).

Shell's third argument is based on a comparison of the 10 percent return on depreciated investment allowed in the calculation of royalty to be paid on natural gas liquids extracted at onshore gasoline plants. This rate is set forth in notices issued by GS on June 1, 1978, with an

effective date of July 1, 1978. Shell urges that since a 10 percent rate is allowed onshore, a higher rate should be allowed for an offshore investment "where the risk should be higher." We do not agree that these notices represent a reasonable basis for determining the fair rate of return on Shell's investment. There is more to such a comparison than the single issue of greater risk. Other factors must necessarily be considered in making such a comparison. The most obvious is that we are examining a rate for the period 1968-1973, whereas the GS notices apply to circumstances after July 1, 1978. Obviously, the fairness of any rate of return varies directly with subsisting general inflation rates. The economic situation which obtained in the period examined herein was vastly different from that which was extant in 1978.

It is evident from our investigation that a fair rate of return depends greatly on the economic conditions and other circumstances of the case at the time involved. GS apparently developed the transportation allowance formula after appropriate research and with input from affected oil companies. Shell has challenged the GS transportation allowance as unreasonable. However, Shell has not disputed the methodology used by GS, nor provided any specific factual basis which would support a finding that the 6 percent rate was unreasonable or that a different rate would be more reasonable for the period from

1968 to 1973. Therefore, we must affirm the GS determination.³

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Director, Geological Survey, is affirmed.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

HOOVER & BRACKEN
ENERGIES, INC.

52 IBLA 27

Decided January 5, 1981

Appeal from decision GS 148-0 & G of the Director, Geological Survey and IND 20-0 & G of the Acting Deputy Commissioner of the Bureau of Indian Affairs affirming the order of an oil and gas supervisor setting a different basis for computation of the Government's royalty from an oil and gas lease and demanding payment of additional royalty.

Affirmed.

³ We do not wish to intimate that the rate of return, which we sustain for the period from 1968 to 1973, is an inflexible standard to be applied in all time frames without reference to exogenous economic factors. On the contrary, we reject such a viewpoint. Our holding herein is expressly limited to the period from 1968 to 1973.

1. Oil and Gas Leases: Royalties

In determining the amount of royalty due to the United States from an oil and gas lease, it is proper for the Geological Survey to use a base value which includes both the purchase price paid for the natural gas and the amount of severance taxes paid by the purchaser directly to the State where, under Oklahoma law, the purchaser is authorized to deduct the amount of taxes paid from the amount paid to the producer. Decision in *Wheless Drilling Co.*, 13 IBLA 21, 80 I.D. 599 (1973), cited and applied.

APPEARANCES: C. David Stinson, Esq., Bill W. Logsdon, Esq., McAfee, Taft, Mark, Bond, Rucks & Woodruff, Oklahoma City, Oklahoma, for appellant.

OPINION BY
ADMINISTRATIVE JUDGE
BURSKI

INTERIOR BOARD OF LAND APPEALS

Hoover & Bracken Energies, Inc., has appealed the decision of the Director of the Geological Survey (Survey), and the Acting Deputy Commissioner of the Bureau of Indian Affairs, dated Nov. 29, 1979, affirming an order of the Survey's Area Oil and Gas Supervisor for Tulsa, Oklahoma. The order required that the value of certain state tax payments be included in the gross value of natural gas sold from appellant's leasehold unit for the purpose of computing Federal royalty payments. Appellant has been basing its royalty payments on the gross proceeds received from

the sale of such gas excluding the amount of state taxes.

As authority, the decision cites Departmental regulation, 30 CFR 221.47, which defines the value basis for computing royalties as follows:

The value of production, for the purpose of computing royalty shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

In addition, the decision quotes the royalty provision of the standard form, Oil and Gas Mining Lease for Allotted Indian Lands (Form 5-154h), used by the Bureau of Indian Affairs of the United States Department of the Interior. That provision reads in pertinent part as follows:

During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of

production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value.

The language of the royalty provision in the lease tracks the language in the regulations in 25 CFR 172.16.

In reaching its decision, Survey relied on the principle enunciated in *Whelless Drilling Co.*, 13 IBLA 21, 80 I.D. 599 (1973), that the value of production for royalty purposes and the term "gross proceeds" includes the amount of severance tax paid by the buyer to the seller of the gas. Survey then concluded that the fact that the buyer in this case paid the tax directly to the State did not change the principle: payment still inured to the benefit of the seller and thus should be considered in computing Federal royalty.

Appellant's leases cover lands which have been communitized with privately owned lands in the same governmental section for the purpose of drilling for and producing oil and gas. Under the communitization agreement, costs are borne by each lessee in the proportion that acreage covered by each lease bears to the total acreage in the unit. Where production occurs, each lessee and royalty owner shares

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in such production in accordance with the terms of the lease.

The State of Oklahoma has levied "a tax * * * equal to seven percent (7%) of the gross value of the production of natural gas." 68 Okla. Stat. Ann. § 1001 (West). By statute, the gross production tax "shall be paid by the purchaser of such products and such purchaser shall * * * deduct in making settlements with the producer and/or royalty owner, the amount of tax so paid." 68 Okla. Stat. Ann. § 1009(d) (West). The State has also levied an excise tax equal to 0.085 of 1 percent of the "gross value of all natural gas and/or casinghead gas produced in the State of Oklahoma which is subject to gross production tax." The excise tax is also paid by the purchaser who is authorized to deduct the amount of the tax when making settlement with the producer. 68 Okla. Stat. Ann. § 1102 (West). Production derived from restricted Indian lands and lands owned by the United States, to the extent the interest in the production is owned by the restricted Indians or United States, is exempt from taxation. See 68 Okla. Stat. Ann. § 1008 (West).

Pursuant to the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § § 3301-3432 (Supp. II 1978), the sale of all natural gas produced in the United States is subject to ceiling price limitations. However, sec. 110(a) of NGPA, 15 U.S.C. § 3320 (a) (Supp. II 1978), states that

a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas * * * if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller * * *.¹

Appellant informs the Board that it has executed gas purchase contracts covering sale of its interest in production from the unit including the leased lands. Under each contract, the purchaser is required to pay to appellant the maximum lawful price applicable to the gas under NGPA and to pay all state severance taxes levied on the gas prior to delivery. Appellant notes that payment of the tax by the purchaser, although not to the lessee, is commonly referred to as "tax reimbursement."

In its statement of reasons, appellant charges that Survey's method for computing royalties is arbitrary, capricious, and an abuse of discretion. Appellant argues that Survey has given no consideration to the "actual value" of the royalty gas. It contends not only that the Board erred in *Wheless, supra*, by focusing only on the concept of gross proceeds, but also that the present case is distinguishable from *Wheless* because of the ceiling price limitations set by the NGPA: it argues that reasonable value cannot

¹ The definition of "State severance tax" includes "any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas" by any State. 15 U.S.C. § 3320(c) (Supp. II 1978).

exceed the ceiling price in a regulated market.

Appellant argues further that the *Wheless* case also stands for the "patently unfair proposition" that the Federal Government may exempt itself from paying state severance taxes on minerals produced from Federal lands and then benefit from such taxes paid by its lessee and all other parties sharing in production from the unit. Appellant suggests that such an outcome is not mandated by any specific statutory authority and such is not a reasonable interpretation of existing regulations.

Finally, appellant suggests that Survey's method for determining royalty is unreasonable because it leads to incongruous results when making certain other comparisons. First, it notes that were the Federal Government to take its royalty share of the gas in kind and then sell it, the value received could be no greater than the ceiling price with no tax reimbursement. Then appellant argues that Survey's method is arbitrary because the identity of the seller of the gas is determinative of its value. Second, appellant points out that Survey's method results in the value of the gas produced from the unit varying according to the size of the acreage in the unit owned by the Federal Government.

[1] It is well recognized that the Secretary of the Interior has considerable latitude in determining what is the "value" of production from a lease on which royalty payments are made. *Amoco Production Co.*, 29

IBLA 234, 236 (1977); *Wheless Drilling Co.*, *supra* at 31; 30 U.S.C. § 226(c) (1976) and 30 U.S.C. § 189 (1976). The Secretary has exercised that discretion by promulgating 30 CFR 221.47 which defines the value basis for computing royalty. In *California Co. v. Udall*, 296 F.2d 384 (D.C. Cir. 1961), the Secretary's authority to establish reasonable values for royalty purposes under the Mineral Leasing Act and Departmental regulations was affirmed.

Appellant urges that the Board reconsider its interpretation of 30 CFR 221.47 as set forth in *Wheless, supra*. We decline to do so. In that case we said that the term gross proceeds as used in the regulation "means the established field price for the natural gas plus any additional sums paid by the purchaser of the gas to the unit operator as consideration for the purchase of gas from the unit of which the federal lease is a part." 13 IBLA at 30-31. We held that reimbursement by a purchaser of state severance taxes paid by the seller was an "additional sum" properly included in determining value of production for the purpose of computing royalty under 30 CFR 221.47. *Accord, Amoco Production Co., supra*.

Contrary to appellant's argument, we find that appellant's case, where the price has been set by the NGPA, is no different from that of *Wheless*, where the price was set by the Federal Power Commission (FPC). Appellant attempts to distinguish the two by noting that *Wheless* Company could elect to sell in the regulated interstate market or

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the unregulated intrastate market and by arguing that in an unregulated market the fair value *would* be the price paid by the purchaser plus tax reimbursement but in the regulated market the value could never be more than the maximum lawful price for which it may be sold. This is a distinction without substance as applied to this case. Appellant itself recognizes that the NGPA expressly allows a *price* for the gas to be set *above* the maximum lawful amount to the extent that it reflects state severance taxes paid. 15 U.S.C. § 3320 (Supp. II 1978). Thus regardless of whether we consider the regulated or unregulated market, the amount of tax payments reimbursed does not affect the amount which a producer can receive for its gas under the NGPA. It still may rise to the ceiling. We find that the *Wheless* principle applies equally in either case.

However, the facts of appellant's case are not exactly the same as in *Wheless*, and we feel that further discussion of the regulation as applied to appellant's leases is warranted. We focus particularly on the fact that the applicable Oklahoma statutes provide that the *purchaser* pay the severance taxes and deduct them from the amount paid to the seller. Thus, the amount of the taxes does not result in "proceeds" as that term was used in *Wheless* and is ordinarily understood. We find, however, that appellant has the same ultimate responsibility for the taxes and receives the same benefit under Oklahoma's method of tax

collection as it would in a state where the seller is obligated to pay the taxes directly and benefits from reimbursement by the purchaser. Here appellant still receives the benefit of "tax reimbursement" and consequently the value of that benefit may be added to the amount appellant receives to determine the value of production to appellant for the purpose of computing the royalty. As reported by appellant, the amount it receives under its contracts is the NGPA ceiling amount. Since under Oklahoma law a purchaser must deduct the amount of taxes paid to reach the purchase price, we assume that such price reflects the deduction of that amount and therefore the value to appellant of the gas in this case is the ceiling amount plus the tax paid by the purchaser.

If we turn to the question of what is a reasonable value, as appellant argues, and examine the regulation in that context rather than in terms of the *Wheless* principle of "gross proceeds" and benefit to the producer, we reach the same result. First we note that the regulation, when it refers to gross proceeds, simply sets the minimum value of production and we find that the focus of the regulation in setting the value of production is price. However, Survey may consider "other relevant matters." On this, the relevant portions of the regulation bear repeating:

The value of production, for the purpose of computing royalty shall be the estimated reasonable value of the product

as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters. * * * In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

Thus the value of production as defined by the regulation is not necessarily gross proceeds; *i.e.*, the amount the producer receives from the purchaser for the gas. If that were true, then appellant arguably would be correct that its royalty should be based solely on the NGPA ceiling because that is the amount it receives under its purchase contracts. Under the regulation, however, all of the circumstances of the pricing of the gas may be considered. One such relevant consideration is that, as we have noted, under the NGPA a producer may set a price for gas exceeding the lawful ceiling to the extent of the amount of taxes it must pay. In Oklahoma, appellant's purchaser pays the taxes and technically deducts them from its payment to appellant. As we have already concluded, since appellant receives the ceiling amount, the actual price to the purchaser is the ceiling amount plus the amount of taxes paid. Thus the value of production is more than the gross proceeds in this case.

Appellant's argument that the value to the United States of the

gas produced changes according to whether the producer sells it and pays royalty, or the United States takes it in kind and sells it, is a misleading over simplification of the situation. Appellant presumes that the value to the United States of in kind gas is only what it could then be sold for. If, however, the Government were to take its royalty interest in kind, the implicit assumption would be that it had a use for the gas. The value of this gas is, therefore, properly computed as the price which the United States would pay on the open market if it were purchasing the gas as an ordinary purchaser. The fact that the United States cannot be assessed state severance tax does not depreciate the *value* of the gas to it. Immunity from state taxation is a function of the Federal Government's sovereignty, which prevents the state from assessing a severance tax. This benefit flows to the Government, not the lessor.

The essential fallacy of appellant's argument is made clear if we reverse the instant situation and assume that the seller pays the severance tax. Under sec. 110(a)(1) of the NGPA, *supra*, the seller would be permitted to obtain reimbursement of the severance tax *above* the established ceiling price. This reimbursement is clearly part of the gross proceeds obtained. The fact that a state may make the purchaser liable for payment of the severance tax does not alter the economic results. In both cases it is the seller who makes the severance and who receives the ceiling

price as a net proceed (excluding, of course, other costs of production, which would remain the same no matter how the tax was assessed).

Finally, appellant's argument that the basis of the royalty decreases as the amount of leased Federal or Indian land within a unit increases is merely a mathematical reflection of the fact that as the extent of the Federal royalty interest within a unit rises, an increasing proportion of unit production is not subject to state taxation. We would point out that appellant's argument would support a finding that the proper mode of determination would not consider any of the lands within a unit as Federally owned.

Using appellant's hypothesis that the NGPA price is \$2 per Mcf (such gas having a Btu content of 1,000 Btu/cf), and that the State of Oklahoma imposes a state severance tax equal to 10 percent of the value of all gas produced, one could argue that the value for royalty purposes should be \$2.20 per Mcf regardless of the percentage of Federal or Indian lands within the unit. Admittedly, this would not represent "gross proceeds" inasmuch as there would be no severance tax assessed on the Federal or Indian royalty interests, and thus no reimbursement. But such a figure might, nevertheless, arguably represent the real value of an Mcf of gas. "Gross proceeds" is a floor, not a ceiling, concept. Thus, the regulation provides that "[u]nder no circumstances shall the value of production of any of said substances for the purposes of comput-

ing royalty be deemed to be *less* than the gross proceeds accruing to the lessee from the sale thereof" (*italics supplied*). 30 CFR 221.47. To the extent that the Government has elected to utilize actual gross proceeds in order to determine value, rather than merely applying the percentage severance tax imposed by the State to *all* production had within a unit, the lessees are the beneficiaries.

We agree that the degree of benefit, under the system of value ascertainment adopted by the Geological Survey, will, in fact, vary according to the percentage of Federal and Indian lands within a unit. But inasmuch as the regulation clearly requires that "gross proceeds" serve as the minimum basis for the royalty assessment, the only alternative method would be to ignore "gross proceeds" and proceed on the assumption that all production was subject to severance taxation to determine the value of the gas produced. This would, necessarily, work to the detriment of every Federal oil and gas lessee.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JAMES L. BURSKI,
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

NORTHWAY NATIVES, INC.**5 ANCAB 147***Decided January 5, 1981*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management F-14912-A and F-14912-B.

Partial remand.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

Where the Federal Government grants a right-of-way for a Federal aid material site, that right-of-way, if valid, is a valid existing right within the meaning of § 14(g) of ANCSA, and as such a patent issued pursuant to ANCSA must contain provisions making it subject to the right-of-way.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

If the terms of the right-of-way grants were violated, the rights-of-way would not be automatically terminated but would be subject to cancellation within the discretion of the Bureau of Land Management.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

When the record before the Bureau of Land Management raises questions which may affect the validity of Federally created third-party interests, Secretary's Order No. 3029 requires the Bureau of Land Management to determine through adjudication, the validity of such interests.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Remand

When the record on appeal raises questions which may affect the validity of Federally created third-party interests, and when there is no evidence that a determination of validity has been made pursuant to Secretary's Order No. 3029, the Board will remand to the Bureau of Land Management for such determination.

APPEARANCES: Peter J. Aschenbrenner, Esq., Aschenbrenner and Savell, and David Wolf, Esq., Keane, Harper, Pearlman and Copeland, for appellant; Elizabeth S. Ingraham, Esq., for Doyon, Limited; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Shelley J. Higgins, Esq., and Martha T. Mills, Esq., Department of Law, for State of Alaska.

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD**

In 1960, the State of Alaska (State) made application with Bureau of Land Management (BLM) to obtain various material site rights-of-way on Federal lands in the vicinity of the Village of Northway. The State asserts that the material sites were needed in connection with the construction and maintenance of the State's highway projects in the area. In 1964, a further material site was applied for in the same locality. Specifically, the material sites here referred to are described as follows:

1. A right-of-way, F-025907, for a Federal aid material site, located in the W½, of Section 18, T. 14 N., R. 20 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

2. A right-of-way, F-025905, for a Federal aid material site located in the E½ of Section 29, T. 15 N., R. 19 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

3. A right-of-way, F-025926, for a Federal aid material site, located in the NW¼ of Section 4, T. 15 N., R. 18 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

4. A right-of-way, F-025909, for a Federal aid material site, located on the W½ of Section 28, T. 14 N., R. 20 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

5. A right-of-way, F-025923, for a Federal aid material site, located in the N½ of Section 11, T. 14 N., R. 19 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

6. A right-of-way, F-025900, for a Federal aid material site, located in the W½ of Section 12, T. 13 N., R. 20 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

7. A right-of-way, F-025791, for a Federal aid material site, located in the NW¼ of Section 10, T. 14 N., R. 19 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

8. A right-of-way, F-033056, for a Federal aid material site, located in the SW¼ of Section 32, T. 16 N., R. 18 E., C.R.M. Act of August 27, 1958, as amended, 23 USC 317.

Appellant's Memo in Support of Statement of Reasons, at 18.

The BLM granted these rights-of-way to the State pursuant to 23 U.S.C. § 317 (1976) which provides:

(a) If the Secretary determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department su-

pervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title.

While the terms and conditions of these material site rights-of-way varied, they basically provided that an unspecified amount of material was to be taken from each site for the purpose of road building (in some rights-of-way "maintenance" was included) and that proof of construction be filed within 5 years (in the case of F-025923 and F-033056, the period was extended to 7 years).

Northway Natives, Inc. (Northway) filed village selection applications F-14912-A, as amended, on

Oct. 22, 1974, and F-14912-B, as amended, on Dec. 12, 1974, for lands located near the Village of Northway, including the lands comprising the material site rights-of-way discussed above. The applications were filed under the provisions of § 12(a) of the Alaska Native Claims Settlement Act (ANCSA), Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. § 1601, 1611(a) (Supp. V, 1975)).

The BLM published, in 43 FR 28051 (June 28, 1978), its Decision to Issue Conveyance (DIC) of land to Northway, in response to village selection applications F-14912-A, as amended, and F-14912-B, as amended. In this DIC the lands comprising the rights-of-way were not conveyed to Northway, but instead reserved to the United States. On July 26, 1978, Northway filed an appeal received by the Alaska Native Claims Appeal Board (AN-CAB) on July 28, 1978.

In its Statement of Reasons, Northway asserts that the rights-of-way were rendered invalid because the State violated the terms of the grants, and further, that BLM failed to follow its own procedures in not terminating the rights-of-way when their terms were violated by the State. Under this theory the right-of-way sites would be "public lands" as defined in § 3(e) of ANCSA and thus withdrawn for Native selection under § 11(a)(1) of ANCSA. Northway asserts that (1) proof of construction was not filed, or not filed timely, by the State as required by the right-of-way grants; (2) amounts of mate-

rial removed were not determined and may have been excessive in which case cancellation of the grants would be required; and (3) material may have been used for unauthorized purposes, requiring cancellation of the grants. On the basis of these allegations, Northway seeks a remand to the Secretary for determination of these matters.

Doyon, Limited (Doyon), filed Motion to Intervene in this appeal on Jan. 11, 1979, and the Board named it a party on Jan. 15, 1979. In its Statement of Reasons, Doyon also asserts that the rights-of-way in question are no longer valid under the law and regulations and should therefore be cancelled. Doyon further argues that the rights-of-way are third-party interests created by Federal law and as such the Department of the Interior is required to determine their validity. Second, to the extent, if any, that these rights-of-way are valid and are not cancelled by the Department, they should be identified in the DIC as existing rights of the State, which the conveyance is "subject to," not as reservations to the United States.

The various questions raised by both Northway and Doyon can be categorized into three basic issues. First, are the State's interests, if valid, third-party interests protected by § 14(g) of ANCSA? Second, if the State violated the terms of the right-of-way grants, were the rights-of-way rendered invalid? Third, did BLM adjudicate the State's right-of-way interest as re-

quired within the meaning of Secretary's Order No. 3029, 43 FR 55287 (Nov. 27, 1978)?

The first question arises because § 14(g) of ANCSA recognized that certain property interests granted by the Federal Government to third parties had to be protected when a land conveyance was made to a Native corporation under ANCSA. Specifically, § 14(g) provides in pertinent part:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. [Italics added.]

As noted above, the Federal Government, through BLM, granted the rights-of-way in question to the State pursuant to 23 U.S.C. § 317 (1976), and such grants were made in 1960 and 1964. Applying these facts to the language of § 14(g), we have a situation "[w]here, prior to patent * * * a lease, contract, permit, right-of-way * * * has been issued for the surface or minerals covered under such patent."

[1] The Board concludes that where the Federal Government grants a right-of-way for a Federal aid material site, that right-of-way, if valid, is a valid existing right within the meaning of § 14(g) of

ANCSA, and as such a patent issued pursuant to ANCSA must contain provisions making it subject to the right-of-way.

Having established that a Federal grant right-of-way for a material site can be a valid existing right within the meaning of § 14(g) of ANCSA, the second question is whether the right-of-way grants would be rendered invalid if the State violated the terms of the grants?

While the appellants argue that certain actions and inactions by both the State and BLM did in fact terminate the grants, the Department regulations as interpreted by the Interior Board of Land Appeals lead to a contrary conclusion. The pertinent regulations are 43 CFR 2802.2-3 and 43 CFR 2802.3-1.

43 CFR 2802.2-3 provides:

Unless otherwise provided by law, rights-of-way are *subject to cancellation* by the authorized officer for failure to construct within the period allowed and for abandonment or nonuse. [Italics added.]

43 CFR 2802.3-1 provides:

All rights-of-way approved pursuant to this part * * * shall be *subject to cancellation* for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way. *No right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation.* [Italics added.]

The "subject to cancellation" language in the above regulations allows the person administering the grants to cancel them when a violation has occurred but it does not

mandate that such action be taken. What action, if any, the administrator is to take when the terms of a grant have been violated, is left to his discretion. Violation of the terms of a grant only subject the grant to possible cancellation.

The last sentence of 43 CFR 2802.3-1: "No right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation," refutes the argument that the grants automatically terminate when the terms of the grants are violated.

The "subject to cancellation" language in the above-quoted regulations has been interpreted by the Interior Board of Land Appeals in *State of Alaska Department of Highways*, 20 IBLA 261, 82 I.D. 242, 245 (1975) as follows:

Quite clearly, then, the regulations make such rights-of-way *subject to* cancellation by the authorized officer for non-construction, nonuse, abandonment, violations of the regulations, or of the terms and conditions of the grant. See *Southern Idaho Conf. of 7th Day Adventists v. United States*, 418 F.2d 411 (9th Cir. 1969). [Italics in original.]

* * * *The fact that a right-of-way is subject to cancellation under these circumstances does not mean that it must be canceled.* The employment of the words "subject to" [an action] in a regulation has been held to invest the administrative officer with the discretion to determine whether noncompliance in a given instance should be excused or whether the prescribed penalty should be imposed. *Tagala v. Gorsuch*, 411 F.2d 539 (9th Cir. 1969); *Pressentin v. Seaton*, 284 F.2d 195 (D.C. Cir. 1960). Use of the term "subject to" said the Court in *Pressentin*, "left the door wide open to a consideration of circumstances." At 199. [Italics added.]

[2] The Board concurs that if the terms of the right-of-way grants were violated, the rights-of-ways would not be automatically terminated but would be subject to cancellation within the discretion of BLM.

The final question is whether the Department adjudicated the validity of State's third-party rights within the meaning of Order No. 3029, *supra*? As to third-party interests created by Federal law, Order No. 3029 (43 FR at 55291) states:

Another issue for resolution is to what extent the law and regulations require the Department to identify and determine the validity of (adjudicate) third party valid existing rights.

* * * [I]t is appropriate for BLM to determine in the first instance the validity of those interests which are created by federal law since BLM is in most cases the agency charged with the administration of those laws.

As to third-party interests created by the State of Alaska, Order No. 3029 (43 FR at 55291), *supra*, states:

Neither the Department's regulations nor ANCSA require the Department to determine whether third party interests created by the State are valid under the applicable State law and regulations. The Department is not an appropriate forum to adjudicate these interests. *If the State created interest is valid on its face* it should be deemed valid for purposes of the conveyance document. [Italics added.]

To ascertain whether BLM had determined and adjudicated the validity of the Federally created interest in this case, the Board issued

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an Order for Further Information on Aug. 8, 1980. This order stated in pertinent part: "Therefore, the Board hereby Orders BLM to furnish it with a concise statement as to whether BLM ever determined the validity of the rights here in question."

In BLM's Response to Order of Aug. 8, 1980, filed Aug. 20, 1980, it made the following declaration:

It is the position of the BLM that it had complied with the requirement of S.O. 3029 "to determine in the first instance the validity of those interests created by federal laws . . ." at the time the DIC was issued.

The BLM maintains a casefile on each of the material site rights-of-way. These casefiles were examined by the ANCSA adjudicator prior to the issuance of the DIC. If a file reveals that a grant had been issued by BLM for the right-of-way on lands to be approved for conveyance, and if no final action has been taken by BLM to cancel the granted right-of-way, the interest is listed in the DIC as a valid existing right. It is the position of BLM that this process meets the mandate of S.O. 3029.

Order No. 3029, *supra*, distinguishes between third-party interests created by Federal law, such as the rights-of-way subject of this appeal, and third-party interests created by the State of Alaska. BLM is directed "to determine * * * the validity" of Federally created interests, while specifically precluded from adjudicating State-created interests other than noting, "[i]f the State-created interest is valid on its face."

The contrast between the treatment of the two types of interest

clearly indicates Secretarial intent to impose upon BLM a requirement to adjudicate Federally created interests at some level beyond simply noting if they are valid on their face.

Order No. 3029, *supra*, does not expressly require BLM to adjudicate the validity of Federally created third-party interests; it merely provides that such adjudication is "appropriate." However, it is apparent from subsequent clarifications of Order No. 3029, that this language was construed by the Secretary as a requirement for adjudication. A Memorandum dated Nov. 20, 1979, from the Solicitor to the Secretary, discusses the Solicitor's concern that the above language would be interpreted to include mining claims and rights-of-way claimed under RS 2477 as interests whose validity BLM was required to adjudicate. The conclusion was that they were not.

This sentence was not intended to require the adjudication of unpatented mining claims * * *. The Department's position that it may convey land which contains unpatented claims, the validity of which has not been determined, was recently upheld in *Alaska Miners v. Andrus*, A 76-263, (D. Alaska) * * *.

Neither was this sentence intended to require the adjudication of rights claimed under RS 2477.

Solicitor's Memorandum, dated Nov. 20, 1979.

Based on these conclusions, Order No. 3029, *supra*, was amended to read:

Nevertheless, it is appropriate for BLM to determine in the first instance the

validity of those interests created by federal laws, which are administered by BLM, other than unpatented mining claims under the Mining Law of 1872, 30 U.S.C. 22 *et seq.*, and rights-of-way under RS 2477 (repealed in 1976 by 90 Stat. 2793).

45 FR 1692, 1693 (Jan. 8, 1980).

Had Order No. 3029, *supra*, not been intended to require adjudication of Federally created third-party interests, the above modification would not have been necessary. The fact that the modification was made underscores the point that with regard to Federally created interests other than the exceptions, BLM is required to undertake some form of adjudicative process to determine validity before conveyance.

BLM has stated its determination in this case was limited to examining the case files to see if the rights-of-way had been issued and had not been cancelled. While this type of review may be sufficient when the record shows no reason for a full adjudication, the record of this appeal raises questions which may affect the validity of the material sites rights-of-way, *i.e.*, whether proof of construction was timely filed; whether the amounts of material removed were permissible; and whether material was used for unauthorized purposes.

[3] The Board finds that when the record before BLM raises questions which may affect the validity of Federally created third-party interests, Order No. 3029, *supra*, requires BLM to determine through adjudication, the validity of such interests.

[4] The Board further finds that when the record on appeal raises questions which may affect the validity of Federally created third-party interests, and when there is no evidence that a determination of validity has been made pursuant to Order No. 3029, *supra*, the Board will remand that portion of the appeal to BLM for such determination.

Therefore, the Board hereby remands this portion of the appeal to BLM so that it may determine the validity of the State's third-party interests in accordance with Order No. 3029, *supra*. It should be noted that BLM's decision on remand will be based upon an interpretation of 23 U.S.C. § 317 (1976), and not ANCSA, and therefore any appeal from that decision must be taken before the Interior Board of Land Appeals, and not ANCAB.

This represents a unanimous decision of the Board.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

ANNUAL REVIEW, REVISION AND REAPPROVAL OF 5-YEAR OCS OIL AND GAS LEASING PRO- GRAMS

M-36932

January 5, 1981

Outer Continental Shelf Lands Act: Generally

Use of consultation procedures of sec. 18
of the Outer Continental Shelf Lands Act,

43 U.S.C. § 1344 (Supp. II 1978), are not required for annual review of an approved 5-year OCS leasing program under sec. 18(e) of the Act.

**Outer Continental Shelf Lands Act:
Generally**

Under sec. 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344 (Supp. II 1978), a reapproval must include a schedule of proposed lease sales for the full 5-year period following reapproval but may not include sales beyond the 5-year period. A revision permits changes within an existing approved schedule without requiring an extension of that schedule to include a full five years after revision.

**Outer Continental Shelf Lands Act:
Generally**

Under sec. 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344 (Supp. II 1978), a revision may add, delete, delay or advance sales and planning milestones within an approved 5-year program. A revision cannot be used to tack additional sales or milestones onto the end of an approved 5-year program. Only a reapproval can add sales beyond an existing approved program.

**Outer Continental Shelf Lands Act:
Generally**

Sec. 18(e) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344(e) (Supp. II 1978), states in discussing revisions and reapprovals that only a revision which is not significant may escape the requirement of sec. 18 consultation procedures. A fortiori, all reapprovals require use of these procedures. Therefore, the procedures must be followed to schedule any sales or milestones beyond the existing 5-year program.

**Outer Continental Shelf Lands Act:
Generally**

Under sec. 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344 (Supp.

II 1978), the Secretary has considerable discretion to determine whether or not the deletion, delay or advancement of sales or milestones within an approved 5-year program is a significant revision.

**Outer Continental Shelf Lands Act:
Generally**

Planning milestones and sale dates beyond the 5-year horizon can be made available as a matter of information, but final approval of a schedule containing such sales cannot occur until the procedures of sec. 18 have been followed. Those milestones occurring within the 5-year period that apply to sales expected beyond five years may be included in a reapproved schedule.

TO: ASSISTANT SECRETARY, POLICY,
BUDGET AND ADMINISTRATION

FROM: SOLICITOR

SUBJECT: ANNUAL REVIEW, REVISION
AND REAPPROVAL OF 5-YEAR
OCS OIL AND GAS LEASING
PROGRAM

This memorandum is in response to your request dated Nov. 14, 1980, concerning the development of a strategy for the review, revision and reapproval of the 5-year OCS leasing program.

Your first question concerned annual review. Annual review is required by sec. 18(e) of the OCS Lands Act which reads as follows:

The Secretary shall review the leasing program approved under this section at least once each year. He may revise and reapprove such program, at any time, and such revision and reapproval, except in the case of a revision which is not significant, shall be in the same manner as originally developed. 43 U.S.C. § 1344(e) (Supp. II 1978).

A plain reading of this language makes clear that use of the consultation procedures found elsewhere in sec. 18 are not required for the annual review. These procedures are only required for revisions, if significant, and reapprovals. The legislative history of the section supports plain reading. S. Rep. No. 1091, 95th Cong., 2d Sess. 106 (1978); H.R. Rep. No. 590, 95th Cong., 2d Sess. 151 (1978); S. Rep. No. 284, 95th Cong., 2d Sess. 77 (1978). Therefore, a decision not to revise the schedule can be reached without formal consultation.

You have proposed two alternatives when a decision is made to revise or reapprove. The first is to revise and extend the program for one or two years using practices employed by the Department for schedule development prior to 1978. For reasons stated below, this is not a legal approach. The second alternative is to revise and extend the program using sec. 18 consultation procedures.

At this point, it is necessary to distinguish carefully revisions from reapprovals. Reapprovals are discussed in both secs. 18(a) and 18(e) of the OCS Lands Act. Revisions are only discussed in sec. 18(e). Sec. 18(a) reads, in part, as follows:

The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs *for the five-year period following its approval or reapproval.* 43 U.S.C. § 1344(a) (Supp. II 1978) (italics added).

Accordingly, a reapproval must include a schedule of proposed lease sales for the 5-year period following reapproval. This is to be distinguished from a revision which would permit changes in an existing approved schedule without requiring an extension of that schedule to include a full five years after revision. See 43 U.S.C. § 1344(e) (Supp. II 1978).

If revision and reapproval are not distinguished and are considered one process, a reapproval always following a revision, it would be extremely difficult for the Secretary to advance even one sale on an approved schedule by one month since a reapproval would require the additional task of adding sales at the end of the existing approved schedule so that the reapproval includes a full five years. In our view, a revision may add, delete, delay or advance sales and planning milestones within an approved 5-year program. A revision cannot be used to tack additional sales or milestones onto the end of an approved 5-year program. Only a reapproval can add sales beyond an existing program. Distinguishing between revisions and reapprovals in this fashion also gives meaning to the distinction in sec. 18(e) between revisions which may be significant or insignificant and reapprovals which are not subdivided by significance.

Concerning consultation requirements, sec. 18(e) states that only "a revision which is not significant" may escape the requirement of sec.

18 consultation procedures. A fortiori, all reapprovals require use of these procedures. Therefore, the procedures must be followed to schedule any sales or milestones beyond the existing 5-year program. Regarding revisions, we believe the Secretary has considerable discretion to determine whether the deletion, delay or advancement of sales or milestones within an approved 5-year program is significant or not. An abuse of this discretion would be judicially reviewable; therefore, determination of insignificance should be supported by an administrative record demonstrating the appropriateness of the determination. Furthermore, the Secretary has discretion to add new milestones to an approved program for sales beyond that program. These, in our view, would not affect the substance of an approved program. *See H.R. Rep. No. 1474, 95th Cong., 2d Sess. 106 (1978).*

You have suggested including in future reapprovals all sale dates for which any planning milestone falls within the 5-year period, and if possible, formally approving sales beyond the 5-year horizon. This practice would not be in accordance with sec. 18(a) which clearly limits the approval of a lease sale schedule to five years. This limitation is entirely consistent with other provisions of sec. 18 providing for comment from designated federal agencies, affected state and local governments

and others. The statutory scheme reflects the difficulty that such commenters would have in giving Departmental decisionmakers effective advice to balance statutory considerations for sales more than five years in the future, particularly given a climate of advancing technology, growing energy needs and environmental sensitivity.

We do not mean to suggest, however, that planning milestones and sale dates beyond the 5-year horizon could not be made available as a matter of information. We only mean that final approval of a schedule containing such sales cannot occur until the procedures of sec. 18 have been followed. Finally, we see no prohibition for including in a reapproved schedule those milestones occurring within the 5-year period that apply to sales expected beyond five years. This would result in prospective lessees being fully aware of planned calls for nomination, for example, thus enabling them to better schedule their planning activities. This would also enable the Department to wait longer within any given approved program before finding it necessary to go through a new reapproval process.

If you have any further questions on this subject, please do not hesitate to contact this office.

CLYDE O. MARTZ
SOLICITOR

GARLAND COAL & MINING CO.

52 IBLA 60

Decided *January 9, 1981*

Appeal from decisions of the New Mexico State Office of the Bureau of Land Management accepting relinquishment of several coal leases and advising of rental amounts due. NM 029179 Okla., NM 029180 Okla., BLM-C 030765 Okla., and NM 033508 Okla.

Reversed.

1. Coal Leases and Permits: Cancellation—Coal Leases and Permits: Rentals—Regulations: Applicability—Regulations: Interpretation

An ambiguous regulation relating to "the proper office" in which to file a relinquishment of a coal lease should not be interpreted to the detriment of a coal lessee who sought to comply with its provisions.

2. Coal Leases and Permits: Cancellation—Regulations: Generally—Regulations: Validity

The Boards of Appeal of the Department of the Interior have no authority to declare invalid a duly promulgated regulation of this Department. Where, however, the regulation was not properly promulgated, is lacking in statutory basis, and has been consistently ignored in actual practice, that regulation will be accorded no force or effect.

3. Coal Leases and Permits: Generally—Coal Leases and Permits: Cancellation

Under the provisions of 30 U.S.C. § 188a (1976) accrued rentals on mineral leases are to be prorated on a monthly basis where the failure to file a timely surrender was not due to a lack of reasonable diligence on the part of the lessee.

APPEARANCES: Jeffrey J. Kahn, Esq., Skelton, Oviatt, and O'Dell, Wheat Ridge, Colorado, for appellant.

OPINION BY
ADMINISTRATIVE
JUDGE BURSKI

INTERIOR BOARD OF
LAND APPEALS

Garland Coal & Mining Co. (Garland) appeals decisions of the New Mexico Office, Bureau of Land Management (BLM), dated June 20, 1979, accepting relinquishment of appellant's coal leases and advising of rental amounts due and payable 30 days after receipt of the decisions. The leases, BLM-C 030765 Okla., NM 029179 Okla., NM 029180 Okla., and NM 033508 Okla. are situate in Haskell and LeFlore Counties in Oklahoma. The leases had been in producing status, and were, therefore, administered by Geological Survey (Survey).

By letters dated Dec. 27, 1976, and addressed to the Area Mining Supervisor of Survey, appellant stated its intent to relinquish the leases "upon the next anniversary date" of the leases, *i.e.*, Feb. 1, 1977. The letters requested information regarding "any questions or formal requirements concerning such relinquishment." The letters indicate that appellant did not send copies to BLM, and Survey did not undertake to do so. Eventually, appellant learned that BLM and not Survey was the proper office in which to file relinquishments of coal leases. By letter dated Feb. 1, 1977, addressed to BLM, appellant purported to confirm its previous letters to Sur-

January 9, 1981

vey dated Dec. 27, 1976. BLM considered the relinquishment as filed on Feb. 4, 1977, the date it received appellant's letter. 43 CFR 3523.1-2 (1976).

In March 1977, BLM requested the report and recommendation of Survey regarding the relinquishment. Survey replied by memorandum dated Mar. 10, 1977, that annual rentals for each of the subject leases had not been remitted on or before the February 1 anniversary date, and on that ground declined to "concur in any relinquishment."

By decision dated Aug. 19, 1977, the relinquishments were accepted as affective Feb. 4, 1977, and appellant was advised of its obligation to pay accrued rentals and royalties for the year commencing Feb. 1, 1977,¹ citing 43 CFR 3523.1-2 (1976). Appellant was allowed 30 days from receipt of that decision in which to remit payment. That decision was timely appealed.

In January 1979, appellant withdrew its appeal on the ground that the United States had withdrawn its claim for the rental amounts. BLM subsequently requested additional information concerning the purported release of the claim for rental, in response to which Garland submitted photocopies of statements of account prepared and issued by Survey. Those statements showed a zero balance in each lease account, the notation, "BALANCE ADJUSTMENT 06/01/78 BAL TRF

TO BLM," and the statement, "NOTICE: LEASE ACCOUNT CANCELED OR TERMINATED. BALANCE SHOWN PAYABLE TO ISSUING OFFICE UPON RECEIPT OF THIS STATEMENT." Appellant construed these notations to mean that the United States had withdrawn the additional charges. By memorandum dated Apr. 27, 1979, from Survey to BLM, it was explained that the above remarks were intended to show only that the account and outstanding balance had been transferred to BLM. Survey stated that the issue of whether rent is owed depends on which of Garland's letters of relinquishment—the December 1976 letters to Survey or the February 1977 letter to BLM—effected the intended action. As noted, BLM accepted the latter and, accordingly, reissued its earlier decision under date of June 20, 1979. An appeal was timely noted.

[1] Appellant argues, *inter alia*, that Survey should have either notified the BLM State Office of appellant's intent to relinquish or informed Garland that the proper office in which to file a relinquishment was the BLM State Office. Given the specific wording of appellant's submittal, however, we do not feel that Survey's actions, alone, would justify reversal of the decision below.

The letters of Dec. 27, 1976, which Garland sent to Survey merely recited the following:

Garland Coal and Mining Co. intends to relinquish its leases from the United

¹ The rental amounts are as follows: \$2,554 (NM 029179); \$1,924 (NM 029180); \$2,098 (BLM-C 030765); and \$634 (NM 033508).

States numbered NM-033508, NM-029-179, and NM-029180 in LeFlore and Latimer counties, Oklahoma upon the next anniversary date of said leases. If you have any questions or formal requirements concerning such relinquishment, please let me know.²

In response to a subsequent inquiry from Garland, dated Oct. 17, 1977, seeking an explanation for the failure of Survey to either forward the letters to BLM or inform appellant of the necessity of filing relinquishment of the leases with BLM, Alex M. Dinsmore, the addressee of the December 27 letters, responded, in relevant part, as follows:

Reference is made to your letter of October 17, 1977, regarding the above referenced appeal.

Please be advised that the two Garland letters of December 27, 1976, were received in this office on December 28, 1976, and copies were not forwarded to any other office as they were addressed to this office. At that time we had no particular questions nor requirements concerning the intended relinquishments.

This explanation, particularly when viewed in conjunction with the specific wording of the December 27 letters, can easily be accepted. By the December 27 letters, Garland informed Survey of its future intent to relinquish the leases; only the subsequent events would have indicated to the employees of Survey that Garland intended *by these documents* to relinquish the leases, with an effective date of Feb. 1, 1977. While someone in Survey

might have been induced by this letter to either forward a copy to BLM or inform Garland that relinquishments of leases should be filed in the State Office, we cannot say that the failure to so act, given the specific wording of the letters, can give rise to any estoppel.

On the other hand, a review of the regulations, which were in force at the time of appellant's actions, indicates that appellant's actions were not unreasonable. The regulation on relinquishment of coal leases presently provides that "[a] relinquishment shall be filed in triplicate by the lessee in the Bureau of Land Management State Office having jurisdiction over the lands involved (43 CFR Subpart 1821)." 43 CFR 3452.1-2. While this regulation explicitly notes that relinquishments are filed with BLM, the regulation which was applicable in 1976, 43 CFR 3523.1-1 (which now relates only to relinquishments of leases for minerals other than coal or oil and gas), provides that the relinquishment be filed "in the proper office." Though there are a number of other references in these regulations to "the proper office" (*see* 43 CFR 3503.1-2(a)), the term "proper office" is never really defined in the regulations as referring to BLM. We feel that the ambiguity in this regulation, particularly in light of the fact that appellant would be dealing with Survey on a number of matters for which it was "the proper office," would justify appellant's actions, herein, particularly in the absence of any third party rights.

² There were actually two letters involved herein. The only difference between the two was that the second letter referred to coal lease BLM-C-030765 in Haskell County, Oklahoma.

Cf. A. M. Shaffer, 73 I.D. 293 (1966).

[2] We also note that BLM made no reference to 43 CFR 3523.3 (1976). While this regulation is still codified, it no longer applies to coal leasing. The regulation presently provides, as it did in 1976 when it was applicable to coal leasing, that:

Any lease shall terminate automatically if the lessee fails to pay the rental on or before the anniversary date of the lease. However if time for payment falls upon any day on which the proper office to receive payment is not open, payment received on the next official working day shall be deemed to be timely. The termination of the lease for failure to pay the rental must be noted on the official records of the proper office. Until such notation is made, the lands included in such lease are not subject to issuance of any other lease.

This provision, with a few exceptions, tracks 43 CFR 3108.2-1(a) which relates to termination of oil and gas leases for nonpayment of rentals. This latter regulation was issued under the provisions of the Act of July 29, 1954, 68 Stat. 585, 30 U.S.C. § 188(b) (1976), which provides for the automatic termination of oil and gas leases for the nonpayment of annual rental. The problem, however, is that the Act of July 29, 1954, *supra*, applied *only* to oil and gas leases. There is not now, nor has there ever been, any statutory provision terminating mineral leases, other than those issued for oil and gas, for nonpayment of annual rentals.

An analysis both of the promulgation of 43 CFR 3523.3, and the

adoption of the Act of July 29, 1954, as well as the actions of the Department subsequent to the enactment of the provision for the automatic termination of oil and gas leases, clearly indicates that no termination occurs for failure to timely file annual rental on mineral leases other than those issued for oil and gas.

There is a certain degree of difficulty surrounding an analysis of the promulgation of 43 CFR 3523.3. This arises from the fact that the regulation was apparently *never* properly promulgated. It first appears in the 1970 recodification of regulations. *See* 35 FR 9716 (June 13, 1970). A review of the pre-1970 regulations discloses no antecedent for this regulation. Inasmuch as the recodification expressly stated that "it is the Department's intent in this revision to make no substantive changes in the regulations" (35 FR 9502 (June 13, 1970)), it is open to doubt whether we may give this regulation any regard whatsoever.

The only regulations which arguably come close to 43 CFR 3523.3, are those provisions providing for the termination of mineral *permits* for nonpayment of annual rentals. No rentals were required for any mineral permits until Oct. 6, 1959, when regulations were adopted relating to potassium permits requiring an annual rental of 25 cents an acre or fraction thereof, but not less than \$20 per year. *See* 24 FR 8067 (Oct. 6, 1959). Two years later, regulations were adopted relating to sodium permits which provided for

annual rental payments and also provided for the automatic termination of sodium permits for nonpayment thereof. *See* 26 FR 775 (Aug. 19, 1961). Finally, in 1963, the Department adopted regulations extending the permit rental requirements to coal and phosphate, and providing the automatic termination of coal, phosphate, and potassium permits for nonpayment of the annual rental. *See* 28 FR 1474 (Feb. 15, 1963). These regulations, though no longer applicable to coal exploration licenses, are presently codified at 43 CFR 3511.4-2(b) (1).

As noted above, however, the first appearance of an automatic termination provision relating to issued leases occurred in the 1970 recodification. The applicability of an automatic termination provision to mineral permits is fundamentally different than the application of the same provision to leases. Thus, the regulations relating to automatic termination of mineral permits were issued under the general rule-making authority of 30 U.S.C. § 189 (1976), as well as the specific authority of sec. 261 (sodium) and sec. 281 (potash), which concern the adoption of rules for the issuance of prospecting permits for those substances. Sec. 26 of the Mineral Leasing Act, 30 U.S.C. § 183 (1976), provides that:

The Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the per-

mit, and shall insert in every such permit issued under the provisions of this chapter appropriate provisions for its cancellation *by him*. [Italics supplied.]

Sec. 31 of the Mineral Leasing Act, 30 U.S.C. § 188(a) (1976), however, which relates to the cancellation of mineral leases, provides a totally different method of cancellation. Thus, that section provides:

Except as otherwise herein provided, any lease issued under the provisions of this chapter may be forfeited and canceled *by an appropriate proceeding in the United States district court* for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this chapter, of the lease, or of the general regulations promulgated under this chapter and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.³ [Italics supplied.]

The opening proviso of sec. 188 (a), "Except as otherwise herein provided" was not part of the original Mineral Leasing Act. It was added by the Act of Aug. 8, 1946, 60 Stat. 956, which consolidated, within sec. 188, the provisions relating to cancellation of oil and gas leases, enacted by the Act of Aug. 21, 1935, 49 Stat. 674, 676, and which had formerly been located in sec. 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976). The 1935

³ We recognize that regardless of the specific wording of this section, the Supreme Court has ruled that the Secretary of the Interior has the authority to administratively cancel leases for prelease violation of regulations or invalidity at their inception. *See Boesche v. Udall*, 373 U.S. 472 (1963). Failure to pay annual rentals in advance, however, is clearly not a prelease event.

January 9, 1981

Act provided for cancellation *by the Secretary of the Interior* of oil and gas leases for noncompliance with any of the provisions of the lease, *after 30 days' notice to the lessees*, provided such leases were not known to contain valuable deposits of oil or gas. This provision presently appears as the first part of 30 U.S.C. § 188(b).

Under these provisions, the Department took the consistent position that failure to pay the advance rental did not constitute a relinquishment of the lease. On the contrary, the rental was properly deemed to have accrued and to have become a debt due and owing the Government. This proved to be a particular problem in oil and gas leasing where the normal practice in private and state leases was that a failure to pay annual rental worked an automatic termination of the lease. While the failure of a lessee to pay the annual rental would constitute a default under sec. 188, and lead to cancellation of a lease if the default continued for a period of 30 days after notification, the lessee was, nevertheless, still liable for the unpaid rentals. *Robert E. O'Keefe (On Rehearing)*, 57 I.D. 216 (1940). Moreover, any relinquishment must have been received prior to the anniversary date to avoid accrual of the rentals. *Thomas H. Fee*, 58 I.D. 125 (1942). In order to alleviate some of the hardships that resulted from the accrual of rentals, Congress enacted first, the Act of Nov. 28, 1943, 57 Stat. 593, 30 U.S.C.

§ 188a (1976), which allowed the proration of rentals on a monthly basis from the date of the accrual of the rentals to the filing of the surrender, and subsequently, the Act of Aug. 8, 1946, 60 Stat. 956, 30 U.S.C. § 187b (1976), which provided that the relinquishment of an oil and gas lease was effective upon its filing "subject to the continued obligation of the lessee and his surety to make payment of all accrued rentals."

Problems, however, particularly involving oil and gas leasing, continued. Finally, in 1954, Congress amended sec. 188 to provide for the automatic termination of oil and gas leases for failure to file the annual rental on or prior to the anniversary date of the lease. *See Act of July 29, 1954, supra*. The legislative history of this amendment makes it clear that it was directed solely to oil and gas leases.

Under existing law, a noncompetitive oil and gas lease is issued without the necessity of filing a bond, unless a bond is required by law, on the agreement of the lessee, which is a provision in the lease, that he will pay rental or file a bond 90 days prior to the rental due date. * * * Administratively, it often has occurred where a lease in which rental was not paid for the fourth year, the 30 days' notice was not received by him in time so that cancellation could be effected prior to the anniversary date of the lease. Consequently, a lessee who no longer desired a lease was required to pay a full year's rental for the fourth year and in many cases also for the fifth year. This was entirely inequitable to the lessee who followed the practice of State leases and leases on private lands, which have an

automatic default clause on nonpayment of rental, and who felt that by not paying the rental when due his lease automatically would terminate.

H.R. Rep. No. 2238, 83rd Cong., 2nd Sess., reprinted in [1954] U.S. Code Cong. & Adm. News 2699.

Not only do both the language of the 1954 amendment and the legislative history make clear that automatic termination applied only to oil and gas leases, subsequent actions of the Department have never proceeded on any other basis. Thus, in *Relinquishment of a Coal Lease*, M-36511 (June 17, 1958), the Associate Solicitor noted that acceptance of a relinquishment related back to date of filing. The Associate Solicitor noted that "[t]he general practice has been to accept a relinquishment upon payment of rentals accrued prior to the filing date." See also *Southwest Salt Co.*, 2 IBLA 81, 78 I.D. 82 (1971); *Walter Scott*, A-28148 (Dec. 16, 1960); *Michael L. Moaro*, A-27576 (May 29, 1958). If, however, a coal lease terminated for failure to pay the annual rentals, there could never be accrued rentals.

Not only is it clear that the statute did not effectuate an automatic termination, it must also be pointed out that this Board has, on at least one occasion since the appearance of 43 CFR 3523.3, ignored the existence of that regulation. Thus, the Board affirmed the accrual of rentals on a phosphate lease in *Cuyama Phosphate Corp.*, 12 IBLA 367 (1973). It is equally obvious that

BLM did not apply this regulation in the instant appeal.

Thus, we are faced with a codified regulation which: (1) was improperly promulgated; (2) lacks any statutory support; and (3) has been consistently ignored by the Department in actual practice. It is, in fact, a derelict on the sea of the law. We hold, therefore, that this regulation can be accorded no validity whatsoever.

[3] Finally, we would note that the above discussion also illustrates that, quite apart from our ruling on the ambiguity of the "proper office" for purposes of relinquishment, the State Office should have prorated the rentals under 30 U.S.C. § 188a (1976), rather than assessed the full annual rental, since it was clear that the failure to timely relinquish in the BLM office was not due to a lack of reasonable diligence. Inasmuch as we have determined that no rental is due here, it is unnecessary to prorate the rentals in the instant case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

BRUCE R. HARRIS
Acting Administrative Judge

*January 12, 1981***NORTHWEST EXPLORATIONS, INC.****52 IBLA 87***Decided January 12, 1981*

Appeal from the decision of the Alaska State Office, Bureau of Land Management, declaring various placer mining claims null and void in their entirety and two placer mining claims null and void in part.

Affirmed.

1. Act of June 25, 1910—Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Authority to Make—Withdrawals and Reservations: Effect of

The President had nonstatutory authority to withdraw public land in addition to authority conferred upon him by the Pickett Act, 43 U.S.C. §§ 141, 142 (1970). Such nonstatutory authority was not limited by the terms of 43 U.S.C. § 142 (1970) which provided that withdrawn lands shall remain open to location for metalliferous minerals.

2. Act of June 25, 1910—Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—Segregation—Withdrawals and Reservations: Generally—Withdrawals and Reservations: Temporary Withdrawals

Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such

forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals.

3. Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

A mining claim located on land which was segregated and closed to mineral entry is properly declared null and void ab initio.

4. Administrative Procedure: Hearings—Constitutional Law: Due Process—Rules of Practice: Appeals: Effect of—Rules of Practice: Hearings

Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

APPEARANCES: Carl Winner, Esq., Robertson, Monagle, Eastaugh & Bradley, Anchorage, Alaska, for appellant; Robert Charles Babson, Esq., Regional Solicitor's Office, Department of the Interior, for the Bureau of Land Management.

*OPINION BY
ADMINISTRATIVE JUDGE
HENRIQUES*

*INTERIOR BOARD OF
LAND APPEALS*

Northwest Explorations, Inc., has appealed the decision of the Alaska State Office, Bureau of Land

Management (BLM), dated June 13, 1980, declaring 28 Liberty and Chinook placer mining claims null and void ab initio and the Liberty #9 and #29 claims null and void ab initio in part.

On Sept. 25, 1979, BLM received copies of location notices for 30 placer mining claims¹ which appellant filed in compliance with section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and Departmental regulations 43 CFR Part 3833. The claims are located in secs. 19, 20, and 21, T. 16 S., R. 17 W., and secs. 10, 11, 13, 14, 23, and 24, T. 16 S., R. 18 W., Fairbanks meridian, Alaska. The Liberty #1 and Liberty #2 claims were originally located in May 1966 but amended locations were filed in June 1969 to reduce the acreage of the claims. The remaining claims were either originally located or amended in 1969. The amended locations also reduced the acreage of previous association claims in compliance with Alaska State law.²

On Apr. 9, 1965, the Director, National Park Service (NPS), requested that BLM "take such steps as may be necessary to withdraw [certain lands in T. 16 S., Rs. 16 and 18 W., Fairbanks meridian] from all forms of disposition under the public land laws—including withdrawal from prospecting, location,

entry and purchase under the mining laws." The request explained a need for a withdrawal pending a study by NPS of requirements for additional public accommodations and services related to Mt. McKinley National Park. NPS wanted to ensure that lands would be available to meet those requirements determined necessary by the study. The lands identified by NPS were on the northern boundary of the park in the Kantishna area.

Following approval of the request by Under Secretary of the Interior Carver on Apr. 22, 1965, BLM filed withdrawal application F 034575 to establish a BLM protective area under authority of Exec. Order No. 10355 (43 U.S.C. § 141 note (1976)). BLM also published a Notice of Proposed Withdrawal and Reservation of Lands dated May 7, 1965, in the *Federal Register* on May 13, 1965 (30 FR 6593). The notice stated that the application was for withdrawal of the lands from all forms of appropriation under the public land laws, including the mining laws.

The BLM decision appealed herein indicates that the withdrawal application was noted on the official status plats in the Fairbanks Land Office on May 4, 1965. It explains that pursuant to 43 CFR 2311.1-2 (a) (1965) the noting of receipt of the application temporarily segregated the identified lands "from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that

¹ See Appendix A.

² Although Federal mining law allows location of association placer claims up to 160 acres, the Alaskan law enacted in 1949 specifies that no association placer claim for previous metals in Alaska may exceed 40 acres in size or 2,640 feet in length. Alaska Statutes § 27.10.110.

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the withdrawal or reservation applied for, if effected, would prevent such forms of disposal." The decision concluded that appellant's claims must be declared null and void because they were located on land segregated from the operation of the mining laws at the time of the locations.

In its statement of reasons, appellant argues that the Kantishna area was improperly withdrawn from mineral entry in 1965. Appellant urges that BLM lacked the authority to withdraw the lands because under the Constitution, Congress holds the power to dispose of the public lands and the only express delegation of that power to the President appeared in the Pickett Act of June 25, 1910, 43 U.S.C. §§ 141-143 (1970) (hereinafter the Pickett Act).³ Appellant also argues

³ Relevant portions of the Pickett Act read as follows:

"§ 141. Withdrawal and reservation of lands for water-power sites or other purposes.

"The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, ch. 421, § 1, 36 Stat. 847.)

"§ 142. Lands withdrawn open to exploration under mining laws; rights of occupants or claimants of oil- or gas-bearing lands; national forests.

"All lands withdrawn under the provisions of this section and section 141 of this title shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: * * *. (June 25, 1910, ch. 421, § 2, 36 Stat. 847; Aug. 24, 1912, ch. 369, 37 Stat. 497.)"

Sec. 141 was repealed and sec. 142 amended by the Federal Land Policy and Management Act of 1976, 90 Stat. 2792.

that *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), in which the Supreme Court recognized a broad Presidential withdrawal authority by virtue of congressional acquiescence to a long continuing practice of withdrawals by the President, is of questionable validity because of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), or, at the least, is circumscribed by the Pickett Act.

Appellant also focuses on the distinction between temporary and permanent withdrawals described in *Withdrawals of Public Lands*, 40 Op. Atty Gen. 73 (1941). The Attorney General had concluded that the Pickett Act applied only to temporary withdrawals for public purposes and did not affect the President's authority to make permanent withdrawals for public uses. 40 Op. Atty Gen. at 76. Appellant contends that the Kantishna area withdrawal was "beyond question" a temporary withdrawal because the Attorney General had characterized such withdrawals as those made pending the enactment of legislation designed to conserve the lands or authorize development of their natural resources. 40 Op. Atty Gen. at 76-77. Appellant alleges that the BLM Kantishna withdrawal application was aimed at conserving the area for later inclusion in Mt. McKinley National Park which could only be enlarged by specific legislation. Appellant concludes that the lands identified in the application should have been left open to mineral entry because the withdrawal

would be temporary and therefore limited by the Pickett Act. Appellant also points out that 43 CFR 2311.1-2 (1965) only segregated land "to the extent that the withdrawal * * * if effected, would prevent such forms of disposal." Since mining was allowed in the park, appellant urges, mining should have been allowed in this withdrawal.⁴

Appellant ends its statement of reasons by asserting that BLM, in issuing the decision, violated its due process rights since BLM did not afford it notice that the decision would be forthcoming and an opportunity to submit written argument on its own behalf.

In response, BLM argues that (1) the withdrawal application herein was filed to establish a BLM protective area and was not a temporary withdrawal pending legislation to add the Kantishna area to Mt. McKinley National Park, (2) the proposed withdrawal of the area was permanent in nature and not subject to the Pickett Act, and (3) even if the proposal were considered to be temporary, the limitations of the Pickett Act are no longer applicable by virtue of continuing congressional acquiescence and ratification of temporary withdrawals from mineral entry. BLM contends that appellant's due process rights have been protected by appeal to this Board.

[1, 2, 3] The question of the authority of the President to make

withdrawals and reservations has been addressed by this Board before. We have recognized that, until Oct. 21, 1976, the President held and exercised over a long period of time an implied nonstatutory withdrawal power in addition to that authority which Congress has expressly delegated by statute. *Glen H. Brooks*, 45 IBLA 51 (1980); *Alaska Pipeline Co.*, 38 IBLA 1 (1978); *Harry H. Wilson*, 35 IBLA 349 (1978); *Sally Lester (On Reconsideration)*, 35 IBLA 61 (1978). In *United States v. Midwest Oil Co.*, *supra*, the Supreme Court first upheld the exercise of nonstatutorily-based withdrawal authority by the President after examining congressional acquiescence in more than 250 instances of exercise of the power by various Presidents over a period of 80 years. 236 U.S. at 469-71. That decision was never overruled by the Court and the implied authority recognized therein was repeatedly exercised by the President or his delegate. See *Mason v. United States*, 260 U.S. 545, 553 (1922); *Portland General Electric Co. v. Kleppe*, 441 F. Supp. 859 (D. Wyo. 1977); *Denver R. Williams*, 67 I.D. 315 (1960); *P & G Mining Co.*, 67 I.D. 217 (1960); *Glen H. Brooks*, *supra*; *Harry H. Wilson*, *supra*; *Sally Lester (On Reconsideration)*, *supra*. In 1952, by Exec. Order No. 10355 (17 FR 4831 (May 28, 1952)), President Truman expressly distinguished between his statutory and nonstatutory authority when he delegated to the Secretary of the Interior both the temporary withdrawal authority

⁴ Although mining activities had been permitted within Mt. McKinley National Park, 16 U.S.C. §§ 350, 350a (1970), sec. 3 of the Act of Sept. 28, 1976, 90 Stat. 1342, repealed that authority.

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set forth in sec. 1 of the Pickett Act "and the authority otherwise vested in him to withdraw or reserve lands of the public domain * * * for public purposes." Finally, and significantly with respect to this case, Congress repealed "the implied authority of the President to make withdrawals and reservations resulting from the acquiescence of Congress (U.S. v. Midwest Oil Co., 236 U.S. 459)" as well as various statutory withdrawal authorities by sec. 704(a), FLPMA, 90 Stat. 2792. We may infer from the language in sec. 704(a) that Congress continued to recognize the existence of the President's implied withdrawal authority, in addition to statutorily delegated authority, until Oct. 21, 1976.

Given sec. 704(a) of FLPMA, it does not appear that Congress perceived that *United States v. Midwest Oil Co.*, *supra*, lost its vitality following *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, as appellant suggests. Furthermore, that case dealt with circumstances entirely different from the case before us: the physical seizure of private property by order of the President. Here we are dealing with the withdrawal authority of the President, both statutory and nonstatutory, related to management of existing public lands. The Pickett Act only limited the President's implied authority as to those temporary withdrawals addressed in 43 U.S.C. § 141 (1970). The President still held a recognized permanent withdrawal authority at the time of the Kan-

tishna withdrawal. *Harry H. Wilson*, *supra*.

The question raised by appellant which remains is whether the withdrawal application at issue was or should have been made pursuant to the Pickett Act. Appellant urges that it was intended to be an application for a temporary withdrawal under the Pickett Act and that BLM has unconstitutionally nullified an act of Congress by the withdrawal application herein because the application does not conform to the Pickett Act. We do not agree. The withdrawal notice on its face makes it clear that the proposed withdrawal was not intended to be a Pickett Act withdrawal. First, it states expressly that the land identified would be withdrawn from "all forms of appropriation under the public land laws, including the mining laws," directly inconsistent with Pickett Act limitations. *See Alaska Pipeline Co.*, *supra* at 13. Second, it states that the purpose of the withdrawal is to establish a BLM protective area under Exec. Order No. 10355. (*See* 30 FR 6593 (May 13, 1965).)

The BLM Manual at sec. 2321.6 explains that the objective of the protective withdrawal program was "to prevent inadvertent disposal of or the allowance of rights in lands having significant public values which require continued Federal or other public ownership for their preservation." A protective withdrawal is defined as

a withdrawal of lands, for the purpose of withdrawing such lands from disposition

under the public land laws to the extent necessary to protect the public values in the lands until a determination is made as to the use or disposition of the lands. "Bureau of Land Management protective withdrawal" is not a determination that the lands will necessarily continue under BLM administration. "*Bureau of Land Management protective withdrawals*" generally include withdrawal of the lands from disposition under the general mining laws, and in Alaska, the settlement laws, but usually do not include withdrawal of the lands from the mineral leasing laws, the Recreation and Public Purposes Act, or State selection laws. A "BLM protective withdrawal" may embrace lands used or to be used for various public purposes, including:

- a. Administrative sites
- b. Natural areas
- c. Recreation areas and sites
- d. Access road locations
- e. Lookout sites
- f. Waterfront zones
- g. Roadside tracts
- h. Roadside zones or strips
- i. Research areas
- j. Material sites. [Italics added.]

Appellant's argument that the Kantishna area withdrawal application was made in anticipation of eventual inclusion of the land in Mt. McKinley National Park is not persuasive. We have no doubt from examining the record of this case that at the time in question NPS may have been studying lands surrounding the park, including those at issue, for recommended expansion of the park.⁵ Nevertheless, in

1965, NPS did *not* request that the Kantishna area be withdrawn pending passage of legislation to include it in the park; rather, they requested that the land be set aside so that it would be available if NPS determined that public lands *adjacent* to the park were needed to support additional public accommodations and services because of increasing demands placed on park facilities. NPS was not suggesting that the lands be *included* in the park for this reason. The administrative vehicle which BLM chose for setting aside the area was the protective withdrawal, not a temporary withdrawal pending legislation to expand the park. If after evaluation, the application for the protective withdrawal had been approved as to some or all of the lands identified, those lands would have been permanently set aside for such public use as BLM determined was necessary. Pursuant to 43 CFR 2311.1-2(a) (1965), the application when noted on the records had the effect of segregating the lands to the same extent that the eventual withdrawal would have segregated them. In this case the application notice expressly prohibited appropriation under the mining laws. Since appellant's mining claims were located after the segregative date, BLM has properly declared them null and void.

[4] Appellant's argument that the failure by BLM to notify it of

⁵ On Mar. 9, 1972, pursuant to Exec. Order No. 10355 and sec. 17(d)(2)(A) of the Alaska Native Claims Settlement Act, 85 Stat. 688, 709, the Secretary of the Interior withdrew various lands in Alaska from all forms of appropriation including entry and location under the mining laws and reserved them "for study and possible recommendations to the Congress as additions to or creation as units of the National Park, Forest, Wildlife Refuge, and

Wild and Scenic Rivers Systems." Included in the lands withdrawn were fractional parts of T. 16 S., Rs. 15 through 18 W., Fairbanks meridian. (Public Land Order No. 5179, 37 FR 5579, 5582 (Mar. 16, 1972).)

the BLM decision before issuance and provide it an opportunity to present written arguments on its behalf violates its due process rights is without merit. Due process does not require notice and a right to be heard in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial BLM decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements. *George H. Fennimore*, 50 IBLA 280 (1980); *Dorothy Smith*, 44 IBLA 25 (1979); *H. B. Webb*, 34 IBLA 362 (1978). Furthermore, status of the public lands is a matter reflected on the public records of this Department and may be officially noticed. No property rights are created by the location of a min-

ing claim on land not subject to location. Appellant's arguments as to the status of the lands in question involved the interpretation of law, not a dispute as to the facts involved, and thus a hearing was not required. *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES

Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

JAMES L. BURSKI

Administrative Judge

APPENDIX A

Claim Name	BLM Serial No.	Discovery Date	Date of Location	Date of Amended Location*
Liberty #1-----	F-59188	3/6/1966	5/22/1966	6/7/1969
Liberty #2-----	F-59189	3/6/1966	5/22/1966	6/7/1969
Liberty #3-----	F-59190	3/6/1966	-----	6/7/1969
Liberty #4-----	F-59191	3/6/1966	-----	6/15/1969
Liberty #5-----	F-59192	3/6/1966	-----	6/18/1969
Liberty #6-----	F-59193	3/6/1966	-----	6/18/1969
Liberty #7-----	F-59194	3/6/1966	-----	6/18/1969
Liberty #8-----	F-59195	3/6/1966	-----	6/18/1969
Liberty #9-----	F-59196	3/6/1966	-----	6/18/1969
Liberty #10-----	F-59197	3/6/1966	-----	6/15/1969
Liberty #11-----	F-59198	3/6/1966	-----	6/15/1969
Liberty #12-----	F-59199	3/6/1966	-----	6/18/1969
Liberty #21-----	F-59208	3/6/1966	-----	7/19/1969
Liberty #29-----	F-59216	3/6/1966	-----	7/14/1969
Liberty #30-----	F-59217	3/6/1966	-----	7/14/1969
Liberty #31-----	F-59218	3/6/1966	-----	7/15/1969

See footnote at end of table.

APPENDIX A—Continued

Claim Name	BLM Serial No.	Discovery Date	Date of Location	Date of Amended Location*
Liberty #32-----	F-59219	3/6/1966	-----	7/15/1969
Liberty #33-----	F-59220	3/6/1966	-----	7/15/1969
Liberty #34-----	F-59221	3/6/1966	-----	7/15/1969
Liberty #55-----	F-59242	7/17/1969	7/18/1969	
Liberty #56-----	F-59243	7/17/1969	7/18/1969	
Liberty #57-----	F-59244	7/17/1969	7/18/1969	
Liberty #58-----	F-59245	7/17/1969	7/18/1969	
Liberty #59-----	F-59246	7/17/1969	7/18/1969	
Chinook #1-----	F-59250	6/10/1966	-----	6/24/1969
Chinook #2-----	F-59251	6/10/1966	6/24/1969	
Chinook #3-----	F-59252	6/10/1966	6/24/1969	
Chinook #4-----	F-59253	6/10/1966	6/24/1969	
Chinook #5-----	F-59254	6/10/1966	-----	6/24/1969
Chinook #6-----	F-59255	6/10/1966	6/24/1969	

*All location notices which purport to be amended specify that the purpose of the amendment is to reduce a previous association claim.

OVERTHRUST OIL AND GAS CORP.**52 IBLA 119***Decided January 13, 1981.*

Appeal from decision of the Utah State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease U 29872.

Affirmed.

1. Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

Failure to pay the annual rental for an oil and gas lease on or before the anniversary date results in the automatic termination of the lease by operation of law. The date of receipt of the rental and not the date of mailing is controlling in determining whether rental on an oil and gas lease was timely paid. A lease may be reinstated if the failure to pay the rental was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976).

2. Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Rentals

Reasonable diligence normally requires sending the payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the payment. Mailing rental payments the afternoon of the day due does not constitute reasonable diligence.

3. Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Rentals

In order for the failure to pay oil and gas lease rental timely to be considered justifiable, generally it must be caused by factors outside the lessee's control, which were the proximate cause of the failure. A lessee's ignorance of the law and regulations and reliance on the business practices of other Governmental agencies accepting a postmark as the date of delivery is not a justifiable excuse.

4. Regulations: Generally

All persons dealing with the Government are presumed to have knowledge of duly promulgated rules and regulations, re-

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gardless of their actual knowledge of what is contained in such regulations.

APPEARANCES: Robert G. Pruitt, Jr., Esq., Pruitt and Gushee, for appellant.

*OPINION BY
ADMINISTRATIVE JUDGE
LEWIS*

*INTERIOR BOARD OF
LAND APPEALS*

The Overthrust Oil and Gas Corp. appeals from the Sept. 11, 1980, decision of the Utah State Office, Bureau of Land Management (BLM), denying reinstatement of oil and gas lease U 29872. Appellant's was terminated by operation of law for failure to pay the annual rental on or before the anniversary date.

The anniversary date of the lease was Aug. 1, 1980. Appellant's rental was not received by BLM in Salt Lake City, Utah, until Aug. 4, 1980. BLM notified appellant that the lease had terminated by operation of law for failure to pay the rental in a timely manner.

Appellant, through its president and sole officer, Shirley Thorup, petitioned BLM for reinstatement of the lease, asserting that the rental payment had been mailed on the last day of July within Salt Lake City, and that, due to the death of a friend and the circumstances of the marriage of her daughter, she (Mrs. Thorup) was not emotionally able to conduct the appellant's business affairs. Mrs. Thorup also stated it was her belief that depositing a payment in the mails constituted timely

payment if received by the addressee within a reasonable time.

BLM issued its decision denying reinstatement because it found that appellant had not shown the failure to pay the rental timely was justifiable or not due to a lack of reasonable diligence, a showing required by 43 CFR 3108.2-1(c).

In its statement of reasons on appeal appellant essentially agrees with the facts as found by BLM but hopes the Board will render a less harsh decision and will approve the reinstatement.

[1] An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976); 43 CFR 3108.2-1(a). The date of receipt of the rental and not the date of mailing is controlling in determining whether rental on an oil and gas lease was timely paid. 43 CFR 1821.2-2(d), (f); *Gretchen Capital, Ltd.*, 37 IBLA 392 (1978). A terminated lease can be reinstated only if, among other requirements, the lessee shows his failure to pay on time was either justifiable or not due to lack of reasonable diligence. 30 U.S.C. § 188(c) (1976); 43 CFR 3108.2-1(c).

[2] Reasonable diligence normally requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c) (2). Appellant's

rental payment was due on Aug. 1, 1980. The payment is claimed to have been mailed July 31 but the postmark was August 1. Assuming the postmarked date as the date of mailing, we find that mailing the rental payment on the afternoon it was due, even within the same city, does not constitute reasonable diligence. *Constitution Petroleum Company, Inc.*, 25 IBLA 319 (1976). Reasonable diligence has not been exercised where a rental payment is posted at a time that one could not assume delivery before the statutory terminal date of the lease. *Ronald C. and Mary A. Hill*, 38 IBLA 315 (1978); *J. R. Oil Corp.*, 36 IBLA 81 (1978); *Adolph F. Muratori*, 31 IBLA 39 (1977). The postmark date on a letter bearing payments of annual rental for an oil and gas lease will be deemed to be the date of mailing, in the absence of satisfactory evidence corroborating the lessee's assertion that the payment was mailed before the postmark date. *Annie Mae Buckley*, 44 IBLA 99 (1979); *Daniel Ashley Jenks*, 36 IBLA 268 (1978); *David R. Smith*, 33 IBLA 63 (1977).

[3] In order for the failure to pay rental timely to be justifiable, generally, the failure must be caused by factors outside the lessee's control, which were the proximate cause of failure. *John J. O'Loughlin*, 50 IBLA 50 (1980); *James E. Kordosky*, 43 IBLA 63 (1979); *Emma Pace*, 35 IBLA 143 (1978); *Richard C. Corbyn*, 32 IBLA 296 (1977); *Louis Samuel*, 8 IBLA 268 (1972). Neither lessee's

ignorance of the law and regulations nor reliance on the business practices of other Governmental agencies in accepting a postmark as the day of delivery is a "justifiable" excuse within the meaning of the reinstatement provisions.¹

[4] It is well settled that all who deal with the Government are presumed to have knowledge of the pertinent statutes and duly promulgated regulations, regardless of their actual knowledge of what is therein contained. 44 U.S.C. §§ 1507, 1510 (1976); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Robert W. Hansen*, 46 IBLA 93 (1980); *Willene Minnier*, 45 IBLA 1 (1980).

The burden of showing that the failure to pay the rent when due was justifiable or not due to a lack of reasonable diligence is on the appellant. 43 CFR 3108.2-1(c) (2). It has failed to meet this burden.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

ANNE POINDEXTER LEWIS

Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

JAMES L. BURSKI

Administrative Judge

¹ Appellant contends that BLM denied reinstatement due to its misconception of the value of the lease. The value of any lease, however, has no bearing on the question of reinstatement.

APPEAL OF FLUOR UTAH, INC.**IBCA-1068-4-75***Decided January 15, 1981***Contract No. 14-06-D-7054, Specifications No. DS-6849, Bureau of Reclamation.****Sustained in part.****1. Rules of Practice: Appeals: Hearings—Rules of Practice: Evidence—Rules of Practice: Witnesses**

The Board refuses to draw inferences adverse to the Government by reason of its failure to have its project engineer testify in important areas and by reason of its failure to call as witnesses two of its employees who attended the hearing where the Board finds that the action of the Government is consistent with the principal defenses made to the differing site conditions claims asserted and where under long-established Board practice, the appellant could have called any or all of the Government's employees concerned as witnesses without making them appellant's witnesses for the purposes of impeachment.

2. Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Action of the Parties—Contracts: Construction and Operation: Construction Against Drafter—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

Where a contractor alleged that differing site conditions were encountered in constructing bored tunnels for the Navajo Indian Irrigation Project and

resolution of the question as to what the contract indicated turned on the construction to be placed on the specifications and drawings relating to the nature of the support required to support the tunnels, as well as upon a Government estimate that approximately 80 percent of the tunnels would require support other than rockbolts, the Board found the contract to have indicated that the deterioration and disintegration encountered in driving the tunnels would be primarily of a surficial nature. In so finding the Board noted that in the disputed area the contract appears to be susceptible of more than one reasonable interpretation and that within the zones of reasonableness the Government as the author has to share the major responsibility for communicating its intentions as well as the main risk of failure to carry out that responsibility. Heavily weighted by the Board in reaching its decision was the fact that all four of the lowest bidders appeared to have construed the contract to indicate that the tunnels could be supported virtually entirely with rockbolts and that that construction was apparently known to the project construction engineer at the time of bid opening based upon his analysis of the bids received.

3. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Substantial Evidence—Rules of Practice: Appeals: Burden of Proofs—Rules of Practice: Evidence

In a case involving the assertion of a differing site conditions claim under a contract for the construction of concrete lined tunnels for the Navajo Indian Irrigation Project, the Board follows the Court of Claims in holding that it is not necessary for the "indications" in the

contract to be explicit or specific, it being sufficient for there to be an indication on the face of the contract documents causing a bidder reasonably to expect that there were no "subsurface or latent" physical conditions at the site differing materially from those indicated in the contract.

4. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

Under a contract for the construction of two concrete lined tunnels for the Navajo Indian Irrigation Project (Tunnel Nos. 3 and 3A) the Board finds a first category differing site conditions claim to have been established with respect to constructing Tunnel No. 3 where the conditions encountered by the contractor in that tunnel were shown to be materially different from those indicated in the contract.

5. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

In a case involving the assertion of first and second category differing site conditions claims under a contract for the construction of two concrete lined tunnels (Tunnel Nos. 3 and 3A), a first category differing site conditions claim was not established with respect to Tunnel No. 3A where the Board found the contract to have indicated that the deterioration and disintegration to be anticipated in constructing the two tunnels would be primarily surficial in nature but the evidence offered failed to show that the rock failures and fallout encountered in Tunnel No. 3A were due to overstressing and therefore nonsurficial in nature.

6. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Con-

struction and Operation: Differing Site Conditions (Changed Conditions)

A second category differing site conditions claim, asserted under a contract for the construction of two concrete lined tunnels for the Navajo Indian Irrigation Project (Tunnel Nos. 3 and 3A), is denied where the basis for the claim is that the rock failures and fallout encountered in constructing Tunnel No. 3A were due to overstressing (shear type failures) but the evidence of record failed to show that overstressing was the cause of such rock failures and fallout as occurred in that tunnel.

7. Rules of Practice: Appeals: Generally—Rules of Practice: Evidence

Outlining the treatment to be accorded voluminous exhibits, the Board states that in the event counsel for either side considers that information contained in a voluminous exhibit either proves or may be of material assistance in proving a particular point, it is incumbent upon counsel to specifically cite the portions of the voluminous exhibit relied upon by page number, by date, or by other appropriate references. Absent specific citations to a voluminous exhibit or to an appropriate summary thereof in evidence, the Board will not undertake to determine the content of this type of exhibit in particular areas before reaching its decision.

8. Rules of Practice: Appeals: Hearings—Rules of Practice: Evidence—Rules of Practice: Witnesses

The Board sustains the action of the hearing member in refusing to receive in evidence documents not identified by a witness through whose testimony their admission is being sought.

9. Rules of Practice: Appeals: Generally—Rules of Practice: Evidence—Rules of Practice: Hearings—Rules of Practice: Witnesses

The Board seriously questions the wisdom of the Government in not arranging for

the audit of multi-million dollar claims apparently advanced in good faith by reputable contractors, noting that securing audits will not only facilitate the examination of witnesses with respect to quantum but are also likely to prove to be useful in establishing a basis for agreeing upon stipulations narrowing the issues in quantum areas or affording a basis for arriving at a settlement prior to the hearing, while it is in progress or after it has been concluded.

10. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Disputes and Remedies: Equitable Adjustments

Where neither what is described as the "reference reach/claim reach" approach nor the total cost method are found acceptable as a proper basis for an equitable adjustment, the Board resorts to the so-called jury verdict method for determining the amount of the equitable adjustment to which the contractor is entitled by reason of the differing site conditions found to have been encountered by the contractor in construction of Tunnel No. 3, a bored and concrete lined tunnel of the Navajo Indian Irrigation Project.

APPEARANCES: Mr. Robert M. McLeod, Attorney at Law, Thelen, Marrin, Johnson & Bridges, San Francisco, California, for Appellant; Messrs. John P. Lange & William A. Perry, Department Counsel, Denver, Colorado, for the Government.

**OPINION BY
CHIEF ADMINISTRATIVE
JUDGE McGRAW**

**INTERIOR BOARD OF
CONTRACT APPEALS**

The instant appeal involves claims of differing site conditions

(first and second category) under a contract for the construction and completion of Main Canal, Station 712+50 to Station 884+50, Station 978+00 to Station 1028+50, Tunnel Nos. 3 and 3A, appurtenant structures and concrete canal lining, under Schedules Nos. 2, 2A, and 3 (Specifications No. DC-6849), of the Navajo Indian Irrigation Project, for which the appellant seeks an equitable adjustment in the amount of \$3,849,560.¹ The Government has denied liability and the case is before us with respect to both entitlement and quantum.

Part I—Background

Contract No. 14-06-D-7054 was entered into under date of Oct. 23, 1970.² Prepared on the standard forms for construction contracts, the contracts includes General Provisions (Standard Form 23-A,

¹ This is the final figure shown in Appendix A entitled *Navajo Project Claim* which accompanied Appellant's Opening Brief (hereafter AOB). After noting that the cost of labor in the Reference Reach for Tunnel Excavation had been inadvertently understated by a total of \$17,791, appellant's counsel states: "Carrying this correction all the way through Exhibit 84 results in a claim amount of \$3,849,560 and a corrected Exhibit 84 is attached as Appendix A" (AOB 56, 57).

In at least one important respect, however, corrected Exhibit 84 appears to be in need of further correction. For example, the aggregate total for the figures listed for the various categories of claimed costs in corrected Exhibit 84 is \$4,004,341, and not the final figure shown in the exhibit of \$3,849,560. A substantial part of the differences of \$154,781 appears to be attributable to the overstatement in corrected Exhibit 84 of "Bond Premium on Increased Contract Amount at .4%" opposite Roman Numeral XII. The original Exhibit 84 shows the amount claimed for this category of cost to be \$15,235, while in corrected Exhibit 84 the claimed amount for this item is shown as \$147,470.

² Appeal File 1 (hereafter AF).

June 1964 Edition), Labor Standard Provisions (Standard Form 19-A), Supplement to General Provisions and Labor Standard Provisions, as well as numerous detailed specification provisions.

As advertised for bids, Tunnel No. 3 and Tunnel No. 3A could be constructed by employing conventional tunneling techniques (drill and blast) or on the basis of machine-bored sections. Fluor Utah submitted a bid of \$6,783,456 on Bidding Schedule No. 2 (all work between Stations 721+81.33 and 874+29.90 for Tunnel No. 3 with machine-bored sections). On Bidding Schedule No. 2A (all work between Stations 985+32.33 and 1018+44.67 for Tunnel No. 3A with machine-bored sections), the company submitted a bid of \$1,136,003. On Bidding Schedule No. 3 (all work except for tunnels), the contractor bid the total sum of \$761,729. In the aggregate, Fluor Utah's bid on all three schedules totalled \$8,681,188. This was the lowest bid received and award of the contract was made to the company in that amount.³

In a meeting between representa-

³ Government Exhibit Y (hereafter GX). In the telegram of Oct. 8, 1970, recommending award to Fluor Utah, the Director, Design and Construction, Bureau of Reclamation, stated: "Although low bid is 33 percent below Engineer's Estimate, it is only 8 percent and 11 percent below second and third bids, respectively. Our estimate apparently assumed a poorer quality of rock than did most of the eight lower bidders. Fluor Utah is experienced and well qualified" (Appellant's Exhibit 75 (hereafter AX)).

At the time of award no final decision on the mole to be used had been made. A lease agreement with Purchase Option was entered into with Dresser Industries, Inc., under date of Nov. 20, 1970 (GX 0).

tives of the contractor and the Bureau of Reclamation (hereafter BOR) on Nov. 5, 1970, the Bureau was advised (i) that the contractor still had not decided on which mechanical excavator to use; (ii) that the excavation would be by mechanical mole excavating to a diameter of 20 feet 6 inches which is 6 inches larger than the A-line⁴ diameter; (iii) that alignment and grade will be indicated by a laser beam reflected on a target in front of the operator; (iv) that the contractor plans to use rockbolts exclusively for support; (v) that the rockbolts will be installed immediately behind the cutter head; (vi) that a special long-shield type anchor will be used on 5/8-inch high strength steel bolts; and (vii) that gunite protective coating will be applied over shale and other unstable formations (GX Z).

At the preconstruction conference on Dec. 2, 1970 (GX AA), the contractor submitted a preliminary construction program for review by the

⁴ "b. Definitions of 'A' and 'B' lines.—The 'A' lines shown on the typical sections of the drawings are lines within which no unexcavated material of any kind, no timbering, and no metallic or other supports shall be permitted to remain; Provided, That in machine-bored tunnels the structural-steel ribs and shotcrete support or steel reinforcement sheets and shotcrete support may extend within the 'A' lines in accordance with minimum concrete lining thickness limitations as shown on Drawing No. 11 (809-D-330). The 'B' lines shown on the typical sections are the outside limits to which measurement, for payment, of excavation will be made and measurement for payment will in all cases be made to the 'B' lines regardless of whether the limits of the actual excavation fall inside or outside of the 'B' lines, and regardless of the size of steel supporters used." (AF 1, Contract, Paragraph 53, Tunnel Excavation, as amended by supplemental notice No. 3, Sept. 11, 1970).

BOR.⁵ The contractor also agreed to review his construction program and attend another meeting to discuss the program the following week. The nature of the tunnel support to be provided continued to be a matter of prime concern to both parties, as is evidenced by the following excerpts from the memorandum:

Mr. Sperry stated that they did not intend to use shotcrete, steel reinforcement sheets or steel sets for tunnel support. They intend to use rock bolts in a pattern placed approximately four feet behind the cutter head. Holes are to be drilled dry. Guniting protective coating will be applied over shale and unstable formations.

Mr. Levine stated that he would like to have the Bureau of Mines perform a pull test on a test section of rock bolting * * *. It was agreed Mr. Levine would make the arrangements with the Bureau of Mines for January.

(GX AA, p. 3).

By letter dated Dec. 7, 1970 (AF 11), the contractor submitted what was described as its anticipated excavation and rock support methods⁶ for BOR approval. The plan was modified in several respects by the contractor's letter of Jan. 19, 1971

(AF 12), to reflect the finding of several products superior to those originally proposed.⁷ Both the suitability of rockbolt support and excavation by the mole to a diameter of 20 feet 6 inches⁸ were questions addressed by the BOR in its letter of Feb. 2, 1971 (AF 13), in which the Project Construction Engineer states:

Whether conditions in Tunnels No. 3 and No. 3A are suitable for an extensive use of rock bolt supports must be determined during and following the excavating process. The spacing of bolts, lengths of bolts, use of corrugated strips, anchorage required for bolts, and other factors related to performance of the rock bolts will be evaluated under actual field conditions. Where ground conditions in the tunnels are indicated to be unsuitable for the use of rock bolt supports, other support types will be required as indicated under Paragraph 50 of the specifications.

Schedule No. 2 in the specifications indicates that approximately 80 percent of the tunnel length was estimated to require a type of support other than rock

⁷ In the letter the contractor confirmed what it had advised the BOR at the Nov. 5, 1970, meeting (GX Z), namely, its plan to mole a 20-foot 6-inch diameter. The letter states: "We still believe that this size is adequate for the support that will be required."

The Dresser Mole covered by the lease agreement then in effect (n. 3, *supra*), had a 20 foot-6 inch bore diameter. In the agreement, Dresser represented that the machine would have (i) the capacity of boring at the rate of at least 12 feet per hour in rock having an unconfined compressive strength of up to 6,000 psi and (ii) a sufficient excavated material handling capacity to bore at a sustained rate of 20 feet per hour.

⁸ "The proposed excavated diameter appears to be adequate for meeting minimum dimensions for 'A' line thickness for rock bolt supported sections. The use of steel rib supports would require excavating to a larger diameter if normal tolerance is provided" (AF 13, BOR letter (2-2-71), p. 2).

⁵ "Mr. Levine stated that we feel the program, specifically the tunnel excavation, is quite optimistic. The six month period for completing the tunnel excavation would require an average of approximately 120 feet per day. The four month period showing 19 percent accomplished per month would require an average of 132 linear feet of excavation per day." (GX AA, memorandum of preconstruction conference (12-8-70), p. 3.)

⁶ "Rock support will be installed about 4 ft. behind the dust shroud of the mole. A shield, about 7 ft. long, will support the excavated back between the cutterhead and the support installation area" (AF 11, Contractor's letter (12-7-70), p. 1).

bolts,⁹ such as shotcrete or structural steel supports. However there is no objection to the use of rock bolts in any portion of the tunnel where conditions are suitable for their use.

The relationship between the method of support employed and the safety of workmen was stressed in BOR's letter of May 14, 1971 (AF 16), in which the contractor was reminded that it might be necessary to require that the tunnels be supported by other than rockbolts if the ground conditions encountered were unsuitable for their use.¹⁰ In BOR letter dated June 25, 1971 (AF 17), the contractor was advised that rockbolt anchorage tests conducted by a Bureau of Mines

geologist had shown that the anchorage obtained through use of the Pattin D-5 shell was inadequate.

Developing Adequate Rock Support for the Tunnels

By mid-July of 1971, problems of roof control and fallout had become so severe that the contractor engaged A. A. Mathews, Inc., a construction engineering consulting firm, to analyze the ground conditions likely to be encountered in Navajo Tunnel Nos. 3 and 3A, and make recommendations (i) for means of supporting the tunnel excavation and (ii) for modification of existing tunneling equipment.

In Construction Report No. 743 dated Sept. 17, 1971 (AX 5), the consulting firm: (i) summarizes the status of the work from the commencement of moling (use of the boring machine) in mid-May until Aug. 20, 1971; (ii) analyzes the ground conditions likely to be encountered in Navajo Tunnels Nos. 3 and 3A; (iii) recommends means of supporting the tunnel excavation; (iv) recommends modifications to the existing tunneling equipment; and (v) submits conclusions and recommendations.¹¹

As the report notes Tunnel Nos. 3 and 3A were to be machine bored

⁹ Bidding Schedule No. 2 shows Tunnel No. 3 to be approximately 15,250 feet in length. The 80 percent figure quoted in the text is based on the relationship between the 12,220 linear feet of support called for in Item 16 of the Bidding Schedule to the 15,250 feet length of the entire tunnel. This relationship was acknowledged by appellant's witness Sperry (Tr. 111-12). In the course of comparing the support requirements for Navajo Tunnel No. 1 with those for Navajo Tunnel No. 3, however, Government witness Rogert testified that in both cases the contractor concerned had the option to choose rockbolts or other means of support with the approval of the contracting officer (Tr. 880).

¹⁰ In commenting upon the method of payment for tunnel supports to be provided in the specifications for Tunnel No. 4, Mr. Bert Levine, Project Construction Engineer, stated:

"[T]he bid schedule for Specifications No. DC-6849 for Tunnels No. 3 and 3A, our most recent specifications, provides for furnishing and installing tunnel support system on a linear foot basis. These specifications also include a predetermined price for rock bolts, bearing plates, and structural shapes for rock bolts. The four low bidders made only token bids for the tunnel support system, which indicates that they planned to use rock bolts. This type of bidding results in an unfair competitive situation, and if a tunnel support system other than rock bolts is required, considerable argument with the contractor will be necessary to obtain this installation." (AX 73, memorandum to Director, Design and Construction (4/09/71), p. 1.)

¹¹ The information on which the report is based includes visits to the job site by the consulting firm personnel on July 16, July 20, July 27, Aug. 2 through Aug. 5, Aug. 11, Aug. 19 and 20, 1971; review of contract plans and specifications; review of BOR report on Construction and Foundation Materials Test Data for the project; examination at the Farmington Office of BOR of cores from exploratory bore holes along the tunnel alignment; and reconnaissance study of surface outcrops along the alignment of Tunnel No. 3 (AX 5, I-1, Introduction).

with an excavated diameter of 20 feet 6 inches. In March 1971, excavation of Tunnel No. 3 began, progressing upstream from the outlet portal at Station 874+29.90. Conventional drill and blast techniques were used to drive the first 50' feet of the tunnel. After this, the boring machine (mole) was installed, and the machine boring began on May 13. By July 14, the tunnel had been excavated for a distance of approximately 1,785 feet to Station 856+15. Between July 14 and Aug. 20, 1971, the tunnel was not advanced. The report (AX 5) describes conditions which existed prior to the resumption of tunnel advance on Aug. 20, 1971.¹²

The tunnel excavation was dry until groundwater was encountered at Station 856+15. In the first 280 feet of machine boring in from the portal (Station 873+80 to Station 871+00), a triangular wedge of rock fell from the crown immediately behind the mole's dust shield before the crown bolts could be placed. These wedges resulted from fractures through intact rock propagating to a shale parting at an estimated height of 2 feet above the crown. Cracks and spalling in the crown occurred in the 150 feet of tunnel between Station 871+00 and Station 869+50.

Beginning at approximately 860+30, a significant shale zone was

encountered in the tunnel sidewalls, developing first in the left sidewall (facing toward heading). The shale zone in the left wall widened from less than 1 foot thick at Station 860+30 to nearly 10 feet thick at Station 859+70. At approximately Station 859+40, fallouts began to develop in the crown before the crown bolts could be placed. The fallouts were essentially the same as those which had occurred near the portal, and were associated with a shale lens dipping down into the tunnel from above. As the tunnel heading was advanced past Station 859+40, the shale dipped further down into the tunnel until at Station 856+15 the shale is approximately 22 feet thick and extends from approximately 5 feet above the crown to within approximately 3 feet of the invert.

Concluding the summary of the status of the work, the report states:

As the tunnel was advanced into this thickening shale lens, spalling and falls in the crown grew more severe and more difficult to control. By the time the heading had been advanced to its present position (Sta. 856+15), rock bolt holes being drilled in the crown were tapping ground-water in a sandstone bed above the shale lens. Roof control became so difficult that the heading advance was halted at the end of day shift on July 14. During the following days the roof at the heading continued to deteriorate, and distress began to develop in the sidewalls. Falls and raveling from the roof over the mole cutterhead worked up through the shale to the sandstone approximately 5 ft. above the crown, and worked out 8 to 10 ft. ahead of the dust shield. On the weekend of July 23 to

¹² "Of the, approximately 1,735 ft. of machine bored tunnel which has been driven to date, some form of fracturing or rock fall is present in all except an approximately 900 ft. length between Sta. 869+50 (580 ft. from portal) and Sta. 860+50 (1,480 ft. from portal)." (AX5, II-1.)

26, a large roof fall occurred near the trailing end of the mole, some 30 to 40 ft. behind the face. Shale over the crown fell out up to the overlying sandstone and formed a void approximately 6 to 8 ft. high by 25 ft. long. The void which formed was slightly wider than the tunnel bore. During this time the sidewalls spalled and slabbed badly along the full length of the mole, both ahead and behind the mole gripper plates. Side-wall spalling did not begin to develop until approximately one day after excavation.

(AX 5, II-3, 4).

The report states that the first step in estimating rock conditions in the tunnel¹³ is to assign a relationship between the rock types shown in the drill hole logs and the anticipated behavior in the tunnel. Based upon analysis of the rock involved and the attempt to classify the rock into categories of good, fair, and poor, the report develops recommendations as to the type of support that will be required to support the ground.¹⁴

¹³ The difficulties involved in estimating the groundwater conditions are recognized in the report which states:

"The drill hole data indicate that most of Navajo Tunnel No. 3 and 3A will be at or below the groundwater table. All four portal areas appear to be above the water table and there appears to be a few hundred feet to several thousand feet of dry ground adjacent to the portals. The longest reach of dry ground is near the east portal of Tunnel No. 3. However, in a sedimentary sequence such as the Nacimiento Formation which contains alternating pervious and impervious strata, it is often difficult to define the groundwater table accurately because of perched water bodies. Perched water is indicated in some of the drill hole information and it is possible that all of the water levels shown above the tunnel are actually perched waters and that the tunnel will encounter only small wet zones when it penetrates the main shale horizons * * *"

(AX 5, III-15, 16).

¹⁴ See AX 5, IV-3.

After noting the type of ground through which Navajo Tunnel Nos. 3 and 3A are to be driven and the absence of any direct correlation between ground support problems and geologic classification, the report states:

The major support problems which have developed to date have been associated with the occurrence of low strength shale partings and lenses, and with the occurrence of water at the present heading. Almost without exception, cracking, spalling, and falls which have been observed in the tunnel have formed through intact rock,^[15] and do not represent simple loosening of the ground along pre-existing joints or bedding planes. It is the writer's opinion that the failures observed to date result primarily from the fact that the in-situ stresses in the ground are high with respect to the average strength of the ground, and that the stress concentrations which tend to develop about the tunnel exceed the load-carrying capacity of the ground.^[16] It is the writer's opinion that the presence of water has had a great influence on support problems at the present heading because the shale material present is very susceptible to softening and disintegration in the presence of water.

(AX 5, IV-1).

The report clearly anticipates problems arising attributable to the presence of water in the excavation

¹⁵ In Appendix A under Fundamental Considerations, the report states: "[A]ttention is directed to a circular, machine bored tunnel in relatively massive, intact ground, that is, ground which is not intensely fractured, jointed, or closely bedded. This condition is closely approximated by the ground in which Navajo Tunnels No. 3 and 3A are to be driven" (AX 5, A 3).

¹⁶ The report emphasizes the special care that should be taken with respect to the weaker ground (e.g., shale, weaker sandstone) (AX 5, IV-4-6).

and recommended the application of shotcrete¹⁷ to exposed surfaces of material when wet. The presence or absence of water was also an important factor for consideration¹⁸ in determining the type of anchorage to be provided for the rockbolts installed in the tunnels.

Modification of the equipment was considered to be of vital importance to solving the problems related to tunnel support. This is clear from the attention given to this subject in the report from which the following is quoted:

In a substantial length of tunnel driven to date, the initial failure of the wedge of rock in the tunnel crown occurred before the rock bolts and their accessories could be installed. The present configuration of the boring machine is such that rock bolts cannot be installed in the area, extending for about 8 ft. behind the dust shield. Allowing another 4 ft. for the actual rock bolting operation, there is about 12 ft. of crown behind the dust shield which must stand unsupported.

Since the standup time for much of ground is insufficient, fallouts have been occurring in this 12 ft. of tunnel. The obvious solution is to provide a means

¹⁷ With respect to surficial deterioration in the better ground, the report recommended that a protective surface coating should be applied. Noting that the latex compound might prove to be sufficient in dry areas, the report states that "shotcrete should be applied in wet areas" (AX 5, IV-15).

See also letter to the contractor dated July 24, 1971 (GX S), in which Mr. A. A. Mathews had stated that shotcrete was the logical medium to prevent shale from raveling between rockbolts since it would adhere to wet surfaces.

¹⁸ "[W]ater is indirectly involved in the extent to which water affects the strength of the ground, and thus the anchorage capability and support requirements of the ground. The presence of water is a direct consideration in the selection of bolt anchors where rock bolts are used, and in determining the need for surface protection between bolts." (AX 5, IV-6.)

for temporarily supporting the crown in this 12 ft. whenever necessary.^[19]

Since the failures are reported to have initiated in about a 3-ft. wide area in the crown, it is felt that if this loosened material can be retained in position until after suitable support is installed, extension or propagation of the failures can be prevented and the stability of the entire tunnel can be maintained.^[20]

(AX 5, V-1).

Notice of a differing site condition was given to the BOR by a letter dated July 29, 1971 (AF 19), in which the contractor stated that the subsurface latent conditions encountered in the vicinity of Station 857 of Tunnel No. 3 differed materially from those indicated by the contract. According to the contractor's letter of Sept. 1, 1971 (AF 23), the conditions so encountered included a quantity of groundwater and thick shale layers

¹⁹ This section of the report concludes with the statement: "Although effective operating procedures will have to be developed in the field, it is our opinion that the use of the partial shield will permit steady, if retarded, progress through areas having weak rock in the tunnel arch" (AX 5, V-4).

Even earlier Mr. A. A. Mathews had stated: "For the remainder of the tunnel, the desirability of the certain modifications to the mole are evident. In more than 50% of the tunnel excavation to date, fallouts have started in the tunnel crown before rock bolts and appurtenances could be installed. In my opinion, it is absolutely essential that the mole be modified to cope with this situation. A shield or some other device which will support the crown between the dust shield and the rock bolt installation area must be designed and installed" (GX S, letter to contractor (7-24-71), p. 3).

²⁰ The difficulty of maintaining stability when water was encountered was adverted to in the Conclusions and Recommendations section of the report from which the following is quoted: "The presence of water can be expected from time to time. Where it is encountered along with heavy shale zones, it can multiply the driving problems" (AX 5, VI-2).

not shown on the log of test boring DH 116. Writing to the BOR on Sept. 9, 1971 (AF 24), the contractor proposed that the BOR take action to correct potential water problems caused by the exploratory drill holes along the tunnel alignment.²¹

In a letter to the contractor dated Sept. 28, 1971 (AF 26), the BOR stated that the exploratory drill holes along the tunnel alignment had been drilled prior to the issuance of the specifications and that they did not constitute a different condition than had been indicated in the specifications. In the same letter the contractor was granted permission to fill the drill holes at no cost to the Government by a method subject to BOR approval. Expressly preserving its right to make claim for the costs involved, the contractor proceeded with the work of draining and sealing the exploratory drill holes ahead of the tunnel excavation (AF 31-33).

Malcolm Logan, Chief Geologist, Bureau of Reclamation, visited the site²² and examined conditions in Tunnel No. 3 on Sept. 14 and 15,

1971. In a memorandum addressed to the Director of Design and Construction under date of Oct. 4, 1971, Mr. Logan states:

The examination was directed toward outlining programs which the project geologic personnel should pursue in compiling data on the contractor's allegations of changed conditions. The proposed programs of data collection are based on the findings developed during the field examination, namely: (1) squeezing ground is not present in the tunnel and the localized linear cracking of the rock near spring line is related to machine operation,^[23] (2) falout in the tunnel arch is primarily related to the stratigraphic sequence in which lenses and relatively thin beds of shale, micaceous sandstone, etc. are present at or near the tunnel arch and do not have sufficient tensile strength to attain natural arching in the 20.5-foot-diameter tunnel, (3) machine operation and associated rock failure in the spring line area is contributing—in a "ripple" effect—to localized failure conditions extending from tunnel arch to spring line, (4) the presence of water and the related disintegration of the fine-grained sedimentary rock are clearly evident in the tunnel, but were as clearly indicated in the specifications document, and (5) the slow rate of progress, due primarily to mechanical failures, is promoting excessive rock failure through delays in establishing artificial arch support and in allowing the accumulation of water at the cutterhead to become a problem of

²¹ In a letter dated Jan. 28, 1972 (AF 42), the contractor suggested realignment of the tunnel as a means of alleviating the problem. In its response letter of Feb. 11, 1972 (AF 43), the BOR said that drill holes along the alignment of Tunnel No. 3 were having a negligible effect on water in the tunnel strata and that realignment of the tunnel was not being considered.

²² The stated purpose of the visit was to conduct geologic examination of tunnel conditions relating to slow progress. Project Geologist Kenneth Cooper accompanied Mr. Logan on all examinations. The results of Mr. Logan's observations were discussed with Project Construction Engineer Bert Levine on Sept. 15, 1971, prior to Mr. Logan's return to Denver (AX 82, Travel Report (10-04-71), p. 1).

²³ By a memorandum dated Oct. 10, 1972, the Chief, Earth Sciences Branch, transmitted to the Chief, Geology and Geotechnology Branch, the results of laboratory tests performed on rock core samples from Tunnel No. 3. Under the caption Summary and Conclusions, the memorandum states: "4. Laboratory tests performed on NX-core samples obtained to correlate changes in density and unconfined compressive strength tests in areas where the 'mole' exerted pressure on the tunnel walls were generally inconclusive because of the highly fractured nature of the samples" (AX 83, memorandum (10-10-72), p. 4).

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machine operation, and (6) geologic conditions encountered in the tunnel to date do not differ from that portrayed by the specifications document.

(AX 82, pp. 1, 2).

By letter dated Dec. 3, 1971, the contractor advised the Bureau that it was continuing to encounter differing site conditions. In its response the BOR noted that as of Dec. 15, 1971, the contractor had failed to furnish any information clarifying in what way the conditions differed materially from those indicated in the contract (AF 34, 35).

The problem of securing adequate anchorage for rockbolts installed in some of the ground through which Tunnel No. 3 was being driven was a matter of concern to both parties (AF 25, 27). Grouted rockbolt anchorage tests conducted by a Bureau of Mines geologist on Aug. 28, 1971, had caused the geologist to conclude that the grouted, tandem expansion shell anchorage system did not provide a safe roof support because of the excessive time required for the grout to cure. By letter dated Nov. 12, 1971 (AF 30),²⁴ the BOR advised the contractor of the results of such tests and that the grouted,

tandem expansion shell anchor was not approved.

At the request of the Government the parties met in Denver, Colorado, on Dec. 6, 1971, to discuss the tunnel support program. Since the parties were meeting over 6½ months after excavation with the moling machine had commenced in Tunnel No. 3 and over 4 months after the contractor had given its first notice of changed condition, the representatives of both sides could point to a considerable amount of experience in Tunnel No. 3 and in other tunnels as the basis for the opinions expressed. The memorandum of the conference (AX 74)²⁵ shows the parties were apart principally on the measures that should be taken to overcome the difficulties encountered with the contractor favoring the continued use of rockbolts²⁶ and the Government representatives generally speaking favoring

²⁵ Immediately after summarizing Mr. Arthur's opening remarks, the memorandum states on page 1: "Mr. Stewart observed that they were having a hard time justifying Mr. McCreight's bid."

The list of conferees attached to the memorandum shows Mr. Stewart to be a Vice President of Fluor Utah with Mr. McCreight being described as "Mgr. Estimating" (AX 74, memorandum to file (12-14-71), attachment).

²⁶ "Mr. Mathews said that * * * by rock bolting very closely after excavation, movement of the rock and therefore loosening of the rock, can be prevented. The action of the rock bolts is to reinforce the rock immediately around the opening, and this reinforcement then prevents loosening of the rock, movement and failure." (AX 74, n. 25, *supra*, pp. 2, 3).

Dr. Heuer stated that more support capacity can be developed with rock bolts than with steel supports provided the rock bolts can be installed very close (8 to 10 feet) to the heading (AX 74, p. 3).

²⁴ Accompanying the BOR letter was a memorandum from the geologist in which he states at page 3:

"Safe roof control in this tunnel-driving operation requires that some type of roof support be implemented directly behind the cutter head of the mole machine. This machine has advanced the tunnel face as much as 60 feet in one 8-hour shift. Therefore, roof support would have to be effective within minutes after the tunnel roof is exposed behind the cutter head." (AF 30).

the use of full circle steel ribs²⁷ at least in shale. There were representatives on both sides who agreed (i) that it is normal for stress redistribution to occur whenever you drive a tunnel,²⁸ and (ii) that there appears to be a correlation between the depth of cover and the degree of stress exerted upon the rock.²⁹ The parties were completely apart, however, on the extent to which the action of the grippers may have been responsible for fallouts in the sidewalls, as is illustrated by the following passage from the memorandum:

[I]t was the Government's position that the action of the grippers was largely responsible for the sidewall fall-out,^[30]

²⁷ Mr. Arthur said he finds it difficult to understand why the contractor believes that steel ribs will not work, since they worked well at Azotea. Mr. Mathews said that at Azotea some 7,000 feet had substantial fallouts in the sides and arch. Mr. Gullet said that some people who were there felt that the fallouts were due to the grippers damaging the walls." (AF 74, n. 25, *supra*, p. 5).

With respect to Tunnel No. 3, however, Mr. Gullet stated that the fact the contractor had been able to bolt 3,000 feet of tunnel showed that the rock was better than the BOR had estimated (AF 74, p. 2).

²⁸ "Mr. Logan stated that it is normal for stress redistribution to occur whenever you drive any tunnel, and Mr. Matthews agreed. Mr. McCreight said this phenomena may have been known to some of the more sophisticated people, but it was not known to this contractor" (AX 74, n. 25, *supra*, p. 4).

²⁹ "[M]r. Logan asked if the contractor expected to encounter less problems of support when they passed out of the area of very high cover, and Mr. Mathews replied that as long as the same formations are encountered they certainly would expect less trouble with less cover. * * * Mr. Levine said that the major problem appears to be high cover inducing high stresses. But what about areas where dampness exists. Even with the stress relief problem, dry shale seems to hold up reasonably well, whereas damp shale falls out." (AX 74, n. 25, *supra*, p. 4).

³⁰ In a report transmitted to the BOR some 3 weeks after the December meeting, Dr. Heuer

and the contractor took the position that the sidewall fallouts were almost entirely due to stress relief. The Government also took the position that the decrease in tunnel diameter, if there was any, which we doubt, was due to recovery of the shale when the grippers were relaxed. * * * [I]t was pointed out, and agreed to by all that precise surveys^[31] are necessary to determine just what is happening to the sidewalls* * *

(AX 74, p. 4).

The contractor's delegation included not only company personnel but also representatives of the firm of A. A. Mathews, Inc., who actively participated in the discussion in their capacity of rock mechanics consultants to the contractor. Dr. Ronald Heuer stated that the problems arise because the stresses in the ground, as a result of removing the tunnel area, are greater than the strength of the rock (AX 74, p. 2). Both Dr. Heuer and Mr. A. A. Mathews of the consulting firm gave as their opinion that the contractor should continue to rely upon rockbolts for tunnel support rather than resort to full circle steel ribs.³² Developing the rationale for continued use of rockbolts, Dr. Heuer stated that by bolting, the ring of rock around the tunnel is reinforced so

states: "Distress of the sidewalls can not be attributed to the influence of the mole gripper plates, because in many locations, falls from the sidewalls have begun to develop in front of the gripper plates" (AF 36, III-13).

³¹ In a letter dated Mar. 27, 1972 (AF 49), the project construction engineer advised the contractor that checks of the elevations of the excavated invert of Tunnel No. 3 from Station 795+00 to Station 811+00 (3-15-72) and the arch from Station 789+00 to Station 795+00 (3-23-72) had been made and that the preliminary results indicate that the tunnel was bored consistently high.

³² AX 74, n. 25, *supra*, p. 3.

that the strength of this cross section is improved so as to be equal to or greater than the stresses tending to cause failure. He pointed out that if such reinforcement is not done, the stresses cause fractures and fallouts (AX 74, p. 2).

After consulting with the other Government representatives, Mr. Harold Arthur, Deputy Director, Design and Construction, indicated that the BOR considered steel ribs were the proper support for the shale and that where difficulty was experienced in developing anchorage, full circle steel ribs should be used³³ placed as closely as possible behind the excavation. The contractor was given permission to proceed with its program of rock bolting, however, subject to later review (AF 74, pp. 5, 6).³⁴

Under date of Dec. 27, 1971 (AF 36), the contractor transmitted to the BOR a report by Dr. R. E. Heuer of A. A. Mathews, Inc., entitled "Construction Report No. 743-3, Ground Support, Navajo Tunnels Nos. 3 and 3A," which was described as constituting the contractor's complete support proposal as requested by the BOR and as

discussed by the parties at their Dec. 6, 1971, meeting in Denver. The report is dated Dec. 23, 1971,³⁵ and is based in part upon information obtained on visits to the jobsite at approximately 2- to 4-week intervals from July 16 to Dec. 9, 1971 (AF 36, I-1). In a number of areas the discussion contained in the report is identical or quite similar to that involved in Construction Report No. 743 dated Sept. 17, 1971 (AX 5), discussed *supra*. The reports cover different time periods, however, and each report includes material not found in the other report.³⁶

The report (AF 36) refers to what the logs of exploration show with respect to: (i) the type of ground to be expected at tunnel level;³⁷ (ii) where perched water had been encountered;³⁸ and (iii)

³⁵ With respect to progress as of Dec. 9, 1971, the report states:

"[A] majority of the tunnel excavated has shown distress in the form of fracturing of, or rock fall from, the smooth tunnel bore. The support problems which have developed have been associated with the occurrence of low strength shale and siltstone partings, lenses, and beds; and with the occurrence of water." (AF 36, VI-1).

³⁶ "[A]ttention is directed to a circular, machine bored tunnel in relatively massive, homogeneous, intact ground; that is, ground which is not intensely fractured, jointed, or closely bedded. This condition is approximated by the ground in which Navajo Tunnels No. 3 and 3A are to be driven" (AF 36, III-3). *Cf.* description at n. 15, *supra*.

³⁷ "[T]he logs of exploratory borings along the tunnel alignment indicate the ground at tunnel level will be mostly sandstone, with a relatively small percentage of shale, generally occurring in thicknesses of less than 5 feet" (AF 36, II-1).

³⁸ "The boring logs indicate that the tunnel excavation may encounter local perched groundwater, such as near DH 114 and DH 51" (AF 36, II-1).

³³ The contractor was advised of a moled tunnel in Utah where the contractor had stood iron from end to end to avoid the fallout problems. It was stated, however, that the Government understood the contractor's problem of installing full circle ribs with the mole the company had put on the job (AX 74, n. 25, *supra*, p. 6).

³⁴ "4. We will again review the rock bolting problem at a later date, say after another 1,000 feet of tunnel has been driven. If it does not prove to be satisfactory support by that time we would like to see ribs tried" (AX 74, n. 25, *supra*, p. 6).

indications in the specifications respecting the use of steel ribs.³⁹

The amount of cover over the tunnel was shown to be a significant factor for consideration in determining the support necessary and how soon it was likely to be required. According to the report support problems may be expected when the depth of cover (expressed in feet) approaches one-half of the unconfined strength of the ground (expressed in psi). The report notes, however, that this concept is quite in conflict with conventional ideas which hold that loads on rock tunnels are independent of the depth of cover over the tunnel. The reason for the conflict is said to be that at normal tunneling depths the in situ stresses are normally low with respect to the intact ground strength (AF 36, III-6).

Commenting upon the extent of the cover involved in Tunnel Nos. 3 and 3A, the report states:

As the excavation of Tunnel No. 3 advances upstream from the outlet portal, it will pass under Harris Mesa with a maximum depth of cover of 1,070 feet. After Navajo Tunnel No. 3 emerges from under the full height of Harris Mesa, the depth of cover will decrease and vary from approximately 150 feet to 600 feet, typically on the order of 350 feet, as the tunnel alignment parallels an edge of the

mesa. Approximately 2700 ft (18%) of Tunnel No. 3 between Stations 823+00 and 850+00 [40] will be under more than 600 ft. of cover. The maximum depth of cover over Navajo Tunnel No. 3A will be only 275 feet.

(AF 36, II-2).

Any plan of support necessarily had to take into account not only the depth of cover but the wide range of strength of the ground through which the tunnels were to be driven. Addressing this question, the report states:

Laboratory test results indicate that cores of rock which have been classified as sandstone exhibit a wide range of unconfined compressive strengths ranging from 300 psi to 9700 psi, with the weakest 60% of the samples averaging 770 psi. Core samples visually classified as shale on the boring logs, but reclassified clayey siltstone after petrographic examination, exhibited unconfined compressive strengths ranging from 1,310 psi to 6,610 psi. Observations in the tunnel suggest that the strength of some of the "shale" materials may be as low as a few hundred psi. Test results on cores described as siltstone or mudstone ranged from 640 psi to 6,610 psi. The average strength of these materials, not counting the one high value of 6,610 psi, was 1,470 psi. [41]

⁴⁰ The report identifies the area between Station 823+00 and Station 850+00 as the most probable locations where supplementary rockbolts will be required as involving the greatest depth of cover (AF 36, VI-2, 3).

⁴¹ "[T]he cracking, spalling, and falls which have been observed in the tunnel result primarily from the fact that the in situ stresses in the ground are high with respect to the average strength of the ground * * *. Although some of the overbreak areas are bounded in part by natural bedding planes, the bedding planes have only localized overbreak and falls, and are not the primary cause of distress. Support problems are aggravated by the presence of water which weakens the ground, thereby intensifying and hastening the effects of overstraining." (AF 36, VI-1, 2).

³⁹ "The contract boring logs indicate the possibility of encountering some ground in which it will not be possible to readily develop adequate rock bolt anchorage. If any significant quantity of such ground is encountered, it may be necessary to install steel ribs supplemented with shotcrete" (AF 36, VI-2).

The report also indicates that full circle support of steel ribs might be required in Class IV ground which was assumed to be ground having a strength similar to cohesionless sand (AF 36, V-17).

(AF 36, II-1).

One of the central concerns of the report was the extent to which and the manner in which the tunnels could be properly supported by rockbolts.⁴² Based upon a rock mechanics analysis and the observations of the actual ground behavior in the tunnel, a recommended rock bolting program was developed by Dr. Heuer which is summarized in a table to the report and illustrated in drawings accompanying the report. The program was based upon the installation of a six or eight bolt pattern in the arch throughout the length of the tunnels. The report contemplates that the basic arch bolt pattern will be supplemented with bolts in the sidewalls and invert whenever necessary. In general the supplementary bolts would only be installed at locations behind the heading where and when significant distress develops in the sidewalls and invert (AF 36, VI-2).

The author states that based upon the ground loads and load carrying capacity of steel ribs used in the report's calculations, it appears that the weaker sandstone and shale under the higher cover could not be supported by steel ribs of reasonable size and spacing (AF 36, IV-

⁴² "Calculations of possible ground loads and of the load carrying capability of steel rib and rock bolt support systems have indicated that (1) adequate rock bolt support may be developed for most of the length of Tunnels No. 3 and 3A, and (2) a rock bolt system is capable of supporting the tunnel where steel ribs of reasonable size and spacing may be inadequate." (AF 36, VI-2).

1).⁴³ The report emphasizes that in some circumstances support must be provided immediately.⁴⁴ It denies that fallouts in the sidewalls are attributable to the mole's gripper plates (n.30, *supra*). The use of shotcrete to prevent surficial deterioration, particularly in wet areas, is again stressed.⁴⁵

The report classifies rockbolt anchors as type A1 or type A2. Designated as type A1 anchors are mechanical expansion shell anchors which can develop adequate anchorage in Class I and Class II mate-

⁴³ Comparing these two methods of support, the report states: "[R]ock bolt support is much more efficient than steel rib support because the rib support does not preserve, develop, and utilize the natural strength of the ground. With rock bolts, the main support comes from the compressive strength of the reinforced, prestressed ground arch." (AF 36, IV-3).

In an earlier report to the contractor in which he considered the question of slabbing, Dr. Heuer states:

"The rock through which the tunnel is being driven is relatively weak and massive, and is overstressed due to stresses in the ground at tunnel depth. * * * The slabbing represents a desirable stress relief and will not result in overall instability of the tunnel if proper support is installed to prevent unchecked progressive deterioration of the tunnel excavation. To prevent the initial formation of these slabs would physically be a near impossibility regardless of the type of support installed (rock bolts vs. steel ribs vs. shotcrete, for example) and would certainly be most uneconomical." (GX R, letter (11-02-71), p. 1).

⁴⁴ "[F]ailures tend to develop most rapidly in the crown, where gravity body forces are most efficient in causing slabs and wedges to fall" (AF 36, III-12). "[T]he basic arch support should be installed immediately behind the face concurrent with excavation, throughout the tunnel. (AF 36, V-15).

⁴⁵ "[T]o prevent raveling and spalling between the bolts where water is present, medium and thick (i.e., greater than 3 ft. thick) beds and lenses of Class III material may be given a protective coating of shotcrete. Shotcrete protective coatings may be applied to thin and very thin lenses and beds whenever required by local conditions." (AF 36, V-14).

rial,⁴⁶ such as the sandstone through which Tunnel No. 3 had been driven in the first 1,300 feet from the outlet portal. Designated as type A2 anchors are epoxy resin anchors which are needed to develop adequate anchorage in Class II and Class III material. The report notes that the bolts with resin anchors should contain a section of reinforcing bar for embedment in the resin anchor (AF 36, V-4, 13).

By early March of 1972 the contractor had satisfactorily answered many of the questions raised by the BOR at the conference of Dec. 6, 1971, with respect to rockbolts. In a memorandum to the Director, Design and Construction, dated Mar. 9, 1972 (AX 71), the project construction engineer stated:

In accordance with our discussions during the December 6, 1971, meeting, we observed and reviewed the rock bolting program from December 6 to January 1. During that time, approximately 1,000 feet of tunnel was satisfactorily supported by rock bolts. During the period of January 2 through March 7 an additional 4,344 feet of tunnel has been satisfactorily supported by rock bolts.⁴⁷

We have found that the use of rock bolts for support has been satisfactory since the epoxy anchor has been in use.

⁴⁶ "Class I ground is ground which does not develop major distress in the sidewalls and, thus, requires only the basic arch support * * *. Class II ground is ground which does develop enough distress of the sidewalls to require support of the walls in addition to the basic arch support." (AF 36, V-2).

⁴⁷ Some 8,334 feet of Tunnel No. 3 (approximately 55 percent) appears to have been bolted to the satisfaction of the BOR by early March of 1972. The footage figure given is derived from the 3,000 feet mentioned in the Dec. 6, 1971, conference (n. 27, *supra*) and the 5,334 feet referred to in the Mar. 9, 1972, memorandum (AX 71).

Periodic pull tests show that the bolts will support in excess of 17,000 pounds.

On several occasions during 1972, the contractor gave written notice to the BOR with respect to differing site conditions. By letter of Feb. 16, 1972 (AF 44), the Bureau was notified that the contractor was encountering differing site conditions in the vicinity of DH 115 similar to those encountered in the vicinity of DH 116.

The DH 116 Claim

In a letter to the BOR under date of Apr. 22, 1972 (AF 50),⁴⁸ the contractor presented a claim for additional costs in the amount of \$511,670 and a claim for time extension of 88 calendar days,⁴⁹ attributed to the subsurface site conditions encountered in the vicinity of DH 116 and said to differ materially from those indicated in the contract. More specifically, the letter states:

[T]his claim includes the additional costs of excavation and tunnel support required through December 31, 1971, between Stations 856+63 and 854+06 (herein referred to as "Claim Reach I") and between Stations 848+48 and 845+80 (herein referred to as Claim Reach II).⁵⁰ In each instance, Contractor en-

⁴⁸ The letter made reference to prior notifications concerning differing site conditions in the vicinity of DH 116, as set forth in the contractor's letters dated July 29, Sept. 1, Sept. 9, and Dec. 3, 1971, and Jan. 5, 1972.

⁴⁹ By letter dated July 12, 1972 (AF 52), the DH 116 claim was increased to \$515,465 as a result of the \$3,795 additional costs incurred after Dec. 31, 1971.

⁵⁰ Under the caption "Reference Reach" the letter states:

"From Sta. 854+06 to Sta. 851+49, tunnel conditions permitted resumption of a moderate rate of advance. This section of the tunnel, herein called the reference reach, is identical in length to and has similar rock conditions as Claim Reach I * * *. [T]he reference reach

—Continued

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countered extensive shale and ground-water seepage resulting in excessive over-break controlled only with special rock bolt patterns and extensive protective coatings of shotcrete. * * * The information presented in the log of DH-116 indicates that the rock at tunnel level in the vicinity of DH-116 at the time of drilling was essentially dry.

(AF 50, pp. 1, 5).

Concerning the manner in which the claim had been computed, the letter also states:

[C]ontractor is hereby claiming reimbursement for the increased costs of driving and supporting the tunnel attributable to the changed conditions encountered. The increase was calculated by a comparison of all costs incurred with respect to the reference reach and all costs incurred with respect to each claim reach. In that the length of Claim Reach II is greater than that to the reference reach, a cost per foot was calculated and multiplied by the total footage of Claim Reach II to arrive at the proper comparison figure.

To the computed difference in excavation and support costs are added the estimated additional mole rental for the extra work days that the mole will be required on the project, costs of mobilizing and constructing a shotcrete plant, costs related to remedial work on existing drill holes including DH-116, consultant fees, overhead,⁵¹ profit, increased bond premium and applicable gross receipts tax.

was completed in 10 working days as compared to the 66 working days required to progress from Sta. 856+63 to Sta. 854+06. The reference reach is also used for purposes of evaluating Claim Reach II." (AF 50, p. 4).

⁵¹The Summary of Additional Costs which accompanied the letter includes an item described as "[a]dditional project site indirect cost attributable to prolongation of the contract period (88 calendar days @ \$1,190/day)" in the amount of \$104,720. Fluor Utah Home Office Overhead at the rate of 2.3 percent of the listed direct and indirect costs amounts to \$9,991 (AF 50, contractor's letter (4-22-72), attachment).

(AF 50, p. 6).

Additional information pertaining to the claim was furnished by the contractor's letter of Nov. 10, 1972 (AF 54). Speaking of the rate of progress achieved in the vicinity of six other drill holes which are along the alignments of Tunnel Nos. 3 and 3A and noting that the average progress in the vicinity of these other drill holes (approximately 250 feet on either side of the drill hole location) varied from a high of 197.3 feet per day to a low of 78.3 feet per day with an average progress while traversing past the entire six drill holes of 104.7 feet per day, the letter states: "The rate of progress attained in the vicinity of these drill holes indicates that the 257 feet and 268 feet involved in Claim Reaches I and II should have been excavated in approximately 2.5 days rather than in the 61 day and 22 day time periods actually required to excavate and support the two claim reaches."⁵²

The Bureau's response to the contractor's letters of Apr. 22, 1972 (AF 50), July 12, 1972 (AF 52),

⁵²The Nov. 10, 1972, letter also states:

"The excavation phase of the project was completed on October 16, 1972, with the hole-through of Tunnel 3A and we have now been able to compare the rate of progress achieved in the vicinity of the six other drill holes which are along the alignment of Tunnels 3 and 3A. Our records show that these drill holes occurred at locations having rock conditions which varied from wet sandstone with shale lenses to dry shale with lenses of siltstone and sandstone. However, in no case was the ground saturated with water which had percolated through the strata at tunnel level from an overlying water source." (AF 54, p. 1).

and Nov. 10, 1972 (AF 54), is contained in a letter dated Dec. 26, 1972 (AF 55), in which it registered its grave doubts as to the merits of the claim, noting (i) that the amount of shale encountered during excavation of the tunnel was not appreciably different than was shown by the logs of exploration; (ii) that a study had failed to indicate a relationship between the water sources for Claim Reach I and Claim Reach II which were approximately 560 feet apart; (iii) that when the contractor bid the job, it had known that the water levels reported for DH 116 were well above tunnel level only shortly before the bid opening; and (iv) that if the contractor had been adequately prepared,⁵³ many of the excavation problems in Claim Reach I would have been materially reduced.

The Bureau's letter referred to the fact that in the letter of Apr. 22, 1972 (AF 50), the contractor had

mentioned groundwater seepage as one cause of the alleged excessive overbreak and elsewhere in the letter had stated that the information presented in the log of DH 116 indicates that the rock at tunnel level in the vicinity of DH 116 at the time of drilling was essentially dry. Concerning these matters and the contractor's assertion that great reliance had been placed on the log of DH 116, the BOR letter states:

It * * * seems that the continuous statements as to the wet and moist condition of the core between 359.2 feet and 432.0 feet would have been an indicator that the rock to be excavated would be wet and that free water could be expected in the tunnel. We, therefore, feel that your interpretation of dry tunneling conditions in the area of DH-116 appears to be erroneous.

(AF 55, p. 1).

Additional information pertaining to the DH 116 claim was furnished to the BOR in a letter dated Jan. 30, 1973 (AF 57), in which the contractor offered its observations concerning the discharge from a drain pipe which had been grouted into the drill hole and with respect to the moisture conditions generally in Claim Reaches I and II. It also advised the BOR that the samples of rock had been taken from Claim Reach I and that two of the rock samples tested, which the contractor described as dry, had moisture content of 5.4 percent and 7.1 percent, respectively. The letter concluded by requesting the Bureau (i) to observe and confirm its findings that the source of water encountered during excavation was at or above ele-

⁵³ "[D]uring our meeting (Dec. 6, 1972), I pointed out instances of your lack of preparation for handling the problems encountered. Although shotcrete was contemplated by the specifications as a means of tunnel support, as well as your submission of proposed support details, considerable delay occurred because shotcrete equipment was not available. The mole would not excavate a bore of sufficient diameter to permit the use of structural steel supports as contemplated in the specifications. You did not install a shield for the mole until October 5, 1972, when the excavation of Claim Reach I was completed. The beginning of the continuous use of epoxy-anchored rock bolts was at this same time. It appears that had you been adequately prepared, your excavation problems in Claim Reach I would have been materially reduced." (AF 55, BOR letter (12-26-72), p. 2).

The reference to Oct. 5, 1972, as the date the shield was installed appears to be in error. The Government's inspection reports indicate the shield was installed on Oct. 5, 1971 (GX AAA(11)).

vation 6019 and (ii) to participate in a joint program of controlled tests of rock in the vicinity of DH 116 prior to the placement of the concrete lining in order to determine its moisture content. It was said that the present moisture content of the rock may be of significant importance to the claim. In a followup letter dated Feb. 15, 1973 (AF 61), the contractor requested that it be advised of the Bureau's intentions respecting a joint program of controlled tests, noting that the arch concrete placement was then in progress. In its reply letter of Feb. 23, 1973 (AF 63), the BOR advised that the Jan. 30 letter contained no new information to show site conditions differed materially from those indicated in the contract documents.⁵⁴ It also questioned whether additional rock testing as suggested by the contractor would be of value in view of the time that had elapsed since excavation of the tunnel through Claim Reach I was completed.⁵⁵

⁵⁴ "The contract documents (logs of drill holes) show that water could be expected within strata in the tunnel section at any point throughout much of the tunnel length, including Claim Reaches I and II. Your observation of moisture content of the rock from Claim Reach I (5.4 percent to 7.1 percent) compares favorably with the 5.9 percent to 6.8 percent moisture in samples tested from DH 116 cores. These data were available to all prospective bidders under Paragraph 42 of the specifications." (AF 63, BOR letter (2-23-73)).

⁵⁵ "It has been almost 17 months (Oct. 1971-Feb. 1973), since the tunnel was excavated through Claim Reach I. Changes induced by the excavation itself render interpretation of moisture and water data somewhat questionable if collected at this time. We, therefore, question whether additional rock testing of the area would be of benefit. However, we have no objection to your performing additional testing if you so desire." (AF 63, n. 54, *supra*).

In a letter to the Bureau dated Apr. 3, 1973 (AF 73), the contractor asserted that the DH 116 claim was based upon the combination of water and shale/siltstone encountered in the vicinity of the drill hole. Among the points made in the letter were the following: (i) the qualitative drill log comments respecting moisture on Drawings D-317, D-318, and D-323 did not agree with the results of laboratory tests of core samples furnished to bidders;⁵⁶ (ii) that the laboratory determined moisture for the cores of clayey siltstone (petrographic classification) and for the cores of sandstone, coarse (petrographic classification) obtained from DH 116 were 6.8 percent⁵⁷ and 5.9 percent, respectively; (iii) that the tests conducted by the contractor, in which the BOR had had an opportunity to participate,⁵⁸ had disclosed that the clayey siltstone is

⁵⁶ "In the Clayey Siltstone the driest sample recorded was called 'moist to wet' while a sample with nearly twice the moisture content was only called 'moist', and there was no moisture comment on a sample with the highest moisture content. In the Coarse Sandstone the sample with the greatest moisture content was called 'moist' while one containing 40 percent less moisture was noted as wet." (AF 73, p. 3.)

⁵⁷ "The Contract Documents indicated a moisture content of the rock in this vicinity of 6.8% and the Contractor based his bid on this knowledge, contemplating that a Clayey Siltstone bearing this moisture would present no particularly adverse problems to an efficient excavation program. This reasoning was fully substantiated when material of the same petrographic classification but considerably higher moisture content was encountered in Tunnel 3A in the vicinity of DH 117 and 118 with no adverse effects on our rate of progress." (AF 73, p. 8.)

⁵⁸ The BOR was invited to participate in such tests by letter dated Jan. 30, 1973 (AF 57). The Bureau declined the invitation for the reasons stated in its letter of Feb. 23, 1973 (n. 54 and n. 55, *supra*).

stable at moisture content up to 10 percent; and (iv) that failure of the Bureau to grout off DH 116 indicated that it did not consider the higher source of water⁵⁹ shown in the drill hole logs would be draining into the lower tunnel formations.

Responding to an inquiry from the contractor concerning the DH 116 claim (AF 83), the Bureau stated: "We were prepared to answer your claim based on conditions encountered in the vicinity of DH 116 until a review of your claims for changed conditions (in situ stress relief) submitted with your letter dated May 18, 1973, indicated there may be an overlapping of claims" (AF 85).

In the "Summary of Additional Costs Associated With Conditions Differing Materially From Those Indicated In The Contract In The Vicinity of DH-116," which accompanied a letter dated Feb. 6, 1974 (AF 112), the contractor submitted a claim for this item in the amount of \$623,748. The same figure is shown in the summary of additional costs which accompanied the contractor's letter of July 22, 1974 (AF 115), in which the direct costs to excavate and support Claim Reach I in excess of the direct costs required to excavate and support the Reference Reach is shown in the amount of \$260,828. The comparable figure for the difference between the

direct costs for Claim Reach II and those for the Reference Reach is shown in the amount of \$53,742.⁶⁰

In the Findings of Fact and Decision dated Dec. 31, 1974, the contracting officer denied the DH 116 claim,⁶¹ stating in part:

[T]he contractor does not contend that more shale and/or siltstone was encountered than was anticipated. He does contend that the shale and siltstone which were encountered contained more water than was indicated by the log of drill hole 116, and he further contends that this situation was the result of the drill hole allowing water to drain down from a perched water table located above elevation 6016 * * *.

* * * * *

16. Accordingly, it is my decision that the conditions which the contractor encountered in constructing the tunnel between stations 856+63 and 854+06 (claim reach I) and between station 848+48 and 845+85 (claim reach II) did not constitute subsurface or latent physical conditions at the site differing materially from those indicated in the contract.

(AF 10, pp. 4, 6).

Invert Heave and Removal of Water From Tunnel

Meanwhile, problems had developed with respect to the invert. By

⁵⁹ "b. No data was presented in the Contract Documents to show that the perched water indications were any more than minor phenomena having little significance for tunnel excavation. The 1969 and 1970 water level readings in DH-116 were obviously related to strata above the tunnel and not to strata at the tunnel level." (AF 73, p. 7.)

⁶⁰ Claim Reach I is between Stations 856+63 and 854+06. Claim Reach II is between Stations 848+48 and 845+80. The Reference Reach used as the basis for determining additional costs with respect to both claim reaches involves the section of Tunnel No. 3 between Stations 854+06 and 851+49 (AF 10, p. 3).

⁶¹ The Government Posthearing Brief (hereafter GPB) states at page 2:

"[F]or reasons undisclosed to the Government, the contractor has abandoned his claim relating to Drill Hole 116 as a separate claim. The alleged additional costs associated with the Drill Hole 116 claim, however, have apparently been incorporated in the claim as it was presented to the Board at the hearing."

letter dated Jan. 31, 1973 (AF 58), the contractor noted that the invert concrete was virtually complete after which it states: "We are concerned that this movement of rock continues even after concrete invert placement as is evidenced by some apparent concrete invert heaving in the area between stations 823+50 and 814+50." On Feb. 15, 1973, the contractor advised the Bureau that "similar invert deterioration has now progressed at least as far as station 834+60" (AF 62). In a letter dated Feb. 23, 1973 (AF 64), the contractor notified the BOR that surveys completed that date had revealed vertical displacement as great as 16 inches at Station 834+65. In the same letter it observed that the heaving problems exists sporadically and in varying degrees between Stations 812+00 and 844+00.

Following an exchange of correspondence pertaining to the heaving invert and the collection and removal of drainage and construction water from the tunnel by means other than free flow in the tunnel invert (AF 65 and 66), the Bureau wrote the contractor on Mar. 15, 1973 (AF 68), to say (i) that a study of the conditions present had shown it would be necessary to remove invert concrete from approximately Stations 812+50 to 824+00 and from Stations 833+00 to 844+50, and (ii) that a meeting would be held in the near future to discuss construction procedures and to negotiate payment for the work.

In a letter to the BOR dated Mar.

27, 1973 (AF 72), the contractor stated that its studies had caused it to conclude that the work required to remedy the concrete invert heave would "because of its necessary sequential nature as well as its magnitude," constitute a change order of such broad consequence so as to change the manner of performance for the whole of the remaining work on this project. The Bureau disagreed with this assessment in a letter dated Apr. 27, 1973 (AF 75), in which it states that the original prices are applicable to almost all of the remaining work. This view of the matter was disputed by the contractor (AF 78). The disputed questions were partially resolved by the contractor's qualified acceptance⁶² of Order For Changes No. 1 (Part 1 of a 2-Part Order) dated Aug. 16, 1973.⁶³ Amendment No. 1 to Part I of Order For Changes No. 1 dated Apr. 1, 1974, provided for a net increase in the sum due under the contract for performing the changed work in the amount of \$613,518 (AF 8). Part 2 of the Order For Changes No. 1 dated July 18, 1974, provided for a net adjust-

⁶² By letter dated Sept. 27, 1973 (AF 100) the contractor returned executed copies of the change order but noted that it had been accepted subject to the conditions stated one of which was that "[t]he work covered by this Order is not unrelated to our claims submitted by our letter to the Project Construction Engineer dated May 18, 1973."

In letter dated Oct. 16, 1973 (AF 103), the BOR stated that the change made in the acceptance of Order For Changes No. 1 was noted as being in dispute.

⁶³ Under the terms of the Change Order the contractor was "directed to remove the concrete invert between Stations 812+42 and 824+00 and between Stations 833+00 and 844+46 of Tunnel No. 3" (AF 4, p. 1).

ment in the sum due under the contract for increased costs of performing original contract work in the amount of \$235,071, noting that the total adjustment for Order For Changes No. 1 represents an increase of \$848,589 (AF 9).

Claim for Overexcavation of the Main Canal Downstream of Tunnel 3A Portal

A changes claim for the costs incurred at the outlet portal of Tunnel No. 3A for the 2 feet of overexcavation required for shale was submitted to the BOR by the contractor's letter of Aug. 17, 1973 (AF 94). In its letter of Aug. 28, 1973, the Bureau took the position that the work in question had been performed in accordance with the specifications and that no change was involved (AF 95). The parties continued to maintain their opposing positions in the ensuing correspondence (AF 111, 112, and 113). As shown in the summary of costs attached to the contractor's letter dated July 22, 1974 (AF 115), the claim as submitted was in the amount of \$73,303. Giving effect to the \$26,370 paid to the contractor at unit prices under schedule items 54 and 55, the net claim was in the amount of \$46,933. The claim in that amount was denied by the contracting officer in the decision from which the instant appeal was taken (AF 10). At the request of the appellant the portion of the appeal represented by this claim item was dismissed with prejudice by order dated Oct. 3, 1975.

Claim For In Situ Rock Failures in Tunnels 3 and 3A

By letter dated Jan. 31, 1973 (AF 58), the contractor submitted a claim for a differing site condition for rock failures in Tunnel Nos. 3 and 3A attributed to the relief of in situ stresses⁶⁴ as manifested in excessive rock displacement in the arch, sidewall and invert sections.⁶⁵ According to the letter an initial survey had indicated that the contractor would encounter extensive tightness in the arch and sidewalls during placement of the tunnel lining. The letter advised the BOR of the contractor's intention to embark upon an extensive program to chart these displacements in Tunnel Nos. 3 and 3A and invited the Bureau's participation in the undertaking.

In a letter dated Feb. 2, 1973 (AF 60), the contractor advised the BOR (i) that it would have a survey crew working in Tunnel No. 3 on Saturday, Feb. 3, 1973, with a view to confirming elevations of the existing moled arch through various reaches of the tunnel and also the extent of the rib squeeze or heave at various reaches; (ii) that a representative

⁶⁴ "Our study of the contract documents, including information on the geology of the site and the required initial tunnel support system did not indicate that rock displacements of the magnitude encountered as a result of stress relief could be anticipated" (AF 58, contractor's letter (1-31-73), p. 2).

⁶⁵ "We believe evidence of a supporting nature is typified at stations 858+00 to 854+00; 824+00 to 811+00; 777+40 and 741+50. We are concerned that this movement of rock continues even after concrete invert placement as is evidenced by some apparent concrete invert heaving in the area between Stations 823+50 and 814+50." (n. 64, *supra*).

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of A. A. Mathews would be present to confirm and concur with the contractor's methods and applications; and (iii) that the BOR was invited to observe the contractor's methods for correlation with the information to be derived. In a follow-up to its Feb. 2 letter and subsequent letters, the contractor wrote on Mar. 22, 1973, to say that survey measurements had revealed displacement up to 6 inches or more in simultaneous occurrences on both sides of the tunnel⁶⁶ and that such displacements are generally of a continuous nature (AF 71).

By letter dated May 18, 1973 (AF 77), the contractor transmitted its claim for in situ rock stresses in the amount of \$2,701,300. The claimed amount included an estimate of the costs attributable to the removal and replacement of damaged invert.⁶⁷ Included with the

⁶⁶ "Our arch concrete placing plant has now reached Tunnel Station 777+50. While we have encountered some tight areas of tunnel during the past two weeks of arch placement, there has been a noticeable increase in the scope of this problem since passing Station 770+40." (AF 71, date shown on letter, 3/22/72, is incorrect, the intended date appears to have been 3/22/73).

⁶⁷ "It is clear that the changed conditions of concrete invert heave between Station 812+50 and 844+50 * * * is an integral part of this claim of differing site conditions. We therefore have included in our cost assessment an estimate of the costs attributable to the removal and replacement of this damaged invert." (AF 77, letter transmitting claim, p. 2).

The claimed amount of \$2,701,300 includes an estimated cost to repair invert heave in the amount of \$526,700 (AF 77, Summary of Additional Costs, Part IV).

Amendment No. 1 to Part 1 of Order For Changes No. 1 dated Apr. 1, 1974, provides in especially pertinent part:

"b. As an adjustment for the increased

claim letter were: (i) an "In Situ Rock Stress Cost Evaluation," (ii) "Navajo 3 and 3A Progress Tabulation," (iii) "Summary of Additional Costs," and (iv) "Construction Report No. 1856." As was true with respect to the DH 116 claim, the contractor predicates its claim on differences between the conditions encountered in what it terms "Claim Reaches" and "Reference Reaches" and the relationship between such reaches to the costs claimed. The following is excerpted from the In Situ Rock Stress Cost Evaluation:

A. TUNNEL EXCAVATION

* * * * *

Claim Reach Tunnel No. 3

On July 1, 1971, at Sta 859+72 incompetent rock was encountered. Rock conditions continued to be materially worse than indicated until May 30, 1972 at Sta 761+90.

From Sta 761+90 until completion of Tunnel 3, rock conditions were as anticipated, although the Contractor's progress was delayed repairing equipment damage caused by the earlier encountered adverse rock conditions until approximately Sta 752+41. The 10,731 ft. section of tunnel, from Sta 859+72 to 752+41, comprises the Claim Reach. It was excavated in 241 working days, an average of 44½ ft. per day.

Reference Reach

The 3,057 ft. section from the end of the Claim Reach to hole-through comprises the Reference Reach. This was excavated

costs incurred to remove and replace the concrete invert between Stations 812+42 and 824+00 and Stations 833+00 and 844+46 of Tunnel No. 3, in accordance with Item 2 of Part 1 of Order for Changes No. 1, the amount due under the contract will be increased by the lump sum of—\$565,838." (AF 8, p. 6).

in 16½ working days, an average of 185 ft. per day.^[88]

Claim Reach Tunnel No. 3A

Ground conditions, at variance to those indicated by the contract were encountered in Tunnel 3A. The startup section of this tunnel comprised 236 ft. to Sta 987+68. From this Station to hole-through comprises the Claim Reach. This 3,053 ft. was excavated in 29 working days, an average of 105 ft. per day.

* * * * *

B. INVERT CONCRETE

Major delays during the placing of the invert concrete were caused by the rock in the invert of the tunnel rising and encroaching inside 'A' line. This rock had to be removed by spading, ripping and blasting. Additional delay was caused by failure of the rock footings at the invert brackets.

* * * * *

Claim Reach

The work in the Claim Reach starts on December 11, 1972 at Sta 769+35, the first day of removal of stress induced invert encroachment, and continued 8,593 ft. through Sta 855+28 on January 12, 1973, the last day of removal of invert encroachment.

⁸⁸ "Reference Reach Rate of Progress"

"The 185 ft. per day advance achieved in the competent rock of the Reference Reach was clearly demonstrated to be a reasonable base figure.

"Shortly after initial crew training and immediately prior to encountering adverse ground conditions, the Contractor achieved a sustained driving rate of 160 ft. per day. After passing through the area of incompetent ground he was able to achieve an average of 194 ft. per day during the final eleven days of operation in Tunnel No. 3; compile an average of 213 ft. of advance in the last calendar week of operation in this tunnel and reach a peak advance of 260 ft. in a one twenty-four hour period of this week.

"To further substantiate his claim that this 185 ft. figure is not only reasonable but conservative, the Contractor notes that:

* * * * *

"2. The excavation equipment had sustained extensive damage from rockfalls in the Claim Reach and, therefore, did not operate at full capacity in the Reference Reach." (AF 77, In Situ Rock Stress Cost Evaluation, pp. 1, 2).

Reference Reach

January 15, and 16, 1973, were the only days of full operation, after the startup period, without invert encroachment.

These two days then must be considered the Reference Reach. While its overall length is relatively short, and the distance to the batch plant considerably less than average, the Contractors records, as summarized below,^[89] show that haulage and equipment delays were actually higher in this reach than in the remaining invert work, thereby establishing the validity of this length of tunnel as the Reference Reach.

It will be noted that the Claim Reach includes one day in which 848 ft. of invert was placed even though there was some delay in removing tights. This clearly demonstrates that the 676 ft. per day of progress for the Reference Reach provides a conservative basis for cost evaluation.^[90]

* * * * *

⁸⁹	"Claim Reach	Reference Reach
Date to Date----	12-11-72	1-15-73
	1-12-73	1-16-73
Station to Station-----	769+35	855+28
	855+28	868+80
Feet-----	8,593	1,352
Working Days----	23	2
Feet per Day----	374	676
<i>Percentages</i>		
Placing Concrete--	23	37
<i>Delays:</i>		
Cleanup and		
Tights ---	30	8
Haulage and		
Misc -----	21	27
Repairs -----	24	26
Shift		
Change ---	2	2
Totals --	100	100

"The duration of the delay to the invert concrete was ten working days, as can be seen on line 10 of the Progress Tabulation" (AF 77, n.68, *supra*, p. 3).

⁹⁰ "The anticipated delay for replacing the invert is 73 working days * * *.

"Strikes in the Fall of 1971 and the Spring of 1973 would not have occurred if changed conditions had not been encountered. Consequently, the 24 working days lost as a result of these strikes is included in this evaluation." (AF 77, n.68, *supra*, p. 4).

C. ARCH CONCRETE

Delays encountered during arch concreting of Tunnel 3 were caused by removal of stress induced encroachment of the tunnel ribs and arch, by placing of additional concrete in fallout voids caused by the high in situ rock stress, and by replacing heaved invert concrete.

Lines 12 through 19 of the Progress Tabulation show actual and projected details of this operation. These figures will be revised upon completion of arch concreting.

(AF 77, In Situ Rock Stress Cost Evaluation, pp. 1-4).

The technical basis for the In Situ Rock Stress Claim is set forth in Construction Report No. 1856 dated May, 1973, and transmitted to the BOR by the contractor's letter of May 18, 1973 (AF 77). The comprehensive report of 70 pages, two appendices, some 35 figures and three large drawings was forwarded to the contractor by letter dated May 3, 1973, from Dr. Ronald E. Heuer of A. A. Mathews, Inc. (AF 77). Much of the material in the report covers ground already discussed in earlier reports of A. A. Mathews, Inc., pertaining to the differing site conditions claims (AX 20; AX 5 and AF 36).

Emphasis is placed upon (i) failures observed at Navajo Tunnel No. 3 generally representing shear failures in overstressed rock adjacent to the tunnel perimeter (p. 51); (ii) the strength and water sensitivity of siltstone/shale materials reported in the Construction And Foundation Materials Data Report (GX U) made available to bidders not being representative of the more troublesome siltstone/shale mate-

rials encountered in the tunnels, i.e., the nature of these materials was not known prior to tunnel excavation (p. 65); ⁷¹ (iii) fracturing in the arch and subsequent rock falls typically developing immediately behind the mole cutter head before the rockbolt support could be installed (pp. 1, 53); ⁷² (iv) the fact that some of the worst rock fallouts cannot be explained as simply a reaction to the presence of free wa-

⁷¹ In a memorandum written to J. F. McCreight under date of Aug. 31, 1970, Mr. J. J. Hayes (the company geologist who had actively participated in the pre-bid site inspection of the area involving Tunnel Nos. 3 and 3A) states under the caption "Mole Operation: [M]inor amounts of perched ground water may occur on top of certain impermeable shale beds. However, no permanent flows are expected. The shale (siltstone) is very water reactive, so all possible precautions must be taken to maintain a dry operation" (AF 110, Attachment, p. 3).

The same language is contained in Mr. Hayes' handwritten report (AX 1, p. 4).

⁷² In an article entitled "Mole Versus Conventional: A Comparison of Two Tunnel Driving Techniques," Mr. Newcomb B. Bennett III, U.S. Bureau of Reclamation, makes a comparison between Tunnel No. 1 (a mole driven tunnel) and Tunnel No. 2 (a conventionally driven tunnel), both of which tunnels were also part of the Navajo Indian Irrigation Project but which were completed prior to Tunnel Nos. 3 and 3A. In the course of the article Mr. Bennett states:

"[W]hen a shale in a tunnel starts lying on a 1:1 $\frac{1}{2}$ -slope, the overlying rock will no longer be stable. When a sandstone is undercut by a rapidly retreating shale, it will fall. It is the large sandstone blocks which cause damage when they fall, but their falling is generally the fault of the shale.

"The shales reacted the same in both tunnels in that they tried to reach stability. The difference appears in the amount of time it takes the shale to begin air slaking. In either tunnel it would generally take 1 to 2 days to begin falling, even after its initial exposure. However, once exposed, differences occurred. In Tunnel 1 the shale would begin dropping immediately after a new reach was exposed. It was believed that this was due to the compressive effects of the cutterhead. After the mole passed, the shale would almost spring into the tunnel and, unless immediately supported, would continue falling." (GX A, p. 2).

ter; ⁷³ (v) the superiority of rock-bolts over other indicated means of support including full steel ribs; ⁷⁴ and (vi) the reference in Paragraph 50 of the specifications to Government testing indicating that "many of the sandstones, shales, and siltstones to be excavated will deteriorate or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three" refers only to surficial phenomena.

With respect to Item vi above, the report states:

[T]he problems being considered in this report resulted from overstressing of the intact rock material about the tunnel excavation due to concentration of in

situ rock stresses about the excavation * * *. This overstressing caused fractures to form in the intact rock about the tunnel. Such overstressed rock in the upper part of the excavation typically fractured and fell into the tunnel before support could be installed. In the lower portion of the excavation, the overstressed, fractured rock moved into the tunnel over a period of time following excavation. These large scale failures of overstressed rock are not simple surficial deterioration, [⁷⁵] disintegration and loosening in the presence of air or water. Much of this failure occurred in portions of the tunnel in which water was not present. The nature of these failures indicates they are of a mechanical and stress-induced origin, and are not simple air slaking or water slaking phenomena causing surface deterioration, disintegration, and loosening.

The phrase "deterioration of disintegration when stress relieved" [⁷⁶] applied

⁷³ "[G]round behavior observed in the tunnel indicates that water in contact with the siltstone/shale surface causes the surface to swell and disintegrate. Such water does not cause the formation of fractures penetrating deep into the rock. Rapid and severe failure such as illustrated by Figs. 18 and 19 can be explained, however, by the formation first of cracks in the rock due to overstressing and resultant rock fracturing. Such cracks provide free water with access to deep within the siltstone/shale material. The presence of free water in such cracks can cause softening and swelling of material along the crack surfaces, leading to the severe and rapid failures which occurred." (AF 77, p. 57).

⁷⁴ "Full circle steel ribs of adequate size could probably have supported the tunnel; although, as shown in A. A. Mathews, Inc. Report 1743-3, submitted to the Owner by the Contractor by letter No. 243 of December 27, 1971, the W5 x 18.5 or M5 x 18.9 ribs required by the Contract would not provide as much support capacity as the reinforced ground arch provided by the rock bolt support system actually used. Steel ribs could not have been installed early enough to prevent fracturing and fallout in the arch and would have experienced the same (or worse) delays as were experienced with rock bolts. Steel ribs and wood blocking are a passive support which do not actively strengthen and restrain the rock, and as such would allow more fracture development and rock failure than the pretensioned rock bolt system used by the Contractor. Thus, the use of steel rib supports would have resulted in a poorer quality of the rock mass about the tunnel." (AF 77, p. 64).

⁷⁵ The report had previously stated: "[T]he degree of failure of the tunnel perimeter depends upon the relative magnitude of the in situ pressure and the ground strength, and upon the support system installed" (AF 77, p. 49).

An earlier draft of the report (3-5-73) had stated: "[T]he degree of deterioration of the tunnel perimeter depends upon the relative magnitude of the in situ pressure and the ground strength, and upon the support system installed" (GX P, p. 49).

⁷⁶ In a letter dated Apr. 6, 1973, addressed to Mr. Sperry then with A. A. Mathews, Inc., "Subj.: Stress Relief Planning for Navajo No. 3," Mr. R. Hungett, Vice President—Construction, Fluor Utah, Inc., offers his comments upon an earlier draft of what later became Construction Report No. 1856. In especially pertinent part the letter states:

"[T]he words 'stress relieved' bother me in view of what we are trying to accomplish but inasmuch as these are quoted from the specifications I guess there is nothing else we can do. * * *

"* * * [I] do not feel that the final sentence on this page should be part of this report. It will be difficult enough to present the Mathews report as an independent consultant's report without it's [sic] stating an opinion about the contractor's entitlement to additional cost. All matters such as this I feel should be covered in our claim letter.

"I am bothered continually with the semantics which we may be dealing in when we are
—Continued

to rock about a tunnel excavation implies a shallow seated or surface spalling of rock, such as extension failure which may occur when rock under stress "expands" in response to release of the stress. The behavior which would be associated with "deterioration or disintegration when stress relieved" would be spalling or ravelling of small pieces of rock from the excavated surface. The term "disintegration or deterioration" does not imply large scale shear fractures which have opened several inches wide, into which an arm can be thrust up to the elbow; shearing displacements of several inches on continuous fractures extending tens of feet along the tunnel; slabs six to eight inches thick and several feet in lateral dimension forming in intact rock and falling from the crown within a few feet behind the mole cutter-head; or slabs of hard rock moving several inches into the excavation below springline.

(AF 77, pp. 61, 62).

After referring to other language from Paragraph 50 of the specifications dealing with the contractor's obligation to provide a clean, undisturbed surface for placement of the lining and the fact that he might accomplish this by "applying protective coatings * * * installing subinvert tunnel protection * * * by dewatering * * * or by removing any deteriorated or disintegrated material back to clean, undisturbed surfaces," the report continues:

These statements are further representation that the deterioration and disintegration referred to in the Contract Specifications was anticipated to be a

banking heavily on the fact that * * * 'deteriorate and/or disintegrate' are in fact different from what we see as displaced material in the tunnel." (GX B, pp. 1, 2.)

surface phenomenon. It is stated that unless protective coating or subinvert concrete are installed, substantial amounts of deteriorated or disintegrated material is expected. This is a representation that the nature of the process forming the deteriorated and disintegrated material would be such that the process could be prevented by installation of protective coatings or subinvert concrete. The massive failures of the intact rock in response to overstressing such as actually occurred, would not be prevented by such simple measures.

(AF 77, p. 62).

According to the May 1973 report (AF 77),⁷⁷ the major impact of the rock failures experienced in Tunnel No. 3 in increasing the contractor's costs was the fact that rock failures occurred in the crown directly over the mole concurrent with the advance of the mole, and before the rockbolts could be installed, interfering with rockbolt installation and heading advance (pp. 69, 70). Stressed in the report were the following factors: (i) fracturing and subsequent fallout in the walls occurred ahead of the mole gripper plates at times, requiring the use of cribbing behind the plates to provide bearing for the gripper plates and thus the reaction needed for the mole advance (p. 60);⁷⁸ (ii) the major support problems and disruption of tunnel advance which developed during construction could not

⁷⁷ Included among the items of information on which the report was based were (1) the contractor's logs of geology and rock support along the tunnels, and (ii) contractor's shift reports and weekly reports (AF 77, p. 2).

⁷⁸ Problems with the gripper plates is mentioned elsewhere in the report (AF 77, pp. 35, 38 and 53).

have been predicted prior to bidding; ⁷⁹ (iii) included in the representations and inferences which could reasonably be drawn from the contract documents and related information were the Bureau's expectation that approximately 80 percent of the tunnels would require some type of support other than rockbolts; ⁸⁰ (iv) the deterioration and the disintegration to be expected would be mainly of a surficial nature; ⁸¹ and (v) all four of the low bidders contemplated using rockbolts as the support for the tunnel.

With respect to item v, *supra*, the report states at page 66:

[N]one of the support prices listed by the four low bidders is adequate to cover the cost of installing a support system such as steel ribs, shotcrete, or the Bernold system. Nor are the excavation unit prices submitted by these contractors high enough to cover this support installation. * * *

⁷⁹ "[R]ock mechanics analyses * * * prior to bidding would not have predicted the severity of failures which actually occurred, because the low strength and sensitivity to water of the siltstone/shale materials encountered in the tunnel were not known prior to bidding. In addition, these theoretical analyses would not predict the time rate of failure, i.e., they would not predict how soon and how close to the excavation face the failures would occur." (AF 77, p. 68).

⁸⁰ "[T]he Owner expected that approximately 12,220 lineal feet of the 15,249 ft. length of Tunnel No. 3 and approximately 2,680 lineal feet of the 3,312 ft. length of Tunnel No. 3A, i.e., approximately 80% of the tunnels, would require some type of support other than rock bolts." (AF 77, p. 24).

⁸¹ "[T]his deterioration, disintegration, and loosening was expected to be mainly a surficial process, such as softening due to absorption of water, and could be prevented by such means as applying a surficial protective coating such as non-structural shotcrete, by installing a concrete subinvert to protect the invert from water and construction traffic, or by draining the tunnel by collecting seepage in sumps and pumping it from the tunnel in pipes." (AF 77, p. 26)

* * * [O]f the twelve bids submitted, the four low bidders, representing some of the most experienced tunnel contractors in the country, did not anticipate the rock behavior which was actually encountered. These contractors anticipated, as did Fluor Utah, Inc., that the full tunnel length could be supported with rock bolts.^[82]

Experience in the tunnel is said to have indicated that none of the support systems contemplated by the contract plans and specifications would have adequately solved the problem which resulted from overstressing of the rock. After noting that none of the supports could have been installed earlier or faster than were the rockbolts actually used, the report concludes that each would have been subject to the same or more extensive delays resulting from large scale failures forming before the supports could be installed. This was said to be so irrespective of whether the support system chosen was shotcrete, the Bernold system,⁸³ half circle steel ribs⁸⁴ or full circle steel ribs.⁸⁵

⁸² See n.10, *supra*.

⁸³ "Even with accelerators, shotcrete requires some time to attain strength. The Specifications require that shotcrete be placed within 10 ft. of the mole dust shield or support shield. However, fractures were forming in the rock about the tunnel before the shotcrete could have been applied. Furthermore, experience in the tunnel showed that adequate shotcrete bond to the siltstone/shale materials could not be developed, particularly in the presence of free groundwater. Therefore, if used alone, neither shotcrete nor the Bernold system would have provided adequate support for a circular excavation unless they were placed over the full 360° of the tunnel perimeter, thus forming a closed structural ring. The Specifications, however, restrict the shotcrete and Bernold system supports to the upper 290° of the tunnel perimeter." (AF 77, p. 63).

⁸⁴ "Half circle steel ribs anchored with short pins at springline would not have provided adequate tunnel support. In the areas of most

Concerning the adequacy of the rockbolt system actually employed,⁸⁶ the report states:

[V]ery little serious progressive failure after excavation has occurred in the arch where resin anchored rock bolts were installed. Only in one short section near Sta 811+50, in an area of water seepage, were steel ribs installed at some time after excavation to supplement the original rock bolt system. The satisfactory behavior of the rock bolted arch indicates that progressive failure of the walls and invert could have been prevented by more extensive bolting of the walls, if such bolts had been approved by the Owner. * * * [T]he Owner refused to pay for rock bolts placed below tunnel springline. As a result, few bolts were placed below springline, and significant progressive failure and inward movement of the side walls and invert occurred following excavation.

(AF 77, pp. 64, 65).

Apropos the siltstone/shale materials encountered, the report states that where such material was encountered in the presence of free water, rock failures were particularly severe. It goes on to note, however, that failures which developed in these materials were not entirely

due to the presence of water, as was shown by the fact that failures developed where shale and siltstone were encountered in dry conditions. Cited as examples of such cases are the materials encountered at Stations 860 to 857 and at Stations 834 to 820, as illustrated in Figures 6 and 20 (AF 77, pp. 56, 57).⁸⁷

A failure in the crown occurring in the first 440 feet of moling in Tunnel No. 3 involved a fallout as much as 5 to 7 feet wide, breaking up to a thin shale seam some 2 feet above the crown, and tapering off to nothing by approximately Station 869+50. On July 1, 1971, a thick shale lens was encountered in the north (left) wall of the tunnel. On July 2, fallout began to develop in the crown as the sandstone broke to a siltstone or shale layer about 2 feet above the excavated crown. By approximately Station 857+20, at the beginning of the day on Friday, July 9, the overlying siltstone/shale dipped down into the tunnel. By the end of that day (at Station 856+75), the siltstone/shale formed the entire tunnel face except for the

severe rock failures, fallouts several feet deep occurred at the springline. Half circle steel ribs in such cases either could not be supported initially, or would have collapsed after installation." (AF 77, pp. 63, 64).

⁸⁶ See n. 74, *supra*, for a discussion of the use of full steel ribs as support.

⁸⁷ "The Contract Specifications represent that where rock bolt support of the tunnel was appropriate, adequate bolt anchorage would be attainable with either mechanical expansion anchors or slot and wedge anchors. Rock bolt pull tests and experience in the tunnel have shown that adequate anchorage could not be developed with such anchors, although rock bolts did provide adequate support. Adequate rock bolt anchorage was attained with resin anchors, an anchor not provided in the Specifications." (AF 77, p. 65).

⁸⁷ Immediately thereafter the report states:

"Major failures and fallout in the arch occurred throughout the interval from Sta 812 to 854 (Fig. 21), all in dry siltstone except from Sta. 846 to 849. Furthermore, surveys by the Contractor, the USBR, and by Brewer show that inward movements of the lower sidewalls and invert occurred in dry siltstone and shale materials after excavation, and necessitated subsequent re-mining to enlarge the excavation and provide the required thickness of final concrete lining. These movements can not be explained as a reaction to water, but must be considered as caused by rock failure and subsequent movements due to overstraining" (AF 77, p. 57).

lower few feet in the invert. Because of the continued failure of the ground at the heading, tunnel advance was halted at Station 856+16 on July 14, 1971.⁸⁸ A large rock fall (estimated 80 to 100 cubic yards volume occurred on Friday and Saturday, July 23 and 24, 1971, pulling out rockbolts anchored to the siltstone/shale. The siltstone/shale material forming the arch and walls fell out to a height of 8 feet over the tunnel, extending to the overlying sandstone (AF 77, pp. 32-34).

On November 1, sandstone bearing free water was encountered in the crown at Station 848+60. Water dripped from the sandstone. Large fallouts from the tunnel walls occurred in the siltstone/shale below the sandstone. During the night of Sunday, November 7, a large fallout in the south wall of the tunnel occurred at Stations 855+37 to 855+60, 770 feet behind the heading and blocked the rail. Heading advance was halted for 4 of the next 6 days while cleaning up and installing rockbolts and shotcrete in the fallout area. Heading advance was resumed on Tuesday, November 16 and continued to Friday,

November 19, but the progress was slow. Progressive failure in the walls was severe. Heading advance was halted at Station 846+04 on Friday, November 19, and the next week was devoted to installing additional rockbolts and shotcrete in the walls of the 200-foot length of tunnel behind the heading and in the vicinity of the November 7 fall-out near Station 855+50. Heading advance was resumed on Monday, November 29. During 19 working days from November 1 through November 30, the heading advanced only 285 feet from Station 848+63 to Station 845+78 for an average of 15.0 feet per working day (AF 77, p. 36).⁸⁹

The Bureau surveyed Tunnel No. 3 at various times during excavation to check on the alignment to which the tunnel was being excavated. In September 1972, prior to constructing the tunnel concrete lining, the contractor had the firm of Lawrence A. Brewer and Associates, Inc., Consulting Engineers of Farmington, New Mexico, to independently check the tunnel profile. The results of these surveys are shown on drawings R2093 and R2094. Both the BOR and the

⁸⁸ "[F]rom Sta. 856 to Sta. 845, when the severe rock failures were first encountered, the average rate of advance was only 11 ft. per working day. For 27 days of this time, from July 14 to August 20, 1971, tunnel advance was halted at Sta. 856+16 because of severe conditions encountered in the vicinity of drill hole DH 116. Excluding this shutdown period, i.e., during the time in which heading advance was being attempted, an average advance rate of 15 ft. per working day was achieved from Sta. 856 to Sta. 845." (AF 77, pp. 59, 60).

⁸⁹ After noting that progress had improved during the next several months, the report states:

"[A] narrow shale seam developed at springline in the vicinity of Sta 782+00 in late March. As the tunnel advanced, this shale seam continued and large wedge shaped failures and fallout occurred behind the mole. These failures extended as much as 5 ft. deep, and developed around this narrow shale seam, principally in the siltstone and fine sandstone below the shale." (AF 77, p. 37).

Brewer surveys⁹⁰ indicated that the invert of Tunnel No. 3 was high and within the 'A' line throughout most of a 10,800-foot tunnel length from Station 747 to Station 855. In general, the invert elevation measured by the later Brewer survey was higher than that measured by the earlier BOR surveys.

To determine whether or not the tunnel had been excavated above grade, or whether the high invert was a result of ground movements which occurred at some time after excavation,⁹¹ the contractor made an additional survey of Tunnel No. 3 on Feb. 3 and 8, 1973. This survey was made using a spider device developed by the contractor (AF 77, pp. 42, 43).⁹²

Respecting the movement of the invert, the report states:

[T]hroughout most of the length of Tunnel No. 3 between Sta 747 and Sta 855, the invert has moved into excavation at some

⁹⁰ "The Brewer survey indicated the invert was as much as 2 ft. high in the interval between Sta 844 and Sta 853 * * *. In other portions of the tunnel between Sta 747 and Sta 855, the Brewer survey indicated the tunnel invert was as much as 0.8 ft. above 'A' line, with substantial lengths more than 0.5 ft. above 'A' line." (AF 77, pp. 42, 43).

⁹¹ "[F]rom approximately Sta 848+50 to Sta 845+50 water from the vicinity of exploratory hole DH 116 was present on the tunnel invert during excavation. The siltstone/shale invert in this area heaved as much as 2 ft." (AF 77, p. 56).

⁹² "[T]his survey showed that the tunnel had been excavated to grade (excavation surface outside of 'A' line), except for a section from Sta 768 to 753, and a few isolated instances where the boring machine apparently was 0.1 to 0.2 ft. high for short distances. Even in most of these areas excavated high, the Brewer survey indicated the invert to be higher than the elevation at which it was excavated." (AF 77, p. 43).

time following excavation. Visual inspection of the tunnel shows a high degree of fracturing in the lower walls throughout the tunnel length with high invert, confirming the conclusion drawn from the survey data (Figs. 24, 25, and 26 are examples of such areas). Drawings R2093, R2094, and R2095⁹³ show the locations where additional material had to be removed from the invert to provide the specified thickness of concrete lining. The locations of these "tights" and descriptions of the amount of material removed and the method of excavation (chipping, spading, etc.) are shown, as recorded by both the Owner and the Contractor.

(AF 77, pp. 43, 44).

Soft invert was a problem confronting the contractor in some reaches of the tunnel. Soft invert was encountered on Apr. 21, 1972, causing the mole to sink about 6 inches. Manipulation of the mole cutterhead for repairs on April 22, caused the mole to settle further and it was 24 inches low when advance was resumed on April 24. By steering the mole upward grade was attained by the end of the day shift on April 25. It was found that a siltstone/shale lens was present immediately below the invert where the mole had been stopped for the weekend. Apparently, a bearing capacity failure developed under the mole shoe allowing the mole to settle. The upper siltstone/shale contact climbed up into the tunnel,

⁹³ "Drawings R2093, R2094, and R2095 also show the relative degree of progressive failure which has developed since excavation at different locations along the tunnels in February 1973. Figs. 34 and 35 show cases where pans in the arch have buckled after installation, due to rock movement and failure." (AF 77, p. 44).

and the invert was in siltstone/shale from approximately Station 771 to Station 769. The mole was maintained on grade until it began to settle again on graveyard shift on April 26. It continued to sink until it reached 34 inches below grade on April 29.⁹⁴ By May 4, the thickness of the siltstone/shale below the invert had begun to decrease and the mole was steered back up to grade (AF 77, pp. 37, 38).

We have previously referred to the large drawings (R2093, R2094, and R2095) which accompanied the May 1973 report (AF 77). Among the items shown on the drawings are: (i) the locations and depths of seven exploratory drill holes along the alignment of Tunnel No. 3 and of five exploratory drill holes along the alignment of Tunnel No. 3A;⁹⁵ (ii) graphs of progress in the tunnel (p. 32); (iii) the results of BOR and Brewer surveys previously discussed; (iv) a summary of geologic conditions in the tunnels;⁹⁶ (v) the correlation existing between the maximum depth of cover and the area of major fallout in the arch

during excavation⁹⁷ on the one hand and the area of significant progressive failure over a period of months⁹⁸ on the other (pp. 52, 54, 55); (vi) the fact that the rate of tunnel advance varied inversely with the number of rockbolts required to be used;⁹⁹ and (vii) the influence of ground condition encountered along the tunnel alignment upon tunnel advance.

As to item (vii), *supra*, the report states at page 39:

Ground conditions encountered along the tunnel alignment are given on drawings R2093, R2094, and R2095. These drawings show the approximate number of rock bolts installed in each 50 ft. length of tunnel, the average advance per month, and the number of days re-

⁹⁷ "As shown in drawings R2093, R2094, and R2095, the areas of continuous and most disruptive fracture and fallout in the arch during excavation, and of most extensive progressive failure after excavation, correlate closely with the area of maximum depth (of cover) over the tunnel, and presumed maximum rock stresses." (AF 77, p. 52).

⁹⁸ "As shown on drawings R2093, R2094, and R2095, observations in Tunnels Nos. 3 and 3A show that areas of significant progressive failure over a period of months correlate closely with that portion of the tunnel under the highest cover. Conversely, tunnel sections under the lower depths of cover generally exhibited little to no progressive failure following excavation. Wet areas in Tunnel No. 3A under low cover (and presumed low stress) exhibited less progressive failure than did similar wet areas under higher cover (and presumed higher stress) in Tunnel No. 3." (AF 77, pp. 54, 55).

⁹⁹ "[T]he graphs on drawings R2093, R2094, and R2095 show clearly that areas of large and continuous rock failure and fallout about the tunnel required the greatest concentration of rock bolts and resulted in the slowest heading advance. Where no rock failure and fallout occurred, as in the vicinity of 860 to 865 or in the upstream 3000 ft. of Tunnel No. 3 (Sta. 750 to Inlet Portal), rock bolt support was a minimum and progress was very rapid." (AF 77, p. 59).

⁹⁴ "[D]uring this time, as the tunnel was slowly advanced, the weak siltstone/shale material in the tunnel invert did not provide adequate bearing capacity to support the mole and allow for corrective steering measures to get the mole back up to grade." (AF 77, pp. 37, 38).

⁹⁵ "[T]he locations and logs of these drill holes were included in the Contract Documents on drawings 809-D-403, -317, -318, and -323." (AF 77, p. 7).

⁹⁶ "Detailed logs of the geologic conditions encountered in the tunnels were made by the Contractor. This information is generalized on drawings R2093, R2094, and R2095 enclosed with this report." (AF 77, p. 45).

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quired to excavate each 500 ft. length of tunnel. By comparing the description of ground conditions encountered, the number of rock bolts installed, the graphs of excavation progress, and the average advance rates, it is possible to see the influence of ground conditions upon tunnel advance.^{100]}

Developments Following May 18, 1973 Claim Submission

Following the May 18, 1973 claim submission (AF 77), the contractor continued to encounter what it considered to be differing site conditions. It notified the BOR of its intention to file claims for reimbursement and for time extensions for these conditions in due course. By letter dated June 7, 1973 (AF 82), the contractor advised the Bureau of a rock fall from the crown¹⁰¹ in Tunnel No. 3A. Six weeks later the contractor wrote the BOR about heaving of the arch in several areas of Tunnel No. 3 between Stations 812+50 and 844+50.¹⁰²

¹⁰⁰ In referring to Tunnel No. 3 almost a year before in what was described at the hearing as the Sperry/Heuer report, the authors state: "Most of the mole downtime could have been expected from a prototype piece of equipment operating in such unexpectedly adverse conditions * * *" (AX 4, p. 543).

An earlier draft of the report dealing with the same subject had stated: "Most of the mole downtime could be expected of a prototype piece of equipment" (GX YYY, III-2).

¹⁰¹ "[O]n Monday, June 4, 1973, Tunnel 3A experienced a rock fall from the tunnel crown within the reinforced section near the outlet portal. We estimate that 40 to 50 cubic yards of rock have fallen out pulling out or breaking off the rock bolts within the fallout area. A major portion of the reinforcing steel already in place was severely damaged.

"Your representative examined the damaged area immediately after the fallout happened." (AF 82, p. 1).

¹⁰² "Since Tuesday, July 10, 1973, we have concentrated on the repair of the area having

By letter dated Sept. 5, 1973 (AF 96), the BOR transmitted to the contractor two copies of Part 1 of Order for Changes No. 1. The contractor requested, however, that certain additions and deletions¹⁰³ be made to the document as submitted. The document was revised as requested¹⁰⁴ after which it was resubmitted to the contractor who accepted it subject to two stated conditions.¹⁰⁵

The Bureau responded to an inquiry concerning the status of the contractor's claims by its letter of Sept. 13, 1973 (AF 99), in which it noted: (i) that it appeared the work under the contract would be completed in November of 1973; and

the greatest displacement. The integrity of the tunnel arch was deteriorating rapidly and it was obvious that the safety of the work was in jeopardy. The section of tunnel between Station 819± and 826± is considered to require immediate repair and its repair is being undertaken prior to the removal of additional tunnel invert concrete as a safety measure." (AF 88, contractor's letter (7-18-73), p. 1).

Final placement of the arch and sidewall concrete between Stations 812+42 and 844+66 was completed on Sept. 21, 1973 (AF 101, contractor's letter of Sept. 28, 1973).

¹⁰³ The contractor requested that the reference to placing of tunnel arch and sidewall lining between Stations 812+42 and 844+46 of Tunnel No. 3 be deleted (AF 97, contractor's letter of Sept. 13, 1973).

¹⁰⁴ Order For Changes No. 1 (Part 1 of 2-Part Order) was revised as requested. The letter transmitting the revised document states:

"[T]he placing of arch and sidewall lining between Stations 812+42 and 844+46 of Tunnel No. 3 has been deleted from the items for which payment is to be made on a cost basis under this order. Payment for the concrete lining in the arch and sidewalls will be made at unit prices under Schedule No. 2 of Specifications No. DC-6849" (AF 98, BOR letter (9-13-73), p. 1)).

¹⁰⁵ See n. 62, 63, *supra*, and accompanying text.

(ii) that since a large part of the additional costs included in the May 18, 1973, claim were estimated because the work had not yet been performed, the contractor might wish to update its claim and furnish additional data for the Bureau's consideration. The letter also noted that it did not appear that the Bureau would be in a position to meet with the contractor to discuss the claim until early in December. In its letter of Oct. 2, 1973 (AF 102), the contractor noted that it was in the process of assembling and finalizing the claim material submitted with its letter of May 18, 1973, but that it was looking forward to meeting with the BOR in early December, as suggested.

Another Consultant's View of the In Situ Rock Stress Claim

Meanwhile, the contractor had engaged the firm of Don U. Deere and Andrew H. Merritt, Inc., Consultants Engineering Geology & Applied Rock Mechanics to visit Navajo Tunnel No. 3¹⁰⁶ and to evaluate¹⁰⁷ the contractor's claim of differing subsurface conditions as

set forth in its letter of May 18, 1973 (AF 77). The purpose of the visit was to inspect the cracking, slabbing and heaving of the exposed rock and buckling of some of the rock-bolted steel support pans. Also noted was the concrete invert which had been cracked by the heaving of the floor.¹⁰⁸

In a letter to the contractor dated Oct. 2, 1973 (GX Q), the consulting firm states that part of the construction and support problems encountered at Navajo Tunnel No. 3 were inherent with the use of the tunnel boring machine¹⁰⁹ and rock-bolt support method because of the weak nature and the horizontal bedding of the sandstone/siltstone,

¹⁰⁸ "Our assignment was to visit the site, to become acquainted with the geological conditions and the construction problems, to study the Contract Document and Specifications, and to evaluate the Contractor's claim of differing subsurface conditions as set forth in his letter of May 18, 1973, to the Bureau of Reclamation. This would also entail a study of the above-mentioned Matthews' report as it formed the technical basis for the claim." (GX Q, n.106, *supra*, pp. 2, 3).

¹⁰⁹ The report notes that by including the tunnel boring machine as an acceptable alternative to excavating the tunnel by drilling and blasting, the owner was obviously contemplating a potentially faster tunnelling method and an overall lower cost, as were the bidders who contemplated using that method. Thereafter, the report states:

"The geology is such that a tunnel boring machine could be expected to cut the weak rock at the site (low strength sandstone, siltstone, and shale) quite rapidly. The only question would be the other attendant problems of (1) thrust of the jacks against weak shales, (2) sinking of the machine in zones of soft and wet shale, (3) fallout of roof slabs at the heading to overlying shale bedding planes, (4) water inflows of perched water from sandstone beds resting on more impervious shales with the possibility of piping of the occasional uncemented to slightly cemented sandstone zones, and (5) difficulties in providing rapid support to the weak horizontally bedded rocks." (GX Q, n.106, *supra*, p. 4).

¹⁰⁶ Dr. Don U. Deere visited Tunnel No. 3 on Aug. 16, 1973 in the company of his colleague, Dr. Andrew H. Merritt, representatives of the contractor and Dr. R. E. Heuer of A. A. Mathews, Inc. (GX Q, letter from Don U. Deere and Andrew H. Merritt, Inc. (10-02-73), p. 1).

¹⁰⁷ "[C]onstruction problems were discussed with Mr. J. D. Davenport, Project Manager, and a variety of construction photographs, heave measurements, and daily logs of tunnel support and tunnel geology were examined. Discussions were also held with Dr. Heuer regarding his previous site visits and observations, and the A. A. Mathews, Inc., Construction Report No. 1856 of May, 1973 entitled 'Navajo Tunnels No. 3 and 3A, Tunneling Conditions.'" (GX Q, n.106, *supra*, p. 1).

shale sequence.¹¹⁰ Following this observation, the report states:

2. Over and above these problems the Contractor encountered, *deep slabbing, very rapid rock shear failure, progressive failure*, and an inordinate amount of *invert heave* of six inches to over 2 feet. These were many degrees greater than what reasonably could have been expected and were, likewise, apparently not recognized by the designers who anticipated only shallow surface disintegration and deterioration due to air, water and stress relief.^[111] The failures were caused by oversteering—i.e. large in-situ stresses and peaked-up tangential stresses in the tunnel walls with respect to the strength of the rocks involved, as explained in the A. A. Mathews, Inc. report.^[112]

¹¹⁰ "It would appear, then, that many of the problems associated with the shale and mudstone in terms of fall-out, slabbing, overbreak, jack thrust, and some invert heaving should have been anticipated by the Contractor as being inherent in the site conditions and the tunneling method selected. Thus, a part of his slower advance rate and increased cost as well as some of his concrete lining overrun set forth in his claim letter could be considered as being inherent to his tunneling method and simply an acceptable cost of doing business." (GX Q, n.106, *supra*, p. 8).

¹¹¹ "The aforementioned deep, rapid slabbing and shear failures as well as the progressive failures and intense invert heaving is certainly over and above what could reasonably have been anticipated by the bidding contractor. From the requirements of the Specifications it is also indicated to me that its nature was not recognized by the Owner's design engineers (mechanical rock bolt anchors, rock bolts above spring-line only, no shotcrete or Bernold sheet in bottom 70", no shotcrete-rock bolt combination, no steel rib-rock bolt combination, etc., protective coating, etc.)." (GX Q, n. 106, *supra*, p. 8).

¹¹² "The A. A. Mathews' report clearly and concisely brings out these points and dwells on the representations in the Contract Plans and Specifications. I am in complete agreement with their report in all aspects including the explanation of the observed behavior in terms of the oversteering effect (i.e. the ratio of the tangential stresses in the tunnel wall to the inherent strength of the rock)." (GX Q, n. 106, *supra* p. 9).

(GX Q, p. 2).

Noting that the greatest amount of problems could be anticipated and actually occurred in the shale/siltstone area¹¹³ the report undertakes to assess the extent to which the amount of such materials¹¹⁴ actually encountered in Tunnel No. 3 was equal to,¹¹⁵ or greater, than reasonably could have been anticipated from the bidding information. Concerning the portion of the tunnel where the subsurface information furnished by the Bureau was not considered to adequately indicate the conditions actually encountered, the report states:

[I]n the stretch from Sta 857-814 where the main problems were encountered the

¹¹³ "While some failure took place in the weaker sandstones at Navajo No. 3, the greatest amount of trouble was in the shale/siltstone reaches from Sta. 857-814 and Sta. 786 to 769+30. These *large reaches of shale/siltstone* are *greater* than reasonably could have been foreseen." (GX Q, n.106, *supra*, pp. 9, 10).

¹¹⁴ Concerning the anticipated ground conditions in Tunnel Nos. 3 and 3A the contractor's geologist stated in the handwritten report submitted to the contractor prior to bidding:

"Any estimate of the relative amounts of sandstone and siltstone-shale must be based largely on conjecture. However it is felt that Tunnel No. 3 will be predominantly sandstone while Tunnel No. 3A will be mostly siltstone and shale." (AX 1, p. 2). See also n.71, *supra*.

¹¹⁵ "The subsurface information available for the stretch from Sta. 786 to 769+30 is only that which can be gleaned from Drill Holes No. 51 within the reach and No. 114 about 800 feet upstream of the u/s reach and No. 115 about 1860 feet downstream of the d/s end of the reach. Within the reach the fine-grained materials were encountered primarily in the lower half of the tunnel, and these caused large problems. An interpretation and extrapolation of the data indicates that perhaps 1700 feet or 40% of the tunnel length from D.H. No. 114 to D.H. No. 115 would be in shale/siltstone rock. Actually, approximately 1670 feet were encountered. The check is obviously quite good." (GX Q, n.106, *supra*, p. 10).

check is not so good. No borings were made in the main part of this sketch, although D.H. No. 116 was just inside the downstream limit where the shale/siltstone thickness was only 5 feet. D.H. No. 115 is located about 1000 feet upstream of this reach. Thus, the distance between drill holes was 5109 feet and within this mile exists 4100 feet of bad tunneling rock consisting of siltstone, shale, and very silty-very fine sandstone.

* * * Even considering the lens-like character of the siltstone/shales etc., there is no reasonable way that the 4.7 feet of shale encountered at D.H. No. 115 and the 5.0 feet of total shale lenses in the very fine sandstone (very silty) sequence at D.H. No. 116 can be interpreted and extrapolated to give 4300 feet of poor tunneling material,¹¹⁶ susceptible to *overstress stabbing, heaving, and swelling* right under the highest part of the mesa.

(GX Q, pp. 10, 11).

In the report from which we have quoted extensively, Dr. Deere refers to the fact that he had served as a pre-bid engineering geology and tunneling consultant to one of the unsuccessful bidders on the project in question. A number of excerpts from Dr. Deere's report to the unsuccessful bidders on the 31, 1970, as contained in the consulting firm's Oct. 2, 1973, letter to the contractor. Of particular interest are the excerpts from the report to the unsuccessful bidder concerning (i) the amount of water anticipated;¹¹⁷ (ii) the level of difficulty

expected in Navajo Tunnel Nos. 3 and 3A compared to that experienced in Navajo Tunnel Nos. 1 and 2;¹¹⁸ and (iii) the relative advantages and disadvantages of using a hard rock mole. Concerning the last item the report states:

[H]ardrock Mole The Jarva, Robbins, Lawrence, etc. hardrock moles are expensive. They have the potential for 100-150 ft/day however. They also have the potential for getting stuck if a little running sand or very slabby shale falls in and envelopes [sic] them. If the bottom is soft, or the sidewalls are composed of slabby shale and/or very weakly cemented sandstone, difficulties in thrusting the machine could occur. Also, fall-out of shale from the roof will occur in certain reaches.

* * * * *

* * * [W]hen the invert is in mudstone, shale, or very poorly cemented sandstone, slush concrete or shotcrete should be placed in the invert immediately after muck and before laying haulage track. When rock in invert is clayey (mudstone or shale) and has a swell potential, rock bolts in the invert may also be desirable. The possibility of encountering such conditions in Tunnel 3 are low (est. 14%), where a substantial portion

Sloughing may occur in a few zones of very poorly cemented sandstone.

"[O]ccasional perched water may be encountered in sandstone lying over shale" (GX Q, n. 106, *supra*, pp. 4, 5).

¹¹⁸ "[C]onditions at both tunnels are expected to be more severe than that encountered in the previously completed tunnels, Navajo 1 and 2. Tunnels 3 and 3A will not only encounter more siltstone and mudstone but the cementation of the sandstones will be much weaker. The mudstone will slake and require protection and support immediately while the weak sandstones will also require immediate support. Although more easy to excavate by a machine, the weakly cemented rock gives more trouble with ground support." (GX Q, p. 5).

¹¹⁶ "[T]he bad materials occur in the roof and upper portion for 1770 feet, over the full section for 1850 feet, and in the floor only for 680 feet." (GX Q, n. 106, *supra*, p. 11).

¹¹⁷ "[I]t is expected most of the tunnel will encounter moist to dripping conditions with occasional small inflows. Total flows out the portals are not expected to exceed 100 gpm.

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of Tunnel 3A may require such treatment.¹¹⁹

(GX Q, pp. 6, 7).

*Events Surrounding February
1974 Meeting*

The parties did not meet in early December of 1973 as had been planned at one time but instead met in Denver on Feb. 7, 1974 (AF 109). In anticipation of the meeting both parties took a number of actions. By letter dated Nov. 1, 1973, (AF 104), the BOR submitted five questions to the contractor related to (i) the reasons why the tunnel boring machine used on the contract was limited to a 20-foot 6-inch diameter bore;¹²⁰ (ii) details concerning the Brewer survey;¹²¹ (iii) how the rapid and severe rock fail-

ures which occurred could be considered to be of a nature unusual in the tunneling industry in view of the statements by N. B. Bennett III in a report referred to by the contractor in the claim letter of Apr. 22, 1972 (AF 50);¹²² (iv) the conclusion by the contractor's consultant, A. A. Mathews, Inc., that the contract documents did not indicate the rock failures which occurred; and (v) the statement by the same consultants that the contract documents did not provide means for the control of the rock failures which developed.¹²³

A detailed response to the questions raised by the BOR is contained in an 11-page document which accompanied the contractor's letter of Jan. 14, 1974 (AF 110). With respect to having excavated the tunnel to a 20-foot 6-inch diameter, the contractor states:

Our evaluation of the bid documents indicated that we could excavate the tunnels within the tolerances provided by a 20-foot 6-inch diameter tunnel boring machine. Molding in this fashion

¹¹⁹ "The purpose of quoting the above fragments from a pre-bid engineering geology report is to illustrate the play-off in advantages and disadvantages of the various available tunneling and support methods for the differing geological conditions at the site. It is apparent, I believe, that many of the anticipated problems for a hard rock mole did, indeed, develop to a lesser or greater extent." (GX Q, p. 8.)

¹²⁰ "[W]hy was a tunnel boring machine purchased for this contract which was limited to excavating a 20-foot 6-inch diameter bore? Using new gage cutters, this only provided a total of 6 inches clearance to the 'A' line which was reduced appreciably when the gage cutters were badly worn" (AF 104, BOR letter to contractor (Nov. 1, 1973), p. 1).

¹²¹ "[Y]our consultant's report No. 1856 * * * refers to your survey made by Brewer in September of 1972. Our surveyors noted that in some reaches it was impossible to locate the invert of the original bore due to the muck buildup in the tunnel invert. We note that the Brewer survey of the arch is very irregular. * * * [A]dvise us how the Brewer surveys were made, and how your surveyors were sure the shots were taken on the original bored invert surface. Also, were the shots in the arch taken on the original bored surface?" (AF 104, n. 120, *supra*.)

¹²² "[I]n Mr. Bennett's paper, under Geologic Comparisons, he states that in Tunnel 1 the shale would begin dropping immediately after a new reach was exposed. He refers to the compressive effects of the cutterhead and states that after passing of the mole, the shale would almost spring into the tunnel and would continue falling unless immediately supported. In view of this and other tunneling publications, how do you support the conclusion of your consultant as stated above?" (AF 104, n. 120, *supra*, p. 2.)

¹²³ "[T]he specifications contemplated that support other than rock bolts would be required for approximately 80 percent of Tunnels 3 and 3A as shown by the bid schedules. Although the small diameter bore of the mole you selected for these tunnels precluded the use of steel supports, it appears that the contract documents are not at fault." (AF 104, n. 120, *supra*, p. 2.)

which was comparable to our performance on the Rivers Mountain Tunnel resulted in our lowering our bid by in excess of \$600,000, and provided an additional savings to the USBR on cement costs. [124]

As to the question involving the Brewer survey, the contractor stated: (i) Fluor Utah furnished a laborer to the survey party who removed muck from the tunnel to enable a reading on the bored invert; (ii) in some reaches of the tunnel where the invert had deteriorated and raveled the bored invert could not be located; (iii) with respect to such reaches a best estimate was made and used for the tunnel profile drawings; and (iv) muck build-up in the invert did not prevent finding the bored invert.¹²⁵

Some three pages of the contractor's reply addressed the ques-

tion raised by the Bureau with respect to the report of N.B. Bennett III (GX A). After noting the differences in the strength of the ground and the amount of low strength shale in the two formations involved in the comparison,¹²⁶ the reply points to some apparent contradictions in the Bennett paper from which it quotes the following:

In a tunnel driven in shaley conditions, the question is how did the shale react. The shales in both tunnels were of the compaction type and air slaked rapidly after exposure to air. Whether the shale is above or below the surface, the process of air slaking is an attempt on the part of the shale to assume stability. When a shale in a tunnel starts lying on a 1:1½-slope, the overlying rock will no longer be stable. When a sandstone is undercut by a rapidly retreating shale, it will fall. It is the large sandstone blocks which cause damage when they fall, but their falling is generally the fault of the shale.

The shales reacted the same in both tunnels in that they tried to reach stability. The difference appears in the amount of time it takes the shale to begin air slaking. In either tunnel it would generally take 1 to 2 days to begin falling, even after its initial exposure. However, once exposed, differences occurred. In Tunnel 1 the shale would begin dropping immediately after a new reach was

¹²⁴ Amplifying this view of the matter and emphasizing the Bureau's role, the document states:

"[E]nclosure 1, Fluor Utah letter to USBR dated December 7, 1970, presented our excavation and rock support methods for approval. Enclosure 2 is the USBR answer dated February 2, 1971, stating that the proposed excavated diameter appears to be adequate for meeting minimum dimensions for 'A' line thickness for rock bolt supported sections. Furthermore USBR states, 'The use of steel rib supports would require excavating to a larger diameter if normal tolerance is provided.' * * *

"* * * [N]ever did we have a bearing failure on a gage cutter as can be verified from job records. Even with ½" wear on gage cutters, excavation would be ½" outside 'A' line in the invert, the most critical point." (AF 110, contractor's answers to questions, p. 1).

¹²⁵ More specifically the contractor states:

"[I]n vicinity of Sta. 770+00 the mole bored 3 feet low and the reach was backfilled with gravel to maintain good trackage. Naturally the bored invert was not located here. The arch survey was taken in the tunnel back in 50 foot increments. Where reaches showed radical elevation changes in the back or roof mats the length of the increments was reduced as necessary." (AF 110, n.124, *supra*, p. 2).

¹²⁶ "The San Jose formation in which Navajo Tunnels No. 1 and No. 2 were driven is comparable to the Naciminto formation in which Navajo Tunnels No. 3 and No. 3A were driven in that both formations contain interbedded sandstone and shale, with groundwater perched in sandstone on top of shale. Rock of the San Jose formation is apparently much stronger than rock of the Naciminto formation. Bennett notes strengths of 5000 to 6000 psi for sandstone in the San Jose formation. Furthermore, there was apparently a much higher percentage of low strength shale materials in the Naciminto formation." (AF 110, n.124, *supra*, p. 3).

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exposed. It was believed that this was due to the compressive effects of the cutterhead.¹²⁷ After the mole passed, the shale would almost spring into the tunnel and, unless immediately supported, would continue falling.

(AF 110, pp. 3, 4).

Commenting upon the above quote, the contractor's reply states that "[i]t is assumed that the third sentence of the second paragraph quoted is in error, and that the shale began dropping immediately after exposure in Tunnel No. 1, as stated in the fifth sentence." Thereafter, the reply notes that Mr. Bennett refers repeatedly to "air slaking" but fails to clearly indicate that the problems encountered were of a nature different from air slaking. The reply also notes Mr. Bennett's observation that the shale dropping

"was believed due to the compressive effects of the cutterhead" after which it states:

Bennett does not describe the size of shale pieces which "began dropping immediately." Cutterhead contact with the ground is through the cutter bits, and consists of a small contact area at each bit. Theoretical considerations following the St. Venant's principle would suggest that the volume of ground significantly affected by each cutter bit contact area has dimensions of the same order of magnitude as the bit contact area. This would suggest that each cutter bit can break out small pieces of rock whose dimensions are also of the same order of magnitude as the bit contact area. This would suggest that each cutter bit can break out small pieces of rock whose dimensions are also of the same order of magnitude as the bit contact area—i.e., dimensions of a few inches or less. Visual observation of muck produced by tunnel boring machines, as reported by Haller, et. al. in the report *Interrelationship of In-situ Rock Properties, Excavation Method and Muck*, Sept. 1972, National Technical Information Service publication AD-751 058, indicates such muck typically is in the 1½ inch to No. 4 (0.187 inch) sieve sizes, with a significant percentage (10% or more) passing the No. 200 sieve (0.003 inches).

¹²⁷ Following this analysis, the reply states:

"Thus, in the absence of any statement by Mr. Bennett concerning the size of the shale particles which began dropping immediately after exposure in Tunnel No. 1, it would be assumed that particles which fell due to the compressive effects of the cutter head would be of the same general size as muck produced by the machine—i.e. generally 1½" or smaller in dimension. This, and the unclear differentiation between 'cutterhead effects' and air slaking, implies that the problems with falling shale at Navajo No. 1 were of the nature of small shale pieces falling in a raveling process.

"The fall of such small size pieces in a raveling process is not the problem which caused so much trouble at Navajo No. 3. Problems at Navajo No. 3 involved falling blocks six to eight inches thick and two to three feet wide. I do not see how such blocks could be formed by the compressive effects of the cutter head. If they could, why did the Navajo No. 3 muck come out in pieces of a few inches or less in dimension? Why do tunnel boring machines typically produce muck of less than 1½" dimension? Why is the attempt to produce coarser muck at a resulting lower energy consumption such an important consideration in boring machine research and development?" (AF 110, n.124, *supra*, p. 5).

Focusing upon Mr. Bennett's reference to falls in shale, the contractor's reply notes (i) that "[f]ailures at Navajo No. 3 were not confined to shale alone, but were experienced also in sandstone and siltstone, independent of the presence of shale"; and (ii) that "[f]allout, support problems, and progressive failure in Navajo No. 3 showed an excellent correlation with depth of cover, i.e., with the magni-

tude of in-situ stresses about the tunnel." ¹²⁸

Concluding the comparison between Bennett's assessment of rock failures in Tunnel No. 1 and those experienced by the contractor in Tunnel No. 3, the contractor's reply states:

Based upon the descriptions given by Bennett for Tunnell [*sic*] No. 1, and upon my observations in Tunnel No. 3 it is our conclusion that the severity of failures which occurred in Navajo Tunnel No. 3 was of a different order of magnitude than experienced in Navajo Tunnel No. 1, and was due to an entirely different failure mechanism. ^[129]

(AF 110, p. 5).

In reference to the contract documents not indicating the rock failures which developed, the contractor's consultant prefaces his remarks by noting that portions of the specifications which the BOR might claim as representing the rock failures which developed are (i) Paragraph 50, (ii) the detailed technical provisions for support items, and (iii) the support quantities in the bid schedules. After quoting from Paragraph 50, acknowledging that the bid quantities anticipated that 80 percent of the tunnel length would be supported by some means other than rockbolts

and noting that the detailed technical provisions for support items had been given in Report 1856 (AF 77), the consultant states:

The provisions of the Contract Specifications show quite clearly that the tunnel excavations were not expected to stand unsupported and without problems. These provisions, however, say essentially nothing about the nature of the anticipated support problem—i.e., rock failures—which were expected except that problems of surface deterioration and disintegration were to be expected. As discussed in some detail in Section VII B.1 and 2., pages 61 and 62 of Report 1856, the rock failures which caused problems at Navajo No. 3 could not properly be called "deterioration or disintegration when exposed to air or water or when stress relieved or a combination of the three." The ground behavior described by this phrase was observed at Navajo No. 3, but was not the major source of trouble. ^[130]

(AF 110, pp. 7, 8).

In the reply to the BOR questioning of the consultant's statement that the contract documents did not provide for control of the rock failures which developed, the

¹²⁹ The consultant describes the major problems in Tunnel No. 3 in the following terms:

"The major problems at Navajo No. 3 were related to the low strength and the extreme water sensitivity of the shale/siltstone materials, and to the falls of the large blocks of rock immediately behind the cutterhead. The problems of the shale/siltstone materials in which the most severe rock failures occurred were not indicated prior to bid because the low strength and the extreme water sensitivity of those materials was not known prior to bidding.

"Some failures in the rock about the tunnel could be anticipated by the provisions of the Contract Documents. The simple and expected occurrence of such rock failures however, was not the problem in driving Navajo No. 3. Rather, the problem was due to the nature, extraordinary extent and rapid occurrence of these failures." (AF 110, n.124, *supra*, p. 8).

¹²⁸ The reply adds that "in apparently similar rock but under lower cover (i.e. lower stresses), failures in No. 3A were less severe than failures in No. 3" (AF 110, n. 124, *supra*, p. 5).

¹²⁹ In reference to this question, the report adds: "We are not aware of the 'other tunneling publications' referenced by the USBR which describe and explain rock failures such as were experienced in Navajo No. 3" (AF 110, n.124, *supra*, p. 6).

consultant acknowledges (i) that the contract specifications did contemplate that support other than rockbolts would be required for 80 percent of the tunnel length and (ii) that the specifications provided for the use of either steel ribs, shotcrete, the Bernold system, or some combination of these items for support of this 80 percent of the tunnels. Referring to the discussion in Report 1856 (AF 77), the consultant says that experience has shown that none of the support items as provided would have adequately solved the problems of rock support which were experienced.

The reply notes that half circle steel ribs pinned at springline would not have been adequate for the reasons stated in Report 1856 (*see* n.84); that the shotcrete or the Bernold system would have been adequate only in a full 360 degree closed structural ring, which was not allowed by the specifications (*see* n.83); and that while full circle steel ribs of adequate size could probably have supported the tunnel they would not provide as much support capacity as the reinforced ground arch provided by the rockbolt system actually used (*see* n.74). Also noted were the fact that the rockbolt system installed by the contractor did prove adequate and that "most severe problems of progressive failure after excavation and initial rock bolt installation in the arch occurred below springline, where the Owner refused to pay for installation of "rock bolts" (AF 110, pp. 8-10).

Summarizing its position respecting the use of rockbolts, the consultant states:

[P]aragraph 50 of the specifications states "Where conditions in the tunnels are suitable for rock bolt supports the contracting officer will approve the use thereof." * * * USBR letter dated February 2, 1971 states that the suitability of the method of tunnel support must be determined during and following the excavating process. Further on in this letter is mentioned "Where ground conditions in the tunnels are indicated to be unsuitable for the use of rock bolt supports, other support types will be required as indicated under paragraph 50 of the specifications." Fluor Utah was never directed to use these so-called "other support types." In this same letter the USBR states that there is no objection to the use of rock bolts in any portion of the tunnel where conditions are suitable for their use. Fluor Utah considered rock bolts suitable and received revenue for rock bolts. The USBR must have also felt they were suitable or they would have required other support methods or not paid for bolts installed.^[131]

In November and December of 1973 the contractor devoted some time to the question of how the several claims should be presented. By memorandum dated Nov. 6, 1973, Subject: DH-116 Claim (GX J), Mr. B. H. Orred advised the project manager (Mr. J. D. Davenport) of the decision of the San Mateo office that a separate claim from that of the In-Situ Rock Stress Claim,¹³²

¹³¹ The portion of the BOR letter relied upon by the contractor's consultant (AF 13) has been quoted earlier in the opinion in the text accompanying n.8.

¹³² The chart entitled "Navajo 3 & 3A Progress Tabulation" which accompanied the claim letter of May 18, 1973 (AF 77), shows (1) excavation in the vicinity of DH 116 to be included in the High Rock Stress Claim for

—Continued

would be filed for DH-116.¹³³ The memorandum includes specific directions as to how costs are to be calculated¹³⁴ for both claim and reference reaches. In a memorandum dated Nov. 16, 1973, Subject: "In-Situ Rock Stress Claim," Mr. Orred wrote the project manager concerning the procedure to be employed in reworking the sum to be billed for that claim. Discussed in the memorandum were (i) the establishment of reference reaches,¹³⁵ (ii) the preparation of a construction schedule,¹³⁶ (iii) the pro-

cedures to be employed in calculating the direct costs pertinent to the reference reaches; (iv) increases in the direct costs owing to escalation not otherwise allocated, (v) professional services and (vi) indirect expenses (GX K., pp. 1-3).

In an intra-office memorandum addressed to Mr. F. B. Myers of the San Mateo office under date of Dec. 26, 1973, Subject: "Navajo Irrigation Project Claims" (GX L), Mr. Orred furnished information concerning the method being employed to establish the values of Drill Hole No. 116 and the In-Situ Rock Stress Claims. Concerning the latter claim, the memorandum states:

A reference reach will be chosen for each of the contract bid items of tunnel excavation, arch concrete tunnel lining, and invert concrete tunnel lining. The reference reach will be a section of the tunnel showing the best daily rate of advance over a consecutive number of work days. Costs of performing the work in the reference reaches will be analyzed and adjusted to reflect a true picture of costs relative to the reference period.

The entire tunnel length, except for a start-up period, will represent the claim reaches.

A construction schedule will be plotted using the reference reaches data as the standard rate of advance for the respective construction features. Canal structures, canal excavation and lining, and miscellaneous work items will be shown on the schedule in a time frame considered a reasonable period in which to perform that work.

Once the "should have" schedule is plotted and the associated direct con-

Tunnel No. 3; (ii) the Claim reach involves 10,731 feet from Station 859+72 to Station 752+41; (iii) the Reference Reach covers 3,057 feet from Station 752+41 to Station 721+84; (iv) excavation in the Reference Reach for Tunnel No. 3 averaged 185 feet per work day; and (v) the time period for excavation in both the claim and reference reaches for Tunnel No. 3 ran from July 1, 1971, to July 6, 1972.

The same stationing for the claim and the reference reaches in Tunnel No. 3 is reflected in the "In Situ Rock Stress Cost Evaluation" which also accompanied the claim letter of May 18, 1973 (AF 77).

¹³³ "To calculate the value of the claim, a reference reach will be established in an area adjacent to the claim reach. The difference in cost between the two reaches plus other associated costs will be the total amount of the claim" (GX J, contractor's memorandum (11-06-73), p. 1).

¹³⁴ For example, under the caption "Equipment Ownership and Operation," the memorandum states: "It will be necessary to recalculate the equipment ownership expense for the claim reaches and the reference reach at A.G.C. rates to conform with our treatment of equipment ownership expense for the In-Situ Rock Stress Claim * * *" (GX J, n.133, *supra*).

¹³⁵ "[R]eference reaches shall be established for each of the main features of construction, i.e., Tunnel Excavation, Arch Concrete Lining, Invert Concrete. Where necessary, reference reaches shall be set up for each tunnel" (GX K, contractor's memorandum (11-16-73), p. 1).

¹³⁶ "[A] construction schedule shall be plotted using the reference reach best rate of advance for each feature as the rate of prog-

ress. Like schedules shall be prepared using a factor of best rate of advance plus 10% and a best rate of advance plus 20% to register lessening degrees of impact for better ground conditions." (GX K, n.135, *supra*).

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struction costs assembled, a comparison will be made to the actual costs of construction. The difference [¹³⁷] or additional costs incurred will be represented on the claim billing.

(GX L, pp. 1, 2).

At the conclusion of the meeting between the parties on Feb. 7, 1974, the contractor presented costs to that date in the following categories and amounts: (i) Summary of Costs Associated with Shale-Over-excavation Main Canal Downstream of Tunnel No. 3A Outlet Portal—\$73,303; (ii) Summary of Additional Costs Associated with Conditions Differing Materially From Those Indicated in the Contract in the vicinity of DH-116—\$623,748; (iii) Summary of Costs Associated with Conditions Differing Materially From Those Indicated in the Contract Throughout Tunnels No. 3 and 3A Due to Rock Failures—\$622,876;¹³⁸ and (iv) Summary of Additional Costs Associated with

Conditions Differing Materially From Those Indicated in the Contract Throughout Tunnels No. 3 and 3A Due to Rock Failures—\$2,812,126. In the aggregate these several claims total \$4,132,053.¹³⁹

By letter dated Feb. 27, 1974 (AF 114), the contractor wrote the Bureau to summarize its position on the in situ stress claim and supplement the presentation made orally at the February 7 meeting.¹⁴⁰ The letter noted that the consulting firm of A. A. Mathews, Inc., had been engaged by the contractor when the latent conditions were first encountered in July 1971 and that that firm had been actively involved in the matter ever since.

According to the letter the conclusions reached by A. A. Mathews, Inc., included the following: (i) The low strength and extreme water sensitivity of siltstone/shale materials in which the most severe rock failures occurred were not indicated by any information available prior to bidding; (ii) the rock failures which were the major

¹³⁷ "[T]he gross difference will be reduced by those costs assigned to the DH-116 claim and the costs recovered under Change orders. To illustrate:

Actual Direct Costs Tunnel	
Excavation	\$
Less: Reference Reach Projected Costs Difference.....	\$
Less Direct Costs Previously Charged:	
DH-116 Claim	
Change orders ..	\$
Additional Direct Costs In-Situ Stress Claim.....	\$

(GX L, contractor's memorandum (12-26-73), p. 2).

¹³⁸ In the decision of Dec. 31, 1974, the contracting officer refers to this item as involving "a claim for additional costs associated with differing site conditions—canal lining," after which he states: "This claim has been settled and is not considered herein" (AF 10, p. 11).

¹³⁹ In the aggregate the claimed costs shown in the invoices transmitted by the contractor's letter of July 22, 1974 (AF 115), were in the amount of \$3,500,833. This represented a net decrease of \$631,220 from the Feb. 7, 1973, claim submission of \$4,132,053. The decrease reflects the settlement of the canal lining claim for which the amount of \$622,876 had been claimed (n. 138, *supra*) and a downward adjustment in the In-Situ Rock Stress claim of \$8,344 (from \$2,812,126 to \$2,803,782).

¹⁴⁰ In the decision from which the instant appeal was taken, the contracting officer states: "[A]t this meeting, the principal spokesman for the contractor was Don U. Deere of the consulting firm of Don U. Deere and Andrew H. Merritt, Inc., * * *" (AF 10, Findings of Fact and Decision (12-31-74), p. 9).

source of increased cost to the contractor cannot be described as simple deterioration or disintegration of the rock materials when exposed to air or water or when stress relieved or a combination of the three; (iii) the provisions for tunnel excavation and support contained in the specifications did not represent, or provide means for control of, the rock failures which developed during construction;¹⁴¹ and (iv) the severe problems resulting from the rock behavior encountered could not be predicted,¹⁴² even from a detailed rock mechanic's analysis, from information available prior to bidding (AF 114, p. 2).

The letter goes on to state that because of the unusual nature of the subsurface conditions and the resulting problems encountered, the contractor had engaged a second consulting firm to review the contract documents, the physical conditions and the reports and findings

of A. A. Mathews, Inc. Concerning this endeavor, the letter states:

The members of the firm of Don U. Deere and Andrew H. Merritt, Inc. advised us that they agree with the conclusions expressed in the Mathews' report. Dr. Deere expressed his opinions at our recent meeting in Denver. Pursuant to your request attached is a copy of a letter dated February 10, 1974, summarizing Dr. Deere's and Dr. Merritt's opinions and comments.

(AF 114, p. 2.)

Addressing a question raised at the February 7 meeting as to whether the fact the contractor had completed the tunnels in approximately the original contract schedule was some indication that the conditions were generally as represented, the contractor notes that it had contemplated completing the work in approximately 64 percent of the 1,100 days allowed for contract performance¹⁴³ and that "time of performance is not an indication of the difficulty of performance" (AF 114, p. 3).

In the decision from which the instant appeal was taken the contracting officer refers to Dr. Deere having commented¹⁴⁴ on three different

¹⁴¹ After adverting to this argument in his decision, the contracting officer makes the following comment: "[F]or steel supports the specifications allowed the placement of full circle supports as close as 12 inches clear distance between flanges and that they did not limit the size of the support except as to minimize size" (AF 10, n.140, *supra*, p. 13).

¹⁴² More than 18 months before, the authors of the Sperry/Heuer report had stated: "[T]he distribution, thickness, and length of the lenses of shale in the Nacimiento formation are quite variable and completely unpredictable. Shale lenses have been observed in the tunnel wall to grow from zero, to 10 feet thickness and then thin to zero thickness, all within 150 feet along the tunnel. Shale lenses have dipped down into the tunnel and grown to thicknesses of over 20 feet within 100 feet along the tunnel. It is not possible to predict lithology ahead of the tunnel because of the discontinuous lensing, and because of facies changes parallel to bedding." (AX 4, p. 540).

¹⁴³ "[W]e had contemplated completing the work in 700 calendar days, which was approximately 64% of the 1100 days allowed for completion of the Contract work. In actuality we completed the work except for the concrete lining of the canal, in 1175 calendar days. The Contract completion date has been or will be extended 600 days because of changes, changed conditions, labor disputes and the like. The actual time to complete the work represents 66% of the total Contract time as properly extended." (AF 114, contractor's letter (2-27-74), p. 3).

¹⁴⁴ The contracting officer notes that Dr. Deere's comments at the meeting were subsequently confirmed by a letter to the contractor
—Continued

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questions¹⁴⁵ at the meeting of Feb. 7, 1974. The questions and Dr. Deere's answers to them as summarized by the contracting officer in his decision are set forth below:

a. *Are the geologic materials encountered in the "reference reach" typical?*—To this question Dr. Deere expressed the opinion that the reference reach¹⁴⁶ contained better rock than the rest of the tunnel but because of operational problems¹⁴⁷ encountered in this reach the progress actually made might be considered a reasonable compromise figure for the representative rate.

b. *How much "flaking" and "invert heave" should have been expected?*—Dr. Deere summarized his answer to this question by stating that we would expect some troublesome but minor problems of air slaking, deterioration, and invert heave in 15–20 percent of the tunnel.

c. *What facts evidence a "material" difference in the site conditions and of an*

dated Feb. 10, 1974 (AF 10, p. 10). A copy of Dr. Deere's Feb. 10, 1974, letter accompanied the contractor's letter to the contracting officer dated Feb. 27, 1974 (AF 114).

¹⁴⁵ The questions as set forth in the contracting officer's decision are identical to those addressed in the Feb. 10, 1974, letter to the contractor from the consulting firm of Don U. Deere and Andrew H. Merritt, Inc. The opening paragraph of that letter states: "We have been asked by your attorneys to address ourselves to the following three questions" (AF 114, consultant's letter (2–10–74), p. 1).

¹⁴⁶ "The reference reach is a 3,057-ft long stretch that extends from Sta. 752+41 to the upstream end of Tunnel 3 at Sta. 721+84. Through this reach the rate of advance averaged 185 ft/day. The contractor is of the opinion that had the geologic conditions been as anticipated, he would have averaged at least this rate throughout the tunnels." (AF 114, n. 145, *supra*).

¹⁴⁷ The operational problems in the reference reach are identified as consisting of "(1) longer haulage than average (13,500 ft), (2) working with tunneling machine and trailing equipment that had been damaged by fallouts in prior extensive areas of poor rock, and (3) damage to the power supply system, possibly by lightning" (AF 114, n. 145, *supra*, p. 2).

"unusual nature"?—This question was divided into two portions by Dr. Deere; namely, the behavior¹⁴⁸ and the amount of shale/siltstone.

(1) Relative to the "*Observed behavior of the shale/siltstone*"¹⁴⁹ Dr. Deere listed four items which he had observed on August 16, 1973, or had been reported to him; these were:

(a) Deep curved shear planes occurring at the walls and in the crown of the tunnel.

(b) Large blocks of rock falling out of the face and roof onto the machine.

(c) Progressive movements in the crown causing buckling of the rock-bolted steel pans and in the sidewalls causing deep slabbing and later fallouts.

¹⁴⁸ The Government's position as stated at the July 24, 1974 meeting was that "nearly all of the major Rock failures that occurred in the tunnel appeared to be due to causes which could be reasonably anticipated from the contract documents. These included rock failures associated with bedding planes, failures of the sidewalls due to pressure from the grippers on the mole, wetting of the water-sensitive siltstone/shale formations, softening of the invert aggravated by the sliding action of the front shoes on the mole, and breakage from running the front-end loader into the tunnel walls." (AF 10, n. 140, *supra*, pp. 11, 12).

¹⁴⁹ Concerning rock failures reported by the contractor, the contracting officer states:

"Mr. Sperry described the failures as 'Failures through intact rock and along existing joints, or along or to existing bedding planes, or where joints and bedding planes came to a feather edge in the excavated opening * * *'. He described one crack wide enough to insert his arm past the elbow which was 3 or 4 inches wide at his fingertips. He also described offsets forming in the rock bolt holes. The Government has been unable to verify these or similar reports by contractor personnel. From the observations of conditions by Government personnel, rock failures in the tunnel were not significant in total extent and in effect upon construction. * * * [C]onsiderable removal of material was required from the tunnel because of alignment deviations exceeding the tolerance limitations of the specifications. These were caused by the fact that the contractor chose to utilize a mole which excavated less than the full dimension of excavation included within the pay lines (or 'B' lines) specified in the contract." (AF 10, n. 140, *supra*, p. 12).

(d) Progressive heave of the invert of 1 foot-2 foot.^[150]

* * * * *

(2) Relative to the "amount of shale/siltstone," Dr. Deere states that two stretches of the tunnel produced construction problems. At one of these, the amount of shale/siltstone encountered agreed well with the amount that could be predicted.^[151] The other stretch was from station 857 to station 814 where Dr. Deere states: "Even considering the lens-like character of the siltstone/shale, etc., there is no reasonable way that the 4.7 feet of shale encountered at drill hole No. 115 and the 5.0 feet of total shale lenses in the very fine sandstone (very silty) sequence at D.H. No. 116 can be interpolated and *extrapolated* to give 4,300 feet of poor tunneling material, susceptible to *overstress slabbing*, *heaving*, and *swelling* right under the highest part of the mesa."

(AF 10, pp. 10, 11).

The parties met again on July 24 and 25, 1974, but failed to reach an agreement on any of the claims still outstanding (AF 116). At that time, however, the contractor was furnished copies of drawings (mappings) of Tunnel No. 3¹⁵² and Tunnel No. 3A¹⁵³ made by the

project geologist, Mr. Kenneth Cooper. Commenting upon the significance of these drawings, Government counsel states:

[E]xhibit A-87, Sheets 1 through 9, which is the Bureau of Reclamation's geologic tunnel mapping is the only evidence in the record which indicates station-by-station where fallout occurred and the nature of the fallout.

* * * * *

This tabulation clearly shows that there were only two stationings where fallout was observed by Ken Cooper, the geologist who did the mapping, which show fresh fracturing associated with the fallout * * * As shown on the tabulation, the fallout from all causes totalled only 3,610 feet of the entire length of the tunnel. Now witnesses testified that they observed fallout associated with fresh fracturing presumably attributed to over-stressing or stress relief, and also observed fallout at bedding planes which were attributed to other causes.

It is the fallout attributed exclusively to over-stressing which fell out rapidly with which we are concerned in this appeal. When one examines Exhibit A-87, it is apparent that there was a great deal of interbedding between the sedimentary rock formation of shale, siltstone and sandstone. There is no other exhibit or testimony which so precisely identifies the exact locations within the tunnel where rock fallout occurred. We submit for that reason that it is the best evidence.

* * * * *

* * * [T]he fallout which occurred from all causes cover approximately only 3,600 feet in Tunnel 3, not the nearly 11,000 feet Appellant alleges. Of this 3,600 feet, approximately 900 feet of the failures are associated with fresh fracturing, apparently the result of stress relief, and by Appeal File Ex. 77 only around 500 feet are characterized as major fallout.^[154]

¹⁵⁴ Appellant's counsel states:

"The Government's characterization of drawings R2093, R2094 and R2095 in Appeal
—Continued

¹⁵⁰ Concerning the observed failures, the letter from the consulting firm states:

"None of the support measures would have prevented the deep cracking, slabbing, and loosening—including the circular steel ribs. The rock bolts, shotcrete, Bernold sheets, and much of the steel rib support did not cover the lower 70% of the tunnel and would not have prevented the wall movement, rib fall-out, and invert heave. The emphasis in the specifications was on shallow, surficial disintegration which would require protective coatings and protection from falling rock blocks." (AF 114, n. 145, *supra*, pp. 4, 5).

¹⁵¹ The stretch in question was from Station 786 to Station 769+30 (AF 114, n. 145, *supra*, p. 5). See n. 115, *supra*.

¹⁵² AX 87 (1), (2), (3), (4), (5), (6), and (9) describe or portray the conditions encountered in Tunnel No. 3.

¹⁵³ AX 87 (7) and (8) describe or portray the conditions encountered in Tunnel No. 3A.

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(GPB 84-88).

According to the Government's brief the drawings show that a total of 900 feet¹⁵⁵ of Tunnel No. 3 involves "Fallout Associated With Freshly Fractured Rock" and that an additional 2,710 feet¹⁵⁶ of that tunnel involves "Fallout Not Associated With Freshly Fractured Rock."

After contrasting the Government's present position with that

File Exhibit 77A as showing only 550 feet of fallout is totally improper. The claim reach in Tunnel No. 3 starts at 859+72 and extends to 761+90 (the adverse effects continued to 752+41). On drawing R2094, 'continuous fallout' or 'nearly continuous fallout in crown' is shown from approximately 859+72 to 810+50 and from 807+00 to the left margin. On drawing R2093 overbreak or fallout is shown from the right margin to 761+90, except for two short stretches near 784+00 and 790+00. Drawing R2095 shows continuous fallout or cracking or intermittent fallout or overbreak throughout the claim reach in Tunnel No. 3A which starts at 987+68. Note that these failures are identified as 'Rock Failures During Excavation' and that further up the drawings 'Progressive Failure After Excavation' is shown." (ARB, 22, 23).

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Station to Station	Length in Feet	Exhibit
839+00 to 833+00	600	AX 87(5)
791+00 to 788+00	300	AX 87(3)

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Station to Station	Length in Feet	Exhibit
859+20 to 859+00	20	AX 87(6)
858+75 to 858+05	70	AX 87(6)
857+86 to 857+45	41	AX 87(6)
856+90 to 856+50	40	AX 87(6)
856+50 to 855+50	100	AX 87(6)
855+50 to 854+00	150	AX 87(5)
854+00 to 851+00	300	AX 87(5)
846+15 to 845+55	60	AX 87(5)
844+70 to 844+45	25	AX 87(5)
843+50 to 842+00	150	AX 87(5)
829+40 to 829+00	40	AX 87(4)
823+50 to 823+25	25	AX 87(4)
820+81 to 820+50	31	AX 87(4)
819+50 to 810+50	900	AX 87(4)
800+00 to 795+50	450	AX 87(3)
788+00 to 786+50	150	AX 87(2)
764+13 to 763+25	88	AX 87(1)
762+50 to 761+80	70	AX 87(1)

2710 feet

maintained by it up to the time of the hearing,¹⁵⁷ appellant's counsel states that "the table at GPB 85 is an incomplete and thus inaccurate characterization of the references and mappings in Mr. Cooper's drawings of freshly fractured rock"¹⁵⁸ and that "the Government's table omits fractures noted or mapped or both"¹⁵⁹ (ARB, p. 23).

¹⁵⁷ "Until the hearing * * * the Government had steadfastly maintained that it had * * * been unable to verify these * * * reports by contractor personnel * * * of rapid shear fractures through intact rock and that the few failures which the Government conceded had occurred were the result of bedding planes, wetting or * * * running the front-end loader into the tunnel walls.' (Findings of Fact and Decision by the Contracting Officer, Appeal File Exhibit 10, paragraphs 26 and 27). * * * [T]he Findings of Fact is dated December 31, 1974 which is a year and one-half after Mr. Cooper completed his drawings (Exhibit 87) which showed extensive fracturing of the type reported by Appellant.

* * *
"In contrast to the Government ambivalence, Appellant has consistently maintained both the existence of rapid, shear fractures through intact rock and the position that these were changed conditions. (E.g., Appeal File Exhibits 19 and 77; Exhibits 5 and 20)." (ARB, 21, 22). See also n. 148, *supra*.

¹⁵⁸ In the Remarks Section pertaining to the 450-foot stretch between Stations 800+00 and 795+50, the project geologist states in three different places that the fallout in the roof resulted from separation of planes of lamination and bedding and occurred immediately on removal by excavation of the underlying supporting rock.

In two of such places, however, the project geologist adds the comment: "Many fresh fractures are present in the sandstone near invert" (AX 87(3)).

¹⁵⁹ Fractures at the stations listed below are said to have been omitted:

Station to Station	Length in Feet	Exhibit
770+50 to 778+00	750	AX 87(2)
820+00 to 822+50	250	AX 87(4)
824+00 to 825+00	100	AX 87(4)
827+00 to 831+50	450	AX 87(4)
832+50	---	AX 87(4)

1550 feet

The drawings (AX 87)¹⁶⁰ also include the project geologist's assessment of the various causes of delay which impeded contract performance, as is reflected in his comments in the exhibit.

By letter dated Aug. 7, 1974 (AF 116), the Bureau advised the contractor that any additional documentation or written information which it wished to have considered in the findings of fact should be submitted as soon as possible. In its response of Sept. 30, 1974 (AF 118), the contractor supplemented the written record with respect to the observations made by Mr. T. W. Greene and Mr. P. E. Sperry, concerning their experiences on the project. The letter also contains a listing of what are characterized as ultimate facts on which the in situ stress claim is based which may be summarized as follows: (i) Curved shear planes occurring at the walls and in the crown of the tunnel formed to a great extent through virgin rock;¹⁶¹ (ii) large blocks of

rock fell out of the face and roof onto the mole and which had been formed by the deep shearing and had surfaces corresponding to the deep curved shear planes; (iii) progressive movements in the arch caused by shear failures, deep rock movements, and creep associated with overstressed rock; and (iv) progressive invert heave.¹⁶²

Part II—Entitlement

A. Testimony of Appellant's Witnesses

1. Summary of Testimony of P. E. Sperry

(Tr. 22-187, 1279-1376)

Mr. P. E. Sperry was the project manager for the contractor at the time boring of Tunnel No. 3 commenced on May 13, 1971, and he continued in that capacity until after excavation of Tunnel No. 3 was

which were observed at depths of one to four feet. They were formed to a great extent through virgin rock although the upper side of some coincided with existing bedding planes. They formed very quickly and almost simultaneously with the cutting head, before any type of rock support could be placed." (AF 118, contractor's letter (9-30-74), pp. 1, 2).

¹⁶² Immediately after the statement of the ultimate facts on which the claim is based, the letter adds:

"[O]n the basis the foregoing facts, our consultants, Dr. Don U. Deere, Dr. Andrew H. Merritt and Dr. Ron Heuer have concluded:

"(1) While some slabbing to pre-existing bedding planes could have been anticipated by a contractor bidding on the project, the behavior actually encountered was not and could not have been contemplated. Such behavior is unique and extraordinary and in the experience of Dr. Deere had occurred only before at the Nevada Test Site.

"(2) None of the support measures specified could have prevented the deep cracking, slabbing and loosening, including circular steel ribs." (AF 118, n.161, *supra*, p. 2.)

¹⁶⁰ With respect to Tunnel No. 3A, neither the Government's posthearing brief nor the appellant's reply brief show (i) any fallout associated with freshly fractured rock, or (ii) any fallout not associated with freshly fractured rock. Examination of the drawings pertaining to Tunnel No. 3A discloses, however, that out of 22 remarks columns applicable to this tunnel, some 11 cases of fallout are reported of which ten are from the roof and one from the left wall. In addition, some 14 cases of fractures in the roof are reported. The project geologist does not report any instances of freshly fractured rock, however, nor does he note in any case that fallout in the roof occurred immediately on removal by excavation of the underlying supporting rock (AX 87 (7) and (8)).

¹⁶¹ More specifically the letter states:

"(1) Deep, curved shear planes occurred at the walls and in the crown of the tunnel

completed on July 6, 1972.¹⁶³ Following award of an M.S. in Civil Engineering Construction degree from Stanford University in 1961, Mr. Sperry went to work for Utah Construction and Mining Co., which subsequently became the construction division of the contractor. He continued with the contractor in various capacities¹⁶⁴ until 1968, when he became the project engineer on River Mountains Tunnel. This was the first mole job that the contractor had.

Mr. Sperry personally prepared the bid estimate¹⁶⁵ for the underground work for Tunnel Nos. 3 and 3A, with some assistance from Mr. Welton, which included under-

ground excavation and concrete. Prior to preparing the bid estimate, Mr. Sperry had been part of a pre-bid site investigation team which included the Chief Engineer and the company geologist. The contractor personnel investigating the site were shown the job by Mr. John Rogert of the BOR. Either by himself or together with the company's geologist (Mr. J. J. Hayes), Mr. Sperry looked at a number of things including (i) the rock cores from the exploratory holes; (ii) outcroppings of rock on the site; (iii) the plans and specifications; (iv) the portals of Navajo Tunnel Nos. 1 and 2; and (v) the mole used on Tunnel No. 1. Mr. Sperry sent for and obtained the materials and foundations report referred to in the specifications. He read the Bennett paper (GX A), two articles appearing in *Western Construction* and the report prepared by the company's geologist, Mr. J. J. Hayes (AX 1).

In preparing the bid estimate Mr. Sperry did not consider the depth of overburden (cover) over the tunnel, since in his experience up to that time overburden was not normally considered in a rock tunnel. It was contemplated that mechanical expansion anchors would be used for the rockbolts and that if problems developed they would employ tandem anchors which had been used successfully at River Mountains Tunnel. In performing the contract, however, it was necessary to use resin anchors. Initial problems with this type of anchor were

¹⁶³ Mr. Sperry came to the project in mid-Dec. of 1970, and left the project at the end of Aug. in 1972 (Tr. 33, 34). By that time the excavation of Tunnel No. 3 had been completed (AX 87(9)). At the time of Mr. Sperry's departure, the excavation of Tunnel No. 3A and the placement of concrete in Tunnel No. 3 were just getting underway (Tr. 105, 128; GX AAA (21); GX LLL (8-17-72)).

¹⁶⁴ See AX 88 for a resume of Mr. Sperry's education and experience.

¹⁶⁵ At an earlier time, he had helped prepare the bid estimate for River Mountains Tunnel. In a report prepared about that tunnel following excavation, Mr. Sperry states:

"Many people thought the rock was too hard to mole and, by leaving 34% on the table, doubts were raised that the bid included an adequate allowance for the possible difficulties involved with this method of excavation * * *. Rock, that was harder than expected, was molded; the unforeseen problems were minimized; and the tunnel was holed-through on schedule, nine months later, at a cost somewhat below the contractor's estimate." (GX G, 11-1).

River Mountains Tunnel was moled in an extrusive volcanic rock that varied from soft to hard, one thousand psi to 23,000 psi being estimated. The 12-foot diameter tunnel was 4 miles long and required support for 800 feet. The only support used was rockbolts, all of which were placed in the very soft rock. (Tr. 31-33).

overcome by changing the mix, using a larger rebar and mixing the resin more thoroughly.

In Mr. Sperry's view the contract indicated that the tunnels could be supported to a large extent without rockbolts or other means of artificial support. The bid was based on the use of a Jarva mole. Because the configuration of this mole would not permit getting the rockbolts just behind the dust shield or close to the face of the tunnel, the bid included an allowance for providing a temporary tunnel support over the mole (TETSOM). The provision for TETSOM was considered necessary, as it was estimated that in some portions of the tunnel the standup time would not be over 50 feet.

In fact, however, Tunnel Nos. 3 and 3A were both excavated by using a Dresser mole. The lesser number of grippers on the Dresser mole permitted better working access to support the rock very close to the dust seal and consequently there was no need to use TETSOM with the Dresser mole.¹⁶⁶ Both the Jarva and the Dresser moles had fixed cutter heads (*i.e.*, the head could not be adjusted to make a larger or smaller excavation as is the case with moles having variable size cutter heads). The Dresser mole was used in conjunction with a laser system which was designed to keep

the moling machine on line and grade.

It was contemplated that some water and moisture would be encountered in the tunnel and the bid estimate did include some time for rock support, some delay time and this covered the fallout anticipated from water.¹⁶⁷ The contractor did not anticipate fallout¹⁶⁸ or failures occurring, however, through virgin rock and in good sandstone.

Mr. Sperry noted that after moling began in May of 1971, some fallout occurred in the arch which had not been expected but that by late June, equipment problems had been solved, the contractor had gone to three shifts and the crews were broken in. The last 3 days in June, the contractor had averaged 160 feet a day which was a very good progress in the ground, as had been anticipated. Commencing in July shale seams appeared on the left rib and there was some fine material that the contractor could not anchor bolts in. Then water was encountered in some of the drill holes and as the tunnel progressed

¹⁶⁷ Noted by Mr. Sperry was the fact that the materials test, the supplement to the plans and specifications that was sent for (GX U), indicated that the sandstones were highly water reactive and that in performing the contract it was not the sandstones but the siltstones slash shales which were highly reactive to water (Tr. 64).

¹⁶⁸ Concerning the type of fallout anticipated when the bid estimates was being put together, Mr. Sperry states:

"We anticipated fallout in the siltstone, the weathering, the air slackening [*sic*], that sort of thing."

Fallout was also anticipated at the contact between two different types of material "but the depth of the fallout * * * several feet up there * * * is not the earth type of fallout that we expected" (Tr. 72, 73).

¹⁶⁶ A shield was not considered necessary when contractor started moling. The rock had enough stand up time and the rockbolt grips were up close to the dust seal and they could be tilted forward to support the rock within about 4 to 6 feet behind the dust seal (Tr. 167).

into more and more siltstone, the contractor had to shut down in order to attempt to support the tunnel. The rockbolts used did not hold, and there was about an 80-yard fallout with the result that the job was shutdown for over a month. It was at that juncture that the contractor sought and obtained assistance from the engineering consulting firm of A. A. Mathews, Inc.¹⁶⁹ The consulting firm advised the contractor both orally and in writing concerning the measures that should be taken (AX 5; AF 36) and provided a detailed analysis of the In Situ Rock Stress Claim (AF 77).¹⁷⁰

In commenting upon Drawings R2093 and R2094—they had accompanied the May 1973 report (AF 77)—Mr. Sperry noted that the drawings were a kind of summary of the excavation progress and the conditions encountered during the excavation of Tunnel No. 3. In testifying, Mr. Sperry worked with the profile to the bottom of the page of the particular drawing, since the progressive failures after excavation, the survey of invert elevation and other matters shown above the profile relate to events which occurred after Mr. Sperry had left the job.

¹⁶⁹ It was to this firm that Mr. Sperry went when he left the employ of the contractor in late Aug. of 1972. Mr. Sperry remained with the Mathews firm for 14 months, after which he joined the firm of Foster-Miller Associates, Inc., and then became a private tunnel consultant (AX 88).

¹⁷⁰ It was a member of the A. A. Mathews firm that Mr. Sperry assisted in the preparation of the May 1973 report to the contractor (AF 77).

Summarizing job progress as shown on the above-referenced drawings, Mr. Sperry states that the very rapid progress achieved in late June of 1971, did not continue and that as the contractor approached DH 116 more and more problems were encountered. In that area water dripped from sandstone several feet above the crown (dripped from rock bolt holes and fallout zones). The drawings show that very little progress was made between mid-July and mid-October of 1971. In addition to a strike and a labor vacation which delayed progress, there was no mole advance between July 14 and Aug. 20, 1971, a time when a program for support of the tunnel was being developed. Beginning in mid-October matters improved until about mid-November. From then until about the first of December, the contractor went through a second wet area where the sandstone came down to about spring line.¹⁷¹ The mole progressed a little better in December. From Jan. until about Apr. 10, 1972, excavation proceeded fairly well. While the fallout continued, there were several sections as shown on the "rock failures during excavation bar" with little fallout. In the middle of April, the contractor encountered some soft invert and the mole got several feet low but by early May, it was back on grade. By about June 1, 1972 (as shown by the drawings "rock failures during ex-

¹⁷¹ The second wet area was identified by Sperry as being in the vicinity of Station 847 plus or minus (Tr. 85).

cavation bar"), there was very little fallout and this continued for the rest of Tunnel No. 3.

Addressing the question of how the failures and fallouts slowed down progress, Mr. Sperry stated that just as soon as the arch was excavated the failures started to occur and that what fell on the mole buckets didn't bother much but the rock that fell behind the dust seal of the mole came down and piled up on that part of the mole where the contractor later put a shield.¹⁷²

In the vicinity of Station 821+00, Mr. Sperry saw extensive failures in the rib area ahead of the grippers. Cracks were between the tunnel face and the grippers. The distance between the tunnel face and the forward edge of the grippers was 20 feet but the forward laser target was about 5 or 6 feet behind the heading and the cracks extended into this area. These cracks were pointed out by Mr. Sperry to the inspector and to Mr. Lincoln and Mr. Rogert of the Bureau.

A sketch showing the failures described (AX 9) was drawn by Mr. Sperry. In his comments, Mr. Sperry emphasized (i) that the rock falling out always broke to curved surfaces away from the heading; (ii) that the failures he described were through virgin rock unless a parting between different rock types was involved in which case the failures would be through

the virgin rock and through the parting; (iii) that sometimes failures occurred along the trailing floor or even down behind the trailing floor, which would be 500 feet, or more, behind the heading; and (iv) that there were offsets involving failures in the lower sidewalls. Mr. Sperry referred to one Saturday in January of 1972, in which he saw a large crack in the invert—3 feet to the left of centerline—so large he put his arm down to try to feel the bottom of it. As the crack was curved, Sperry could not get his arm down all the way but he did get his arm down as far as his elbow.¹⁷³

The direct examination of Mr. Sperry concluded with him noting that for the last 161½ days of the excavation, the mole had averaged 185 feet per day. This rate of advance (in what the contractor has called the reference reach) was achieved even though the section of the tunnel involved had the longest haul time, with the haulage delays averaging 12 percent of the scheduled time.

On cross-examination, Mr. Sperry stated that Tunnel Nos. 3 and 3A

¹⁷³ The crack in the invert to which Mr. Sperry testified was at Station 821+00 plus or minus (Tr. 95-96). The section involving failures ahead of the grippers was in the same general area (Tr. 96, 97).

On Voir Dire with respect to AX 9, the following colloquy occurred:

"Q. Now, are the rest of the things that you depict on Exhibit No. 9, in a general sense, rather than a specific stationing?

"A. Yes. These failures extended from the whole claim reach less the sections where there weren't failures. There were one or two sections noted here as little overbreaks or fall-out." (Tr. 97).

¹⁷² Sperry thought the shield was installed on the mole in Aug. or Sept. of 1971 (Tr. 77). In fact, the shield was not installed until Oct. 5, 1971 (n.53, *supra*).

were quite similar to Tunnel No. 1,¹⁷⁴ and that 44 percent of Tunnel No. 1 was supported with steel.¹⁷⁵ With respect to Tunnel No. 1, he noted that because of the configuration of the mole the contractor concerned could not get rockbolts in around the mole and could not get anchorage of their rockbolts. Mr. Sperry agreed that the mole used in Tunnel Nos. 3 and 3A had a fixed cutter head, as contrasted with the mole used in Tunnel No. 1 which had several variable head sizes.¹⁷⁶ While he was of the opinion that the Tunnels Azotea,¹⁷⁷ Blanco,¹⁷⁸ and perhaps Oso¹⁷⁹ had been bored

with moles having variable head sizes, he stated that it was not common to have variable head sizes and that the more recent moles have not been built with variable size cutter heads.

While agreeing that the contract indicated that approximately 80 percent of Tunnel No. 3 would require support other than rockbolts, Mr. Sperry had thought it a bit odd that the Bureau contemplated so much of the support required would consist of other than rockbolts. As to the statement in Paragraph 50 of the Specifications,¹⁸⁰ about Government testing indicating that "many of the sandstones, shales and siltstones to be excavated will deteriorate or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three," Mr. Sperry said that in the context of the paragraph the references to "deteriorate" and "disintegrate" clearly referred to superficial things and not to the deep cracking that had occurred in Tunnel No. 3.

After Mr. Sperry left the employ of the contractor in late Aug. of 1972, to join the engineering consulting firm of A. A. Mathews, Inc., he assisted in the preparation of the May 1973 report (AF 77). In that role he had corresponded with Fluor Utah's Mr. R. Hungett, Vice President of Construction. In a letter dated Apr. 6, 1973 (GX B), Mr. Hungett stated that the words

¹⁷⁴ Mr. Sperry recalled the company's geologist, Mr. Hayes, saying that they were quite similar. He had read Mr. Hayes' report (AX 1) before Fluor Utah's bid was submitted (Tr. 104, 105).

¹⁷⁵ The contractor could have erected steel supports in Tunnel Nos. 3 and 3A, but they would have encroached on the "A" line. Mr. Sperry acknowledged that the contractor had taken a calculated risk in assuming that all of the support problems could be cared for by using rockbolts (Tr. 107, 108).

¹⁷⁶ Tr. 108. The Final Construction Report for Tunnel No. 1 states:

[T]he machine can bore diameters of 19 feet 10 inches, 20 feet 10 inches, and 21 feet 2 inches (GX KKK, Appendix, p. 9).

¹⁷⁷ The Final Construction Report on Azotea Tunnel states:

"Rock bolt installation in the test section was conducted using the tunnel bore established for the steel support section (13-foot, 3-inches diameter) from Station 1273+94 to 1260+20.2. At Station 1260+20.2 the contractor reduced the bore diameter to 12 feet 6 inches which was the normal size for a rock-bolt supported section." (GX QQQ, p. 48).

¹⁷⁸ The Robbins tunnel boring machine used in Blanco Tunnel permitted the diameter of the tunnel excavation to be varied from 9-feet 11-inches to 10-feet 7-inches (GX SSS, p. 45).

¹⁷⁹ The Final Construction Report on Oso Tunnel shows that excavation of the tunnel started using a bored diameter of 10-feet 7-inches but that later the cutter head was reduced to a diameter of 10-feet 2-inches (GX RRR, pp. 53, 65).

¹⁸⁰ See Appendix for the provisions of Paragraph 50 and of Clause 4 of the General Provisions ("Differing Site Conditions").

"stress relieved" appearing in the report bothered him in view of what the company was trying to accomplish but that since the words were quoted from the specifications he guessed there was nothing else the company could do.

Upon his prebid site visit, Mr. Sperry saw the layers of shales, siltstones, and sandstones by the portals and concluded that there was a very slight dip to the east. He agreed that the formation in the layers would continue into the mountain and that as the contractor bored into the mountain these layers of different material would intersect right at the circumference of the bore.¹⁸¹

Prior to selecting the Dresser mole¹⁸² for use in the tunnels, Mr. Sperry visited construction jobs where moles were being used and observed the boring machines in operation. The contractor had had direct experience with the Jarva mole on the River Mountains job. In preparing the bid on the instant project, the contractor obtained

¹⁸¹ Where the material changed the contractor could expect to experience rock falls and failures. (Tr. 127). It is not easy to discern where materials intersect in a moled tunnel, however, as is shown by observations made with respect to Tunnel No. 1:

"[O]nly in the portion of tunnel excavated by conventional methods are joint and bedding planes readily visible. The relatively smooth surface of the machine-bored tunnel makes such features difficult to discern. Moreover, a coating of silt and clay plastered on the tunnel surface by action of the machine obscured, and in some places perhaps obliterated, traces of joint planes." (GX KKK, Appendix, p. 10). To the same effect, see GX A, p. 3).

¹⁸² The mole selected was a prototype mole. It was the first mole manufactured by Dresser Industries and had originally been designed for hard rock (40,000 psi) with a 16-foot bore diameter (Tr. 129, 130).

specifications on other moles besides the Jarva mole including those for the Caweld, Lawrence, and Robbins moles.

Further details were elicited on cross-examination as to how the laser system used for guidance of the mole was intended to function and how it had functioned.¹⁸³ Mr. Sperry testified that there were two targets on the mole, the forward target indicating where the cutterhead was and the rear target indicating the direction the mole was steering in; that the mole operator was approximately 10 feet from the rear target and 18 to 20 feet from the front target; that the operator observes where the light is on the front target and positions the mole cutterhead so that he's steering with the spot in the forward target in the center; that the target the operator is required to observe is 8 inches by 10 inches and that he's expected to keep the laser beam in half-inch radius, one inch circle and that's in the center of the target; that the tolerance allowed for the mole going around the circumference was one inch at the bottom of the invert; and that sometimes the mole would get off line and grade more than an inch and cause tightness in the tunnel.¹⁸⁴

¹⁸³ With the laser system used to guide the mole, it was possible for the mole to get off line and grade. One reach of Tunnel No. 3 was moled high and, according to the correspondence, all of Tunnel No. 3A was moled high (Tr. 144).

¹⁸⁴ It would be possible for the mole to be driven with the target system used so that the mole would actually rotate around the laser beam. Mr. Sperry could not say from his experience, however, as to whether this had ever happened (Tr. 146).

Responding to a question as to whether the rock in River Mountains Tunnel was better than the rock in Tunnel Nos. 3 and 3A, Mr. Sperry stated that the rock in River Mountains stood unsupported for long lengths of the tunnel. He added, however, that it was necessary to take into account that the tunnels involved different rock types and different diameters. Noting that the diameter of Tunnel Nos. 3 and 3A (20 feet 6 inches) was much greater than the diameter of River Mountains Tunnel (13 feet excavated), Mr. Sperry stated that failures in the same type of rock would be worse in the bigger tunnel.

Mr. Sperry was aware of the article which had appeared in Western Construction concerning the contractor setting world records in Tunnel No. 3 (GX F). The world records had been set during excavation in the reference reach of Tunnel No. 3. The record set was at the far end of the tunnel between the inlet portal and Station 755 and reflected consideration of the size of the tunnel and the 260 feet of excavation accomplished in one day.

Upon rebuttal Mr. Sperry testified to a number of things including the following: (i) his experience in estimating tunnel projects as a private consultant; (ii) the fact that the mole used on Tunnel No. 1 had been a prototype mole;¹⁸⁵ (iii) that neither the Jarva mole on which the contractor's bid had been

based, nor the Dresser mole used to perform the contract¹⁸⁶ had variable cutter heads; (iv) that it was not common for contractors to use a variable head mole; (v) that at the time of the hearing mole contractors were using a guidance system very similar to what had been employed on Tunnel Nos. 3 and 3A; (vi) that in the vicinity of DH 116 and in another wet area the amount of water pumped had ranged from 30 gallons to 40 gallons per hour; (vii) that as a private consultant Mr. Sperry had participated in the preparation of at least part of the bid estimate for the VAT tunnel and in that capacity had had occasion to see and study the specifications; and (viii) that during excavation he was in Tunnel No. 3 an average of five times a week.¹⁸⁷

It was during Mr. Sperry's rebuttal testimony that his résumé was offered in evidence (AX 88). In the course of such testimony Mr. Sperry drew a diagram showing the location of the roll indicator (AX 89) and another diagram designed to illustrate the functioning of the guidance system (AX 94-A and 94-B). Also offered and received in evidence were two pages from Mr. Sperry's diary (AX 90) showing readings he had taken from gauges measuring pressures being exerted against rockbolts after they had been torqued. The readings were in pounds per square inch and were

¹⁸⁵ It is undisputed that the mole used to excavate Tunnel Nos. 3 and 3A was a prototype mole. See n. 100, *supra*.

¹⁸⁶ The Dresser mole used on the project was neither proposed nor discussed as a variable head mole (Tr. 1291).

¹⁸⁷ Mr. Sperry made an entry in his diary every day that he was on the job (Tr. 1308).

taken by Mr. Sperry in late Dec. of 1971 and in early Jan. of 1972. According to Mr. Sperry the exhibit indicates that while the arch was coming down, the support system of the bolts and pans was taking the weight (*i.e.*, the arch was not falling out behind the bolts).¹⁸⁸

Another exhibit involving Mr. Sperry's diary is AX 92. The entry for Mar. 24, 1972,¹⁸⁹ shows that Mr. Sperry was underground on that date; that at the beginning of the day the face of the tunnel was at Station 781+46; and that the mole advance achieved that day was 63 feet. One of the entries states: "Some ties submerged between Stations 790 and 785. Invert very wet. Bolts over mole again dripping water. Told CRP to drill drain holes between pans." Mr. Sperry said that the instruction was issued to the tunnel superintendent to avoid having the water dripping from the rockbolt holes conducted by the steel pans (attached to the rockbolts) to the rib where it would run down the ribs causing the mole grippers to slip to some extent. The effect of drilling drain holes between the pans would be that more of the water would drip right down on the invert rather than running down the ribs of the tunnel. When the water ran down the ribs, it sometimes ran on to the top of the gripper pads and if the grippers were extended the

water had no place to go except to conduct itself to the leading or trailing edge of the grippers and run down there.

Over the objection of Government counsel two exhibits offered by the appellant were received in evidence. Accepted into evidence was a work sheet (AX 91) which was characterized by Mr. Sperry as a summary of work done by him while at A. A. Mathews, Inc., in 1973,¹⁹⁰ in conjunction with Report No. 1856 (AF 77). Another exhibit to which a Government objection was raised involved an excerpt from the specifications for the VAT tunnel. The purpose of offering the exhibit was to show that the later VAT specifications contained a provision essentially the same as that contained in Paragraph 50 of the instant contract¹⁹¹ but with additional language warning the prospective contractors of possible fracturing due to overloading and extremely short standup times.¹⁹²

¹⁸⁸ The figures used in the exhibit were stated to have been taken from the job records of Fluor Utah except for Column 8 which represents a projection made by Mr. Sperry. The basis for the Government objection was the absence of the records upon which the summary was based (Tr. 1313-15). The hearing member noted the serious question he had about the value of evidence received where the underlying data had not been offered (Tr. 1345).

¹⁹¹ "Government testing indicates that many of the sandstones, shales, limestones, and siltstones to be excavated in the tunnel will deteriorate or disintegrate rapidly when exposed to air or water or when stress relieved" (AX 93).

¹⁹² The language containing the twofold warning reads: "In addition to surface deterioration, fallout may occur along bedding planes and joints, also fracturing may occur in the rocks due to overloading. Extensive reaches may be encountered where the ground stand up time is extremely short" (AX 93).

¹⁸⁸ The diary entries given in AX 90 were for Dec. 29, 30, and 31, 1971, and Jan. 3, 1972.

¹⁸⁹ Mr. Malcolm Logan visited Tunnel No. 3 on Mar. 23 and 24, 1972. Asked whether the conditions he observed on March 24 had obtained on the preceding day, Mar. 23, 1972, Mr. Sperry stated: "Yes. We had been in this condition for some time" (Tr. 1320).

Also objected to by Government counsel was the following testimony elicited from Mr. Sperry:

Q: Did you consider a mole manufactured by Robbins?

A: Yes.

Q: Was that offered to you with a variable head?

A: No. In fact, Mr. Robbins, Dick Robbins, advised against the use of a variable head on the mole.

Q: Had the Robbins mole been used on any of the tunnels mentioned during the course of this hearing?

A: Yes.

Q: Which ones?

A: Azotea, Blanco, and Oso, plus—I guess that's all.

(Tr. 1289-90).¹⁹³

Appellant's witness Sperry also testified upon rebuttal that there is a reach in Tunnel No. 3 which he had selected as the reference reach in connection with the claim. The entire colloquy¹⁹⁴ between appellant's counsel and the witness is set forth below:

Q: Do you recall, Mr. Sperry, that there's a reach of Tunnel No. 3 which the contractor calls a reference reach in connection with his claim?

A: Yes.

Q: Which extends from Station 752 plus 41 to Station 721 plus 84, a distance of some over 3,057 feet, do you recall that?

¹⁹³ The basis of objection to this line of questioning was hearsay (Tr. 1290).

¹⁹⁴ Appellant's counsel returned to the subject a short time later when interrogating Mr. Sperry with respect to AX 91. The following exchange took place:

"Q: And is the Column 6, which is headed 'Reference Reach,' the reference reach which you selected?

A: Yes.

Q: Did you discuss that with any of your superiors at Fluor Utah?

A: Discussed this with Mr. Hungett * * * who was a vice president of Fluor Utah at the time." (Tr. 1313).

A: I recall the reference reach, the station sounds right and I'm not sure of them.

Q: In any event, it was up toward the far end of the tunnel—

A: Yes, right.

Q: —from where you started moling?

A: And those stations are at the far end, yes.

Q: And who selected that reference reach in connection with this claim?

A: I did.

Q: And why did you select that particular reach?

A: Well, the reach goes from where the equipment was finally repaired, put back together after the damage sustained by the fallout and the end of the job. It's the entire length of time in those, from those stations.

Q: And was that reach, in your judgment, comparable to the—were the conditions in that reach comparable to the conditions indicated in the contract?

A: Yes.

Q: Is that why you chose that reach?

A: Yes.

(Tr. 1310-11).

At the conclusion of his testimony the hearing member asked Mr. Sperry to enumerate the factors that had caused him to disregard or at least not proceed on the basis of the Government's estimate that approximately 80 percent of the tunnel would require support other than rockbolts. In response Mr. Sperry stated that the main factor was the way the contractor's prebid investigating party had "interpreted the rock conditions from what we saw on the job, not only the cores but the topography, the mesa land at the jobsite itself and the way that stood and the way it was so massive" (Tr. 1373).

After referring to articles he had read on the Navajo 1 and the Na-

vajo 2 jobs, including the Bennett article,¹⁹⁵ two articles in Western Construction and an article in Mining Engineering, and the fact that the prebid investigating party had looked at the equipment in Tunnel No. 1, Mr. Sperry stated: "And I think a large factor was our success at River Mountains Tunnel which was for the Bureau of Reclamation and our success in steering the mole and also supporting the rock with rock bolts" (Tr. 1373-74).

2. Summary of Testimony of Thomas W. Green

(Tr. 208-50, 266-390)

Thomas W. Green, a professional engineer, went to the Navajo Indian Irrigation Project in January of 1971 as the office engineer. He continued in that capacity until September of 1973 when he became acting project engineer. That position was held by him until the job was completed in June of 1974.

As office engineer Mr. Green was responsible for inventorying critical

¹⁹⁵ After noting that the Bennett paper had been testified to as confusing, Mr. Sperry stated that the gauge cutters on the mole used in Tunnel No. 1 were angled around at quite a sharp angle so they actually cut a very large chamfer between the face of the tunnel and the walls of the tunnel and so cutting at this angle tended to overstress the rock that was to remain.

Mr. Sperry also noted (i) that the pictures they had taken of the cutters used on Navajo-1 showed them to be worn completely flat (through the shell into the bearings); that while these weren't necessarily the gauge cutters, he had assumed that in a lot of cases the gauge cutters must have been worn drastically which he felt certainly damaged the rock; and that the Jarva mole on which the contractor's bid had been based would not damage the rock either by reason of the angle of its cutters to the rock or by reason of the way in which its grippers functioned (Tr. 1374-75).

materials associated with all phases of the work. During the excavation of Tunnel Nos. 3 and 3A Mr. Green monitored the mole cutters and kept records on the cutters that were used on the mole. He estimated that he entered the tunnels an average of twice a week during the excavation of Tunnel Nos. 3 and 3A. Mr. Green did not go into the tunnels nearly as often when the concrete work was being performed. In addition, Mr. Green entered the tunnels for the purpose of taking pictures (he was also job photographer) and because some materials and supplies were kept there.

Mr. Green drew a sketch (AX 12) to illustrate the type of rock failures that he had seen in the claim reach in Tunnel No. 3. The failures that he had seen consisted of (i) failures in the arch extending to a point 5 feet plus or minus the spring line; (ii) failures right on the face of the tunnel with typical failures involving rock that had failed approximately 4 or 5 feet above the invert; (iii) failures up to a layer of shale; and (iv) failures observed in the rib section 4 to 5 feet above the invert. Some of the arch failures seen by Mr. Green involved failures to bedding planes. Some of the failures had curved surfaces and some of the cracks in what appeared to be homogeneous material were considered to be new failures. The failures that he witnessed that were not to distinct bedding planes were failures in one material. Mr. Green estimated that 90 percent of the failures sketched in AX 12 had occurred in the claim reaches of tun-

nel excavation in Tunnel Nos. 3 and 3A.¹⁹⁶

Some of the failures observed in the rib section of the tunnel were behind the cutterhead but ahead of the grippers looking toward the heading. Sometimes it had been necessary to place cribbing between the grippers and the ribs in order for the grippers to achieve the necessary pressure to thrust the mole forward. Generally speaking, cribbing was necessary only where the material was moist. Rock failures were also observed behind the grippers in the rib of the tunnel¹⁹⁷ and sometimes Mr. Green saw fallout back onto the trailing floor which extended about 560 feet from the heading. Mr. Green's sketch of observed failures (AX 12)¹⁹⁸ was received in evidence without objection.

As to the effect that the failures observed had had upon the excavation operations, Mr. Green stated (i) that sometimes the mole had to be shut down in order to handle the muck generated by the failures; (ii) that fallout damaged hydraulic lines to the rockbolt drills and to the hydraulic lines associated with the operation of the mole itself;

¹⁹⁶ Mr. Green gave as a rough estimate that he entered the cutterhead 60 to 70 times in Tunnel Nos. 3 and 3A and that he saw rock failures or fallout ahead of the cutters 40 to 45 times (Tr. 331).

¹⁹⁷ Some failures occurring in the ribs of the tunnel behind the grippers were considered to have been caused by the grippers. Failures of any significance attributable to the grippers occurred where there was a joint or bedding plane underneath the gripper pad (Tr. 336-37).

¹⁹⁸ No stationing is indicated on the sketch (AX 12) by Mr. Green (Tr. 338-39, 382).

(iii) that a considerable amount of the mole downtime attributable to hydraulic system problems was due to the fact that the hydraulic motors were set with very fine tolerances and could not take the contamination of the system by reason of the breakage of the lines; (iv) that the invert concrete operation had been delayed considerably due to having to remove tights from the invert and having to clean the invert prior to concrete placement; (v) that there were delays resulting from continual fallout on the utility lines which damaged the lines and took time to repair;¹⁹⁹ and (vi) that the failures observed which delayed completion of the arch concrete was the additional concrete required to be used behind the forms because of the overbreak outside the bored diameter of the tunnel.²⁰⁰

Eight photographs taken from an album of Fluor Utah showing job progress was introduced as AX 16. All of the photographs related to conditions existing prior to concrete

¹⁹⁹ The failures observed occurred in the claim reach, the reference reach and in the reaches which were neither one. The most severe failures that delayed the contractor the most, however, occurred in the claim reach (Tr. 350-51). In Tunnel No. 3 some tight removal was experienced in the reference reach but that did not severely delay the invert concrete placement (Tr. 352).

²⁰⁰ As to the arch concrete, Mr. Green testified that there was fallout occurring ahead of the concrete placement that was quite severe and that required cleaning before the forms could be set. The fallout had to be cleaned out before the concrete could be pumped behind the arch forms. Utility lines damaged by fallout had to be repaired before the contractor could proceed with the placement of the arch concrete (Tr. 353).

placement and all but AX 16A (showing typical placement of arch forms) were assumed to have been taken in Tunnel No. 3 on Mar. 17, 1973.²⁰¹ With respect to failures in the arch, the following exchange occurred on direct examination:

Q: Do you recall a section in this tunnel (in) which the sub invert [²⁰²] concrete was removed pursuant to order for changes number 1?

A: Yes. I do.

Q: And do you recall seeing the arch in that area?

A: Yes.

Q: Do you recall seeing any—well, could you describe what you saw with respect to the arch in that area?

A: Well, what I saw was several cracks in the arch in that area. The arch appeared to be low. It wasn't a perfect circular tunnel. There were these cracks and it looked like the top of the arch had come down just by visually looking at this.

Q: And was that area of the arch remined, essentially, throughout the reach where the order of changes number 1 applied?

A: That area was remined, in that we had to remove some of the rock bolts in that area, and reinstall the rock bolts after remining.

Q: And, in fact, that was done in a very careful manner, wasn't it?

A: Yes, it was quite dangerous to remove these rock bolts, and to relieve the bearing under the bearing plate, we removed the rock bolts, remove the tights, and then install another rock bolt, was quite time consuming, and quite dangerous for a miner under an area he was relieving the support he had there.

(Tr. 364-65).

On cross-examination Mr. Green acknowledged that the only tunnel

he had been in during excavation were Tunnel Nos. 3 and 3A. He also stated that he could not recall any instances of gripper caused rib failures where the material was more than damp; that in his tunnel visits he had sometimes found it dusty and at other times clear; and that he did not recall how much additional concrete had to be placed within the forms because of the rock failure he had observed in the tunnel.²⁰³

Mr. Green also testified extensively as to quantum.²⁰⁴ He had participated in the preparation of the claims involved in the appeal, as had Mr. Mike Eldridge,²⁰⁵ an accountant employed by the contractor. The general arrangement was for Mr. Green (the office engineer) to determine what equipment was to be used, what dates were to be used that were relevant and what

²⁰³ On cross examination the following colloquy took place:

"Q. Mr. Green, do you have any idea on how much additional concrete had to be placed within the forms because of the types of rock failures or disintegration you observed in the tunnel?

"A. I don't—additional concrete had to be placed, I don't recall the figure." (Tr. 383-84).

²⁰⁴ Testimony as to quantum is included under Part II, Entitlement, since there appears to be some benefit in having the testimony of the witnesses in one section of the opinion where, as here, the failures in what has been designated as the claim reach and those occurring in the reference reach have been characterized as involving only differences in degree (Tr. 352).

²⁰⁵ At the time of the hearing, Mr. Eldridge was outside of the country, as were Mr. Huntgett and Mr. Davenport. Because of the importance of the records which Mr. Eldridge either prepared or collaborated in preparing (AX 10 and AX 11), the record was kept open for 120 days to allow the Government to take the deposition of Mr. Eldridge upon his return to this country. Although Mr. Eldridge did return within the specified time, the Government did not avail itself of the opportunity to depose him (Tr. 244-61).

²⁰¹ That is the date shown for AX 16F which is a photograph depicting Tunnel No. 3 rib tights at Station 781+75 (Tr. 356-61).

²⁰² No subinvert was placed in the tunnel (Tr. 383).

footage was to be involved in the various reaches with Mr. Eldridge responsible for extracting from the books and records of the contractor the dollar figures for the labor, equipment and other items of costs related to the contract work.

Offered and received in evidence as AX 10 was a voluminous document containing working papers²⁰⁶ and other data pertaining to the In Situ Rock Stress Claim. Included in the front of the exhibit is a three page document entitled "Navajo 3 and 3A Progress Tabulation." This tabulation²⁰⁷ was part of the claim submitted to the Bureau of Reclamation in February of 1974. Shown in AX 10 are the costs actually incurred in the claim reaches of Tunnel Nos. 3 and 3A. Categories of costs under the heading "Tunnel Excavation" are "Labor," "Equipment," "Materials & Supplies," and "Permanent Materials," showing the amounts claimed for each. The same categories of costs and the amount claimed for each are also shown under the headings "Place Invert Concrete" and "Place Arch Concrete."

²⁰⁶ At the time Mr. Green testified the working papers included in AX 10 showed the actual costs incurred in the claim reaches for Tunnel Nos. 3 and 3A. The exhibit also shows in various places what is described as "should have been costs" for the claim reaches. Except for limited items of costs (e.g., "Permanent Materials"), the actual costs incurred in the reference reaches were not shown (Tr. 214, 232, 268, 301-09).

²⁰⁷ The tabulation shows the reference reach for the DH 116 claim to consist of 257 feet of tunnel between Station 854+06 and Station 851+49 (AX 10). This stretch of the tunnel is included as part of the claim reach for Tunnel No. 3 (Station 859+72 to Station 752+41) in the May 18, 1973 claim submission (AF 77). See text accompanying n.68, *supra*.

The actual costs shown for Tunnel Nos. 3 and 3A reflect costs extracted by Mr. Eldridge from the general ledger and entered on sheets contained in the exhibit. The backup sheets for summary items (e.g., Tunnel 3 Excavation Labor) include subtractive items for time periods when the contractor was not in the claim reach. These adjustments were necessary because the ledger was not posted on precisely the same day that the claim reach started and ended.

It was Mr. Green who selected the equipment included in the claim but it was Mr. Eldridge who had developed the cost for the equipment applying AGC rates in accordance with the terms of the contract.²⁰⁸ Mr. Eldridge also determined the amount to be included in the claim for the escalation of materials purchased after a certain date²⁰⁹ and calculated the amounts of indirect costs for which claim was made. It was Mr. Green, however, who prepared the computations in support of the amounts claimed for "Additional Mole Rental" and for the actual grout costs in Tunnel Nos. 3 and 3A.

²⁰⁸ Shown on Sheet C1 of AX 10 are the equipment costs claimed for Tunnel Nos. 3 and 3A excavation, Tunnel No. 3 invert concrete and Tunnel Nos. 3 and 3A arch concrete. The costs for equipment ownership and for equipment operating expenses do not represent actual costs but rather represent the development of costs by applying AGC rates in accordance with Paragraph 17 of the Specifications (Tr. 219-23).

²⁰⁹ Mr. Green assumed that the sheets starting with Sheet L1 of AX 10 show the escalation of job materials and supplies after the date the contractor considered the project should have been completed (Tr. 235-36).

In a number of instances items had either been improperly included in or omitted²¹⁰ from the claim. Mr. Green testified as to the proper adjustments to be made to the various schedules and summaries of the costs involved.

Asked upon cross-examination as to how it was determined that one stretch of tunnel would be considered a reference reach and another would be treated as a claim reach, Mr. Green stated that various personnel had had input and that determination of these reaches was not a decision that he had personally made. He noted, however, that the reference reach rates of progress for Tunnel Nos. 3 and 3A were shown at the front in AX 10²¹¹ and that such rates of progress had been attained in some part of the tunnels.²¹² Mr. Green acknowl-

edged that the San Mateo office of the contractor had written to the project manager concerning the establishment of the reference reaches for the various categories or had copied him on other correspondence, as evidenced by Government Exhibits J, K and L. He also agreed that with respect to Tunnel No. 3 there was an overlapping between the invert concrete reference reach (Sheet F1) and the excavation claim reach (Sheet A1) and between the arch concrete reference reach (Sheet I) and the excavation claim reach (Sheet A1).²¹³ Although there was a cost coding for excavation as reflected in AX 10, Mr. Green was unable to say how costs for removing tightts in the tunnel were recorded (Tr. 299-300).

Mr. Green had participated to a limited extent in the preparation of AX 11 ("Equipment Cost and Usage"). Comparatively little testimony was elicited from him with respect to the portions of the exhibit that he had prepared or assisted in preparing.²¹⁴

3. Summary of Testimony of Thomas Case Stone

(Tr. 784-825, 970-75a, 1068-98)

Mr. Thomas Case Stone (a certified public accountant employed by the contractor) testified extensively with respect to the quantum aspects of the claim with particular em-

²¹⁰ Among the examples of costs thought at one time have been omitted from the work sheets as prepared by Mr. Eldridge (AX 10) were the operating expenses for the equipment used on the second and third shifts for Tunnel No. 3 excavation (Tr. 225) and for Tunnel No. 3 arch concrete (Tr. 229-30).

²¹¹ Tr. 272-73. "Navajo 3 and 3A Progress Tabulation" (AX 10) shows the rates of advance in the reference reaches to be as follows:

"Tunnel 3 and 3A excavation reference reach -----	185 FPD
Tunnel 3 Invert concrete reference reach -----	676 FPD
Tunnel 3 arch concrete reference reach -----	378 FPD
Tunnel 3A arch concrete reference reach -----	300 FPD"

²¹² Addressing the question of whether the rates of progress shown for the reference reaches represented the fastest rates of progress achieved throughout the project for the various categories, Mr. Green said that was clearly not true with respect to the rate used for excavation.

Mr. Green stated that except for excavation he could not answer the question posed with respect to the various categories without examining the daily logs for the particular activity (Tr. 274-78).

²¹³ In Tunnel No. 3 a total of 444 feet of the invert concrete reference reach and a total of 1,324 feet of the arch concrete reference reach fell within the excavation claim reach (Tr. 289-91).

²¹⁴ Tr. 310-17, 386-90. See n.205, *supra*.

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phasis upon additions to, deletions from or corrections of AX 10.²¹⁵ Offered in evidence as simply a digest of the work papers included in AX 10 was AX 77.²¹⁶ Among the changes made by Mr. Stone to AX 10 was the inclusion in the front of the exhibit of a lead schedule (work paper "A") in which is set out the claim reach cost and the reference reach costs under sections designated by Roman numerals in related exhibits (AX 10; AX 77; AX 84). Roman I is "Tunnel Excavation," Roman II is "Place Invert Concrete," and Roman III is "Place Arch Concrete."²¹⁷ The lead schedule was considered necessary since there were work papers in AX 10 relating to Tunnel No. 3 or Tunnel No. 3A or to other things such as arch repairs, grout, or cleanup.

The data developed by Mr. Stone with respect to the actual costs incurred in the reference reaches had not been included in the working

papers prepared by Mr. Eldridge or Mr. Green (n.206, *supra*). Mr. Stone also made changes in the working papers (AX 10) to correspond with the testimony given by Mr. Green concerning changes considered necessary to accurately reflect the costs properly includible in the claim. For the most part Mr. Stone's testimony consisted of identifying working papers in AX 10 prepared by Mr. Eldridge or Mr. Green and explaining how figures carried forward to the lead schedule had been obtained from such data (*e.g.*, adding the subtotal of columns in the various schedules included among the work papers).

In some instances, however, entirely new schedules were developed by Mr. Stone or his assistants and added to the other work papers in AX 10. This was true with respect to such items as arch repair, grout, or cleanup. The amount claimed for arch repair as shown on Working Paper K16, was \$48,437,²¹⁸ comprised of costs for labor (\$34,203), equipment (\$8,203), material and supplies (\$3,887), and permanent materials (\$2,144). The figures for these categories of costs were carried forward to the lead schedule (AX 10). Work Paper K7 shows the costs incurred for grout in the cost categories of labor, equipment, material and supplies, and perma-

²¹⁵ At the time he testified Mr. Stone was manager of project accounting for the contractor. Throughout Mr. Green's testimony he had been present in the hearing room for the purposes, among other things, of later determining the costs incurred in the reference reaches on the same bases as had been used by Messrs. Eldridge and Green in determining the costs in the claim reaches (Tr. 201-08, 787-88).

²¹⁶ Before his testimony concluded, Mr. Stone had discovered that the figures shown in AX 77 for equipment items were in error in that the exhibit reflected an overstatement of equipment operating expenses and an understatement of equipment ownership expenses. According to Mr. Stone's testimony, AX 84 reflects the amounts properly includible on the claim for equipment items based upon the use of AGC rates (Tr. 970-75, 1070-73).

²¹⁷ The costs collected in these three Roman Numeral sections are subdivided further into the categories of "Labor," "Equipment," "Materials & Supplies," and "Permanent Materials" (AX 10; AX 77; AX 84).

²¹⁸ The figure of \$48,437 is the addition of the amounts in the General Ledger Account 7304013 and reflects minor adjustments in the General Ledger from the time Eldridge or Green prepared an earlier work paper. The comparable figure for this item in the July 22, 1974, claim submission (AF 115) is \$48,523 (Tr. 803-04).

nent materials for Tunnel Nos. 3 and 3A,²¹⁹ and the allocation of such costs between claim reach costs and reference reach costs with the combined figures for the two tunnels being posted to the lead schedule. The combined costs for cleanup in Tunnel Nos. 3 and 3A are shown in Work Paper K14,²²⁰ broken down into the categories of costs for labor, equipment, and materials and supplies.

In the course of his testimony Mr. Stone discussed the manner in which the claim had been computed in the three categories of "Excavation," "Place Invert Concrete," and "Place Arch Concrete." He stated that he had collected the costs within the three categories for both the claim reach and the reference reach by adding various columns representing labor, equipment, materials and supplies, and permanent materials as is reflected in the lead schedule (AX 10) after which he had transferred the figures so obtained for the reference reaches and the claim reaches to AX 77.²²¹ The

linear feet shown on AX 77 for both the reference reaches and the claim reaches were obtained from the "Navajo 3 and 3A Progress Tabulation" included in the front of AX 10.

Under Roman Numeral I "Tunnel Excavation," AX 77 shows the reference reach and the claim reach to consist of 3,057 linear feet and 13,784 linear feet respectively. The \$49.83 shown as the cost per foot without changed conditions is arrived at by dividing the total cost shown for tunnel excavation in the reference reach of \$152,336 by 3,057 (the linear feet of tunnel in the reference reach). The exhibit shows that if the 13,784 feet of tunnel comprising the claim reach could have been excavated at the cost per foot in the reference reach, the cost to the contractor would have been in the amount of \$686,882. According to AX 77, however, the costs actually incurred in the claim reach for excavation were in the amount of \$2,036,564. Deducting from this figure the amount of \$686,882 (cost of excavating in the claim reach but for the changed conditions) the dollar figure claimed for tunnel excavation of \$1,349,682 is obtained.

The amounts claimed for Roman Numeral II (Place Invert Concrete) of \$154,770 and for Roman Numeral III (Place Arch Concrete) of \$660,657 have been calculated on

of this aspect of the claim, however, since all of Mr. Stone's testimony in this area was given with respect to AX 77. While the changes reflected in AX 84 and in corrected AX 84 have affected the amounts claimed for various items, there has been no change in the method of computing the claim.

²¹⁹ In preparing the work paper the General Ledger balances for three accounts (two for Tunnel No. 3 and one for Tunnel No. 3A) were picked up. The combined figures for grout for the two tunnels as shown in Work Paper K7 (AX 10) are \$98,033 for the claim reach cost and \$10,092 for the reference reach cost. The same type of costs are included in the July 22, 1974, claim submission (AF 115) in the amount of \$66,576 (Tr. 804-07).

²²⁰ The cleanup costs come from two ledger accounts, one for Tunnel No. 3 and one for Tunnel No. 3A. The combined figures for cleanup are \$61,752 for the claim reach cost and \$4,507 for the reference reach cost. The same type of costs are included in AF 115 in the amount of \$16,994 (Tr. 807-08).

²²¹ AX 77 has been replaced by AX 84 (n.216, *supra*) and that exhibit has in turn been replaced by corrected AX 84 (*see* n.1, *supra*). We have referenced AX 77 in our discussion

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the same basis as has been described for Roman Numeral I (Excavation). In the aggregate the three categories of costs total \$2,165,109, as is shown on AX 77 opposite Roman Numeral IV (Total Increased Direct Costs due to Changed Conditions).

Mr. Stone also testified with respect to Roman Numerals V through XIII except for Home Office Overhead. With respect to Roman Numeral V (Consultant's Services), the claim is said to represent payments made to A. A. Mathews, Inc., for consulting services not related to the prosecution of the claim.²²² Copies of supporting invoices are contained in Work Paper M of AX 10. Roman Numeral VI (Escalation on Job Materials Purchased After Oct. 9, 1972) involves a claim in the amount of \$33,067. The details pertaining to the claim are contained in Work Paper L of AX 10, a work paper prepared by Mr. Eldridge or Mr. Green with the total amount shown on the work paper being simply brought forward without change to AX 77. In Roman Numeral VII (Additional Mole Rental) the contractor makes claim for this item in the amount of \$22,058. The backup for this claim is contained in Work Paper N (AX 10) which was apparently prepared by Mr. Green.

²²² AX 78 (covering at least some of the consulting services rendered by A. A. Mathews, Inc., in connection with the DH 116 Claim and the Navajo 3 and 3A stress claim) was introduced in evidence for the purpose of highlighting that the amounts paid for consulting services of that nature were not included in the claim (Tr. 810-14).

Here again the total from the work paper was carried forward by Mr. Stone to AX 77 (Tr. 814-15).

A major claim item is Roman Numeral VIII (Additional Project Indirects due to Prolongation on the Contract). The claim is in the amount of \$826,361. Data pertaining to the claim is included in Work Paper O (AX 10), a work paper prepared by either Mr. Eldridge or Mr. Green. Mr. Stone stated that the total amount claimed for this item on AX 77 is simply a combination²²³ of lines 24 and 25 of Work Paper O.

Another major claim item is Roman Numeral IX (Home Office Overhead). On AX 77 this claim item is shown to be in the amount of \$341,330.²²⁴ Offered in support of this item was AX 79, a paper prepared by Mr. John Schulz, Controller of Fluor Utah. The paper shows total company revenue, home office costs and the derived percentage figures for the years 1971, 1972, 1973, and 1974 (*i.e.*, the years of

²²³ The following colloquy occurred on direct examination:

"Q. Why did you combine the amounts on those two lines?

"A. Because we now have only one claim.

"Q. What were the two lines before you combined it, what were the two lines on the work paper?

"A. It was the total line and the line just above it was DH 116 claim.

"Q. Which had previously been a deduction to arrive at the total on the work paper?

"A. Yes.

"Q. So you just put it back in?

"A. Yes." (Tr. 815).

²²⁴ In AX 84 the amount claimed for this item was increased to \$345,122. In correcting AX 84 which accompanied the appellant's opening brief the figure has been reduced to \$336,234. See n.1, *supra*.

contract performance). Mr. Schulz testified ²²⁵ that the figures for total revenue and home office costs for the years involved were extracted by him from the books and records of Fluor Utah which had been kept in the ordinary course of business.

Roman Numeral X (Premium on Bond Surcharge) involved a claim in the amount of \$8,280. The claim is for reimbursement of a surcharge over a period of 20 months at \$414 per month. Concerning this claim item Mr. Stone stated that it was a number he had picked up from the summary of additional costs due to rock failures (AF 115).²²⁶

Still another major item of claim is Roman Numeral XI (Profit at 10 percent). The amount claimed in AX 77 of \$342,465 ²²⁷ represents a figure derived from multiplying the subtotal of Roman Numerals IV through X by the 10 percent claimed as profit.

Roman Numeral XII (Bond Premium on Increased Contract Amount at .4 percent) involves a

claim of \$15,068 ²²⁸ on AX 77. This is another derived claim item being the result obtained from multiplying the subtotal of Roman Numerals IV through XI by the .4 percent claimed for additional bond premium.

Roman Numeral XIII (New Mexico Gross Receipts Tax at 4 percent) represents a claim for reimbursement in the amount of \$151,287.²²⁹ This is still another derived figure as it was obtained by multiplying the subtotal of Roman Numerals IV through XII by the 4 percent claimed for the New Mexico Gross Receipts Tax.

Following the conclusion of his direct testimony with respect to AX 77, Mr. Stone gave further testimony concerning the equipment rates used in the claim. Commenting upon AX 80,²³⁰ Mr. Stone states that based upon the equipment items selected for comparison the amounts included in the claim for equipment are lower overall than would be the case if the applicable AGC rates in effect in 1970 had been used. (Tr. 823).

On cross-examination Mr. Stone denied that he had testified that he

²²⁵ On cross examination Mr. Schulz stated that the figures in AX 79 did not include any amounts for (i) contributions or donations; (ii) losses on other contracts; (iii) interest; (iv) premium on bonds; or (v) subsidiary companies. While acknowledging that some business entertainment expenses were included in the figures submitted, Mr. Schulz was unable to say offhand the amount involved. Some company-type advertising was also included in the figures but in Mr. Schulz's opinion the amount so included would have been a minor amount which he imagined would be in the realm of five to ten thousand dollars a year for each of the years involved (Tr. 860-64).

²²⁶ Earlier Mr. Stone had testified that he had been successful by and large in tracing all the figures in AF 115 except for the bond surcharge for 20 months at \$414 per month (Tr. 787).

²²⁷ Tr. 820. In AX 84 the amount claimed for this item is \$346,261. Corrected AX 84 (n.224, *supra*), shows the claimed amount to be \$335,159.

²²⁸ Tr. 820. In AX 84 the amount claimed for this item is \$15,235. Corrected AX 84 shows the claim for this item to be in the amount of \$147,470. See, however, n.1 *supra*.

Mr. Stone acknowledged that the percentage figure employed had been obtained from AF 115 (see n.226, *supra*).

²²⁹ Tr. 821. AX 84 shows the amount of this claim item to be \$152,964, while corrected AX 84 shows the applicable figure to be \$148,060.

²³⁰ AX 80 is a memorandum from Mr. C. H. Coulson to Mr. Stone under date of May 5, 1976, in which Mr. Coulson (then an assistant to Mr. Stone) states:

"[T]he average 1970 AGC rate appears to be higher than our average claimed rate."

had been able to tie the data in AX 10 to the contractor's ledgers.²³¹ Interrogated as to his knowledge of other matters, Mr. Stone was unable to say (i) whether equipment costs, insofar as they involved idle time, had been prepared in accordance with Paragraph 17; (ii) whether the equipment in the third shift referred to on page G3.2 of AX 85 was operating; or (iii) whether the figures shown on the claim reach side of Roman Numeral VIII of AX 84²³² included an amount for the New Mexico Gross Receipts Tax.

4. *Digest of Testimony of Dr. Ronald Eugene Heuer (Tr. 390-554, 1275-79)*

Dr. Heuer was an important witness for the appellant, not only because of his expertise in the field of soil and rock mechanics²³³ but

²³¹ Immediately thereafter the following exchange took place:

"Q. You didn't say that?

"A. (Indicates negatively).

"Q. Well, were you able to do that?

"A. I did not attempt." (Tr. 1083).

²³² Mr. Stone also appeared to be uncertain as to whether Roman Numeral VIII (Additional Project Indirects due to Prolongation of the Contract) of AX 84 included general and administrative expenses for the project. This was so even though Mr. Stone's attention was directed to Work Paper O (AX 10) which he had testified was the supporting data for Roman VIII and which has a column labeled G & A under which are figures that are reflected in the total figure carried to AX 84 (Tr. 1094-96).

²³³ Dr. Heuer's doctorate in civil engineering (granted by the University of Illinois in 1971) was in soil mechanics and rock mechanics. His master's degree from the same school was in geology. In addition to his educational background, Dr. Heuer had had extensive consulting experience in the areas of his specialty (AX 19; Tr. 391-94).

also because of the important role he apparently had had in the development of a support program for the tunnels based almost entirely upon the use of rockbolts. When the rock conditions encountered in mid-summer of 1971 resulted in tunnel advance being halted for over a month, the engineering consulting firm of A. A. Mathews, Inc., was retained by the contractor. Dr. Heuer, then an employee of A. A. Mathews, Inc., was given the initial assignment and remained the person principally responsible in that firm for handling problems arising in connection with Tunnel Nos. 3 and 3A.

We previously have considered at length reports which Dr. Heuer authored either entirely or in large part. These reports include Construction Report No. 743 dated Sept. 17, 1971 (AX 5);²³⁴ Construction Report No. 743-3 dated Dec. 23, 1971 (AF 36);²³⁵ and Construction Report No. 1856, May 1973 (AF 77A).²³⁶

In his testimony Dr. Heuer covered much of the same ground and in the same manner as had the referenced reports. Since we have quoted extensively from or otherwise treated these reports in our above discussion, we will give primary emphasis to the testimony Dr. Heuer gave concerning (i) the photographs, sketches and other exhibits offered in evidence through him and (ii) the an-

²³⁴ See n.11 and 12 and accompanying text.

²³⁵ See n.35 to 46 and accompanying text.

²³⁶ See n.67 to 99 and accompanying text.

swers he gave to the basic questions raised concerning the claims asserted. But first, we shall turn to the conditions Dr. Heuer observed on his initial visit to the site.

Dr. Heuer's first visit to Tunnel No. 3 was on July 16, 1971. The following day he prepared a handwritten report (AX 20). The report describes the general rock types that Dr. Heuer observed²³⁷ and contains sketches of the fractures and failures visible to him in the excavated portions of the tunnel. The sketches are accompanied by explanatory comments among which are the following:

Failures showed some relation to joints or bedding [²³⁸] but most striking was the fact that fractures generally cut through "intact" rock, generally with "curved" or "dished" failure surfaces.

Shear movement and buckling of pans in many places has occurred after bolts and pans were placed.

Sections about 150-200 ft. in from portal shows shear displacement low on sidewalls with crumpling and shearing in the crown.—16" wide sheet metal pans (on rock bolts) in arch show buckling due to compressive movements, some have occurred recently, far behind heading (AX 20, p. 5).

Section near portal shows fallout in

²³⁷ After noting that the geology, in general, was very similar to Navajo Tunnel Nos. 1 and 2 (sedimentary rocks, very flat lying, dip 2 degrees or less), the report states:

"Sandstone and siltstone predominates, contains interbeds and lenses of shale.—Shale interbeds can range up to perhaps 20 ft. thick, as seen in cliffs above #3 outlet tunnel.—Shale lenses can be very irregular in tunnel, vary from paper thin to 3' thick. Lenses may be 3' thick on one wall, almost nonexistent on other wall. Present problem in shale interbed or lens grew from nothing to nearly full face." (AX 20, p. 3).

²³⁸ Elsewhere the report states: "[B]edding and jointing in tunnel very indistinct generally, can only be seen in a few places" (AX 20, p. 4).

arch going up perhaps 2' to what is generally a shale seam. Breach occurred through fresh rock, not along joints. Fall occurred before bolts could be placed, pans are bent to shape of fall.

Similar failures occurred further in. Crown fallouts generally occur immediately behind dust shield, about 4' back of face, 8' ahead of rock bolt augers.

(AX 20, p. 6).

Introduced as illustrative of what Dr. Heuer saw in his first visit to the tunnel were four photographs (AX 21, 22, 23, and 24). Relating these photographs to the sketches made of the conditions observed (AX 20), Dr. Heuer stated that while the photographs were not taken on the day of his visit, they show the things which could be seen in the tunnel that day. AX 21 shows spalling at spring line attributed to the action of the gripper pads; AX 22 illustrates fractures that had formed in the rock looking toward the heading on the left side of the upper quarter arch, a few feet left of the spring line.²³⁹ AX 23 shows cracks in the lower quarter arch. The same situation is illustrated on page 5 of AX 20 where at the bottom of the circle shown there is an arrow pointing to the fracture accompanied by the words "offset $\frac{1}{2}" \pm$." AX 24 portrays shearing deformation of the rock, which is also shown in the sketch on page 7 of AX 20 and Figure 6 of the May 1973 report (AX 77A). In connection with AX 24, Dr. Heuer also noted that a large cavity in the cen-

²³⁹ The same type of fractures are illustrated on page 6 of AX 20 but in the crown. As to this aspect, Dr. Heuer states: "As the tunnel progressed into the mountain, the location of that fracture and fallout varied around the crown" (Tr. 404).

ter of the picture is where a large wedge of shale sheared and fell out.

According to Dr. Heuer, "a shear type of failure means that the material has been overstressed and it deforms in a shearing motion" (Tr. 407). Amplifying upon this answer he noted that in connection with the doctoral thesis for his Ph.D., he had made a model study on behavior of tunnels in high stress fields. A number of exhibits were introduced as background for the conclusions reached in the model study.²⁴⁰ In order to further explain shear type failures, Dr. Heuer drew six sketches showing rock failures in the two common failure modes (shear failure mode and extension failure mode). Other exhibits introduced to show fractures around tunnels due to overstressed ground were AX 38 (extension fracturing) and AX 39 (shear fracturing).

In his thesis Dr. Heuer had noted that he had not been able to find documentation for shear failure modes²⁴¹ but only for extension failure modes. He had anticipated where documentation for the former might be found, however, and read the following into the record from page 307 of his thesis (AX 40):

This question might be answered by observation of the failure mode about machine circular tunnels. The study should be made in such a tunnel in a fairly brittle rock, for example a sand-

stone rather than a shale, which is massive and at a depth such that the vertical free field stress is approximately equal to the rocks unconfined compression strength. Such a field situation would approximate the model situation very closely and should exhibit the same failure mode if the models do in fact, achieve the desired degree of similitude.

Immediately following the reading of the above quote, Dr. Heuer stated: "And there they were." The following colloquy then ensued:

Q. Does "there they were" mean that when you walked into Navajo Tunnel you had found this very thing that you described, with the massive rock and the appropriate cover [²⁴²] and all of the rest of the qualifications that you just read from your thesis?

A. Yes.

(Tr. 433-34).

On subsequent visits to the site²⁴³ Dr. Heuer saw many other examples of the type of rock failures he had seen on his first visit, as exemplified by all but one of 34 photographs²⁴⁴ received in evidence. Wherever possible, Dr. Heuer undertook to provide exact stationing as shown below:²⁴⁵

²⁴² On his first visit, Dr. Heuer had been conscious of cover, stating: Depth of cover over No. 3 is typically 400 ft. or less, but one length of $\pm 4000'$ reaches 1170 ft. of cover. Cover over No. 3A is less than 280 ft." (AX 20, p. 2).

²⁴³ Besides the initial visit Dr. Heuer visited the site at least ten more times, several of which were in the 6 months following July 16, 1971 (Tr. 437-38).

²⁴⁴ See AX 41, 42, 43, 44A, 44B, 44C, 44D, 45, 46, 47, 48, 49A, 49B, 49C, 49D, 50A, 50B, 50C, 50D, 51A, 51B, 51C, 52, 53A, 53B, 53C, 53D, 54A, 54B, 54C, 55, 56A, and 56B. All but AX 56B (photo of Zoo Park Station Pilot Tunnel, Washington, D.C.) are of Tunnel No. 3 (Tr. 438-63).

²⁴⁵ With respect to AX 52 he testified that it was taken some where between Stations 855 and 856.

²⁴⁰ See AX 25-31; AX 39. The thesis itself is AX 40 (Tr. 406-13, 427-29, 437).

²⁴¹ The search in the literature for documentation of shear failure modes was being conducted by Dr. Heuer in late 1968 (Tr. 434).

Exhibit No.	Date or Dates	Stationing
AX 46-----	7/12/73-----	(upper photograph) 826+00
AX 46-----	7/12/73-----	(lower photograph) 828+10
AX 47-----	7/12/73-----	(upper photograph) 821+40
AX 47-----	7/12/73-----	(lower photograph) 823+66
AX 49A-----	2/06 or 2/07 1973-----	844+00
AX 49B-----	2/06 or 2/07 1973-----	827+20
AX 49C-----	2/06 or 2/07 1973-----	767+40
AX 49D-----	2/06 or 2/07 1973-----	778+00
AX 50A-----	2/06 or 2/07 1973-----	777+35
AX 50B-----	2/06 or 2/07 1973-----	772+ ..
AX 50C-----	2/06 or 2/07 1973-----	793+00
AX 50D-----	2/06 or 2/07 1973-----	771+80
AX 51A-----	2/06 or 2/07 1973-----	854+00
AX 51B-----	2/06 or 2/07 1973-----	838+40
AX 51C-----	2/06 or 2/07 1973-----	824+50
AX 53A-----	2/06 or 2/07 1973-----	777+00
AX 53B-----	2/06 or 2/07 1973-----	775+50
AX 53C-----	2/06 or 2/07 1973-----	810+70
AX 54B-----	(1/11/72)-----	831+00
AX 54C-----	(12/03/71)-----	849+70
AX 56A-----	(1/11/72)-----	827+60

Sometimes he could only provide approximate stationing.²⁴⁶ In some cases only the approximate time periods²⁴⁷ in which the pictures were taken were known.²⁴⁸

²⁴⁶ Approximate stationing was given for the following:

Exhibit No.	Date	Stationing
43	Fall of 1971/ spring 1972	Between 835 and 855
54A	August of 1971	Vicinity of DE 116
55	Fall of 1971	Between 835 and 855

²⁴⁷ For the following exhibits time periods but no stationing were given:

Exhibit No.	Period in Which Picture Taken
AX 41-----	Fall of 1971
AX 42-----	Fall of 1971
AX 44A-----	Fall of 1971
AX 44B-----	Fall of 1971
AX 44C-----	Fall of 1971
AX 44D-----	Fall of 1971
AX 45-----	Fall of 1971
AX 48-----	Prior to preparation of AX 4 in spring 1972
AX 53D-----	February 1973

²⁴⁸ Except for AX 53D, all the photographs listed in n.247, *supra*, were taken by Dr. Heuer,

While all of the photographs introduced by Dr. Heuer were discussed to some degree, his comments upon a number of them were particularly significant in terms of developing the patterns by which rock failures in the shear mode or in the extension mode are recognizable. A pair of photographs (AX 41 and 42) taken by Dr. Heuer in the fall of 1971 show the left wall of the tunnel looking toward the heading. They show fractures above and below the fan line, angling back into the wall isolating a wedge behind the fan line. Concerning AX 43 he noted that it and Figures 5 of AX 4 are photographs taken on top of the mole around the

prior to preparing AX 4 in early 1972. Concerning the lack of stationing, he stated: "Yes. I wasn't thinking of a claim presentation at the time and I didn't sufficiently identify the time and place in which they were taken" (Tr. 445).

rockbolting operations. He called attention in Figure 5, to a fracture in the rock showing up immediately above the rockbolt drill, a curved fracture starting about in the center of the photograph and angling back to the left, revealing a rock block which is being isolated by a fracture.

Dr. Heuer drew a sketch (AX 57) to illustrate the excavated perimeter of the tunnel arch showing above that two families of shear planes, potential shear planes. With respect to the sketch he noted (i) that the two intersecting families interforge a number of wedges; (ii) that they form sawtooth, irregular sawtooth lines bounded by shear surfaces; (iii) that the wedges below the sawtooth line represent wedges which have been loosened and detached from the wall because of the formation of shear fractures due to overstressing of the rock; and (iv) that the significant thing is the pattern of irregular sawtooth excavation parameters. Then Dr. Heuer called attention to the fact that in Figure 5 of AX 4 and in AX 43 you can see the very thing illustrated in the sketch, the irregular sawtooth surfaces formed in the crown after these wedges have been isolated by the shear fractures and allowed to fall into the tunnel.

Concluding this phase of his testimony Dr. Heuer stated that one distinctive thing about a shear fracture is the curved failure surface while another is the very fresh appearance of the fracture (a fresh fracture through virgin intact

rock). As illustrative of this fresh fracture through intact virgin rock, Dr. Heuer pointed to AX 22 and to photograph 2 of AX 5 (Tr. 453-55).

Cited as an example of shear fracturing in an early stage is Figure 13 of AF 77A (Station $826 \pm (1/28/72)$). Said to illustrate what happened in that general area in the tunnel over a period of time are AX 44A, B, C, and D. A picture in the same general area (Station 828) is the bottom photograph in AX 46, showing extension slabbing and spalling. As to these several photographs, Dr. Heuer stated that what he was showing were examples, fracturing, failure of the rock due to overstressing, sometimes in the shear mode and sometimes getting into the extension failure mode.

Concerning AX 51A and C and AX 52, Dr. Heuer said that these photographs show that the material above the crack has moved inward, there has been a shearing displacement.

Dr. Heuer also described the effects of the failures he had observed in a 1½-inch diameter hole drilled radially up into the crown of Tunnel No. 3 at Station 851 on October 26, 1971. Using a sketch to illustrate his testimony (AX 58), he said that if the hole had been through virgin intact rock and you looked up it, you would have seen a simple circle as shown in Figure 1-B. Looking up the hole actually made, however, you see (as shown in Figure 2-B) a short distance up the hole an arc

that shows the hole which has been offset by a sliding shearing motion along a crack in the rock.

In the course of his testimony Dr. Heuer referred to three large drawings²⁴⁹ which accompanied the May 1973 report (AF 77A). He undertook to explain what these drawings show above the profile. Of particular interest were his comments on the bar chart labelled "Progressive Failure After Excavation" which he noted shows three divisions: (i) an uncolored or open section (little to no visible progressive failure); (ii) slightly darker, lightly shaded (labelled "Some Progressive Failure"); and (iii) heavy shading, darker (labelled "Significant Progressive Failure"). Dr. Heuer also called attention to the fact that the notes above the bar chart describe in more detail the type of progressive failure which occurred and to the fact that the number of photographs submitted by him dated Feb. 6 or 7, 1973. (n.245, *supra*), had been taken by the contractor at his request to illustrate the sort of thing depicted in the bar chart.

Above the bar chart there is a graph labelled "Invert Elevations Relative to A Line" reflecting information obtained from the "Brewer Survey (Sept. 1972)," the "Owner Survey," and the "Spider Survey,"

²⁴⁹ Drawings R2093, R2094, and R2095. The actual drafting was not done by Dr. Heuer but he prepared the data which the draftsmen used in preparing the drawings. Data came from observations made in the tunnel on Feb. 2 or 3, 1973, and from tabulations supplied by the contractor which had been abstracted from his daily shift reports, as well as information which the contractor gave Dr. Heuer that had come from the Bureau (Tr. 466-74).

a survey made by the contractor in February of 1973, immediately following Dr. Heuer's visit. The "Spider Survey" was made to try and determine the elevation at which Tunnel No. 3 had been actually bored. Still higher in a series of notes across the top of the drawings labelled "Areas of High Invert Requires Removal of Tights Before Invert Concrete Placement." Along the length of the tunnel is shown the amount of material which had to be chipped out of the invert in order to place the required thickness of concrete.

Answering questions posed as to the conclusion he had reached with respect to the causes of the rock failures he had described, Dr. Heuer stated that the failures were not due to (i) unusually high stresses in the sense of stresses which are higher than those which might have been anticipated; (ii) stress relief;²⁵⁰ or (iii) fallouts along joints and bedding planes.²⁵¹ He acknowledged, however, that there were cases in the Navajo Tunnel where fractures forming through intact rock, shear fractures, for example, which would propagate back into the virgin rock

²⁵⁰ While acknowledging that some of the failures he observed might possibly be interpreted as stress relief fractures, Dr. Heuer

considered that they were more likely extension failures due to overstraining, as he states: "[B]ut when right next to it you see another curved shear [sic] fracture, you know that overstraining failures are occurring, which leads one to suspect that the fracture in question was an overstraining fracture and an extension failure mode" (Tr. 477-78).

²⁵¹ AX 56B and AX 60 through AX 66 illustrate fallout along joints or bedding planes in other tunnels, in other geologic situations. Fallout and separation along joints and bedding planes in tunnels are characterized by flat planar surfaces bounding the fallout.

around the tunnel until they intersected a nearly horizontal bedding plane, terminating there. The rock wedge isolated by the curved shear fractures and the flat bedding plane would then drop out. Dr. Heuer stated that this type of behavior is illustrated in photographs 1 and 2 of AX 5 and in Figure 2.14, page 2-28, of AX 38.²⁵²

Dr. Heuer stated that in September of 1970, he could have predicted that failures of the sort he described would occur. In explaining his answer he noted that the depth of cover over the tunnels was indicated in the plans and specifications; that the materials report available to a contractor upon request showed that the BOR had run unconfined compression tests on rock samples and that they had had failures at stresses which were relatively low; that the weakest 60 percent of the sandstone averaged about 770 psi; and that when you compare that strength with the 2,000 psi you might expect in the wall of the tunnel, you see that the material is overstressed and you would predict²⁵³ it would fail. Dr. Heuer would not have been able to predict, however, how fast the fail-

ures were going to occur.²⁵⁴ Also noted by Dr. Heuer were the progressive failures he had observed²⁵⁵ and which were chartered across the large drawings which accompanied AF 77A.

In Dr. Heuer's opinion the type of failures to which he testified had not been indicated in the contract. In support of this opinion, Dr. Heuer noted that the main problem during excavation was the rapid rate of failure and that there were no provisions in the contract which call attention to the need for (placing) support any closer than the contractor actually installed it (Tr. 499-501).

Asked for his interpretation of Paragraph 50 of the specifications and more specifically a particular subparagraph ("Government testing indicates that many of the sandstones, shales and siltstones to be excavated will deteriorate or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three"),²⁵⁶ Dr. Heuer stated that the subparagraph did not indicate the type of failures

²⁵² AX 67 also contains illustrations of fallout to joints and bedding planes in rock tunnels. Although noting that fallout to joints and bedding planes is a very common behavior problem in rock tunneling, Dr. Heuer stated that Mr. Hayes, in his report (AX 1), had described how he did not anticipate the problem due to the massive character of the rock (Tr. 488-92).

²⁵³ Dr. Heuer made a point of saying, however, that he had not testified that a common contractor (as opposed to people well versed in rock mechanics) could have predicted the failures which occurred (Tr. 550-51).

²⁵⁴ At Navajo the failures were said to have occurred immediately. Figure 5 of AX 4 was cited as an example of immediate failure with the rock from the fallout lying on the partial shield of the mole (Tr. 498).

²⁵⁵ According to Dr. Heuer the progressive failures could take days, weeks and months (or perhaps even years) to develop. Figure 13 of AF 77-A, AX 46, and other photographs in this same general area (Station 826 to 828) were said to illustrate progressive failure (Tr. 498-99).

²⁵⁶ Tr. 501-04. Asked whether there was anything else in the contract which indicated the things that had actually occurred and which had impeded the contractor's operations, Dr. Heuer answered "No" (Tr. 504).

which the contractor actually encountered. In support of this interpretation, Dr. Heuer said that later provisions in Paragraph 50 indicate that the problems of disintegration or deterioration due to air or water or stress relief could be solved by the application of protective coatings, by the use of a subinvert or by pumping water out of the tunnel and not allowing it to flow in the invert, after which he stated:

The problems which I've described, the overstressed problems to the large fractures falling out could not have been resolved or solved or prevented by any of those means. This just does not convey to me what I saw in the tunnel. It does not provide for control of what I saw in the tunnel.

(Tr. 504).

Queried as to whether the deterioration, disintegration, and fallout in the vicinity of DH 116 had been caused by water,²⁵⁷ Dr. Heuer stated that while water had had a part in what happened there, it was not primarily responsible for the magnitude of the failures that occurred.²⁵⁸ Nevertheless, he considered that the water problems encountered at Navajo were more severe than he had seen elsewhere in tunnels.

Dr. Heuer said that if he had been assisting in the preparation of the bid estimate in 1970, he would not have anticipated some of the

problems that occurred, because he did not believe that the very low strength of these very reactive materials and their sensitivity to water was indicated by any information that would have been available to him. Elaborating upon his answer, Dr. Heuer said that the water immersion test data tabulated in the materials report available to contractors from the BOR describes sandstone as the most water reactive material and shale and siltstone as less so, while, in fact, in the tunnel it was exactly the opposite.²⁵⁹ He did not consider it unexplainable that the sandstone did appear to be very reactive, however, for it was a very weak material, very poorly cemented, and depending on the nature of the cementing agent, it could be very water reactive.

Another hypothetical question was addressed to Dr. Heuer based upon the assumption he had been part of the contractor's bidding team in 1970. Knowing the Government's estimate as to the overburden on the tunnel and assuming the tunnel was going to be excavated through the type of rock described, he was asked whether he would have considered the amount of overburden presented a serious problem in terms of overstress. Dr. Heuer said that he would have.

On cross-examination Dr. Heuer stated that when the A. A. Mathews firm was engaged as a consultant,

²⁵⁷ Disintegration and deterioration due to water alone is said to be shown in the top photograph of AX 46 (Tr. 505).

²⁵⁸ Page 9 of AX 20 was said to illustrate the interaction of water and oversteering. While the area involved was just short of DH 116, it was in the same area and involved problems of water and shale and large fallout (Tr. 505-06).

²⁵⁹ Immediately thereafter Dr. Heuer stated: "[T]here were minimal if any problems with water sensitivity in sandstone materials; but the shale and the siltstone materials were extremely water sensitive and caused a great deal of trouble" (Tr. 508).

the problems the contractor was having were that material was falling out of the sides and crown of the tunnel and that difficulties were being experienced in supporting the tunnel and maintaining it in a stable condition. The recommendation of the consulting firm for supporting the tunnel are contained in the Dec. 23, 1971, report (AF 36).

After ascertaining that the materials used in the model tunnel were considered to be of a homogeneous and isotropic nature, Government counsel interrogated Dr. Heuer as to the extent to which Tunnel Nos. 3 and 3A had been driven in materials of this nature. Responding to these questions Dr. Heuer stated (i) that the Nacimiento formation as a whole was not a homogeneous and isotropic formation; (ii) that the entire section of that formation in which Tunnel Nos. 3 and 3A were driven was not; (iii) that the entire portion of these tunnels which are within the claim reaches were not comprised of homogeneous and isotropic materials; (iv) that because of the relatively flat dip of the structure of the beds, anytime you had a section which was relatively homogeneous and isotropic that would continue for a long distance in the tunnel with no interbedding of any other material; and (v) that an example of homogeneous and isotropic materials in the tunnel would be sections consisting of pure sandstone (Tr. 534-36). Upon redirect examination the attention of Dr.

Heuer was directed to AX 4 and GX P,²⁸⁰ after which he was asked how he was using the term "deterioration" in those two exhibits. Dr. Heuer said that as he used the term "deterioration," it meant "a reduction in quality, a getting poorer, if you will" (Tr. 538-40).

Near the conclusion of his testimony Dr. Heuer was asked whether if the tunnel had been supported with steel the problem he had described would have been alleviated to a considerable extent. He said that simply installing steel would not have alleviated most of the problems and that practically speaking he did not think that the steel sets could be installed any closer to the heading than they were installing the rockbolts (Tr. 549).²⁸¹

5. Digest of Testimony of A. A. Mathews

(Tr. 554-618)

A. A. Mathews, a construction engineering consultant, gave testimony supporting that given by Dr. Heuer with respect to many of the key issues involved in this appeal. At the time he testified, Mr. Mathews had had 40 years' experience as a professional engineer of which he estimated more than 50 percent was related to tunneling and under-

²⁸⁰ GX P was page 49 of an earlier draft of AF 77A. (See n.75, *supra*.) Both GX P and GX Q (see n.106-112, *supra*) were received in evidence over objection of appellant's counsel. Another exhibit introduced in evidence on cross-examination was GX R (letter to the contractor from A. A. Mathews, Inc., dated Nov. 2, 1971 (n.43, *supra*)).

²⁸¹ See n.74, *supra*.

ground work.²⁶² Prior to the A. A. Mathew, Inc.'s firm being retained by the contractor in July of 1971, the firm had been a consultant to the contractor responsible for construction of the Azotea Tunnel.²⁶³ He personally participated in the engagement relating to the tunnels involved in the instant appeal²⁶⁴ by visiting the site, by assigning Dr. Heuer responsibility for handling problems arising with respect to Tunnel Nos. 3 and 3A, by reviewing reports submitted to the contractor by Dr. Heuer, and by concurring in his recommendations.

From the observations he made in the tunnel and from the reports reviewed by him, Mr. Mathews concluded that the rock failures the contractor was experiencing in the tunnel were due to what he termed "geodynamic pressures." This was a term "coined" by Mr. Mathews which he defined as "pressures on the tunnel structure that are mobilized when the stresses from the surrounding rock exceed * * * its strength" (Tr. 564). He knew that he was seeing failures resulting from geodynamic pressures because he observed cracking that was described in detail by

Dr. Heuer and which he considered to be unique²⁶⁵ to a failure resulting from geodynamic pressures. Mr. Mathews did not believe that the failures he was seeing were fallout to bedding planes or joints for the most part;²⁶⁶ nor did he consider the failures he observed to be the result of stress relief.²⁶⁷

Mr. Mathews gave as his opinion that the contract documents indicated that the contractor should only have to consider support due to loosening of the ground by which he meant loosening due to rock defects. After noting that the contract documents provide for several options with respect to supporting the ground, Mr. Mathews stated that none of them were suitable for resisting geodynamic pressures. He also expressed the view that the occurrence of geodynamic pressures in

²⁶⁵ In developing this position on cross-examination Mr. Mathews stated:

"Well, it's the shape of the fractures that indicate the reason for the failures * * *. These fractures running up on a curved surface that had nothing to do with the bedding planes, that fractured in intact rock, and if one of them happened to eventually intercept the bedding plane and the failure occurred, then the bedding plane would be a natural termination for the failure" (Tr. 588).

²⁶⁶ While occasionally fallouts terminated at bedding planes, that was considered to be only coincidental having nothing to do with the instigation of the failure (Tr. 564-65).

²⁶⁷ In Mr. Mathews' view the term "stress relief" when properly used describes what occurs when in excavating a tunnel you take the rock away thereby removing a pressure that at one time served to maintain the stress in the rock. Explaining why he uses the term "stress relief" interchangeably with stress redistribution or stress concentration, Mr. Mathews stated: "When you remove this rock and remove this pressure you also, if you are deep enough, will be mobilizing the geodynamic pressure which causes the stress redistribution, so the act of permitting stress relief on the surface induces these other things" (Tr. 608-09).

²⁶² The résumé of Mr. Mathews' experience (AX 68) does not include all of his experience in bored tunnels (Tr. 559-61).

²⁶³ Azotea Tunnel was the first tunnel the BOR ever had bored (Tr. 618). The size of the bore excavation on the Azotea Tunnel was about 9 feet (Tr. 599).

²⁶⁴ Mr. Mathews' initial visit to Tunnel No. 3 was in July of 1971. Following that visit he was the author of a letter to the contractor under date of July 24, 1971 (GX 8). He made one or two additional visits to Tunnel No. 3 while it was being excavated. Mr. Mathews did not visit Tunnel No. 3A during construction (Tr. 561-63).

a moled tunnel was a very rare phenomenon and that prior to September of 1970 he had only observed the phenomenon once before and that was in Azotea Tunnel.²⁶⁸ Mr. Mathews stated that the failures in Tunnel No. 3 were not the result of defects in the rock but were the result of geodynamic pressures.

Mr. Mathews was asked for his expert opinion as to the best means of supporting Tunnel No. 3 bearing in mind the conditions that actually exist in that tunnel. He prefaced his answer by stating that one principle that has generally been accepted where you have geodynamic pressure is that you have to permit the ground to relieve itself, to come in in order to reduce the pressure to a value which can be tolerated or handled. Given that requirement, it would have been possible to support the tunnel with (i) full circle steel ribs;²⁶⁹ (ii) shotcrete as long as it is put around the full circle; or (iii) rockbolts. As to item (iii), Mr. Mathews said he was not ignoring the fact that the failures occurred very close to the face and therefore the rockbolts would have to be installed pretty close to the face. He categorically stated that the tunnel

could not be supported with half circle steel ribs.²⁷⁰

On cross-examination Mr. Mathews stated that the observations he had made concerning the support systems for the tunnel were based upon his study of the specifications, particularly Paragraphs 50, 53, 54, 55, 56, 57, 58, 59, and 60. He considered these to deal primarily with the difficulty in driving the tunnel. Mr. Mathews acknowledged that the contract drawings indicated a possibility of using a full circle steel rib. Mr. Mathews also testified (i) that the falling rock he had testified about did not involve homogeneous and isotropic materials; (ii) that in drill and blast tunnels, rock failures due to geodynamic pressures²⁷¹ were an expected phenomenon; (iii) that the water conditions he had observed in Tunnel No. 3 were similar to those he had observed in the Azotea Tunnel.²⁷²

Predicated upon his experience as an estimator, Mr. Mathews was asked a number of questions concerning whether the depth of over-

²⁶⁸ In Azotea Tunnel the heading was at least a mile ahead when the phenomenon was first observed (i.e., the fallout did not occur immediately as it did at Navajo) (Tr. 569-70).

²⁶⁹ On redirect examination, Mr. Mathews testified that full circle steel ribs installed in the manner specified in the contract would not have supported the rock in Tunnel No. 3. Nor did he consider that any of the methods of supports illustrated on the contract drawings and installed in the manner required by the specifications would have supported the rock in Tunnel No. 3 (Tr. 613).

²⁷⁰ In support of this view he stated: "[G]eodynamic pressures are exerted all the way around a periphery and in Navajo Tunnel number 3 it's a matter of record that the bottom did come up. So obviously a half cycle support is supporting the top half and is not going to supply any support to the bottom half" (Tr. 612).

²⁷¹ It was Mr. Mathews opinion that if the Bureau had anticipated the geodynamic pressures they probably would have required the excavation to be done in such a way as to permit some of the ground to move into the tunnel without encroaching on the A line (Tr. 570-72).

²⁷² Mr. Mathews had observed very little water in the Azotea Tunnel (Tr. 602).

burden or cover over the top of the tunnel was a relevant factor to consider in submitting a bid.²⁷³ In a case where it was assumed that the contractor did not know about problems attributable to geodynamic pressures, Mr. Mathews stated that the depth of cover would not be relevant to estimating a tunnel job, insofar as the difficulty in excavating or supporting the ground were concerned. Later, Mr. Mathews, was asked whether if he had looked at the material in the contract and had made an adequate site investigation of the area involving Tunnel No. 3, he would have considered that the amount of cover was relevant to determining the stress that the contractor would encounter in the tunnel. In response he stated that a person would have to have a very strong qualification in geology in order to have foreseen the possibility of geodynamic pressures developing in Tunnel No. 3. Mr. Mathews said that had he been involved personally in estimating the job for the contractor in 1970, he did not think he would have expected the development of geodynamic pressures in Tunnel No. 3 and he knew he would not have if he had not had the experience in the Azotea Tunnel (Tr. 607-08, 615-16).

²⁷³ Concerning the relevancy of the cover question, Mr. Mathews stated that geodynamic pressure is not present at shallow depth; that for any given type of rock it would be necessary to be down to some depth before the geodynamic pressure would develop; that in between a nominal amount of cover and the point where geodynamic pressure became a problem, the depth of cover is not important; and that rock which is loosened because of defects in the rock is independent of the depth of cover (Tr. 607-08).

B. Testimony of Government's Witnesses

1. Summary of Testimony of Dr. J. W. Hilf

(Tr. 624-713)

Dr. J. W. Hilf, an expert in the field of rock mechanics, gave important testimony in the area of his specialty. At the time he testified Dr. Hilf had had very extensive experience with dam projects of which about half had had tunnels in them. From 1946 until 1962 he was employed by the Bureau in the design office in Denver, specializing in geotechnical engineering,²⁷⁴ soil mechanics and foundation engineering.²⁷⁵ In 1966, Dr. Hilf became Assistant Chief, Designing Engineer, Division of Design, Bureau of Reclamation. In 1970 he was made chief of the division in which capacity Dr. Hilf served until May 1975 when he resigned from the Bureau to become a consulting engineer in private practice.

The technical provisions of the specifications and the drawings involved in this appeal were prepared under the direct supervision of Dr. Hilf. He had also participated in a conference with the contractor's representatives concerning the July 22, 1974, claim submission. Dr. Hilf had

²⁷⁴ Geotechnical engineering encompasses soil mechanics, rock mechanics and engineering geology (Tr. 626). Dr. Hilf's major technical experience has been the geotechnical engineering of earth dams (GX T).

²⁷⁵ Dr. Hilf was graduated from New York University in 1940, with a Bachelor of Science degree in civil engineering. His Masters degree (1948) and his Ph.D. degree (1956), were obtained by him from the University of Colorado (Tr. 625).

not been in Tunnel Nos. 3 or 3A during construction but he was familiar with the geology in the vicinity of the tunnels, as he had visited the general area in 1958 or 1959 during the construction of the Navajo dam. Dr. Hilf had also visited the tunnels in March of 1976 (*i.e.*, following the completion of the tunnels but prior to the hearing).

In addition to the information provided to bidders in the usual core logs, they were advised in Paragraph 42 of the specifications of the availability of a construction and foundation materials test data report (GX U). Table 1 of the report gives the compressive strength²⁷⁶ for the core samples taken along the alignment of Tunnel Nos. 3 and 3A in pounds per square inch (psi). In Tunnel No. 3 the highest and lowest values shown for the 13 samples tested were 6,610 psi and 630 psi, respectively.²⁷⁷ For Tunnel No. 3A the values shown for the eight samples tested vary even more widely ranging from a high of 9,700 psi to a low of 300 psi.

Asked to comment upon Dr. Heuer's testimony with respect to his thesis and his observations in

Tunnel No. 3, Dr. Hilf noted that when Dr. Heuer entered the tunnel for the first time he saw some evidence of shear failures which were remarkably similar to the failures he had observed in the model used for his doctoral thesis. He also noted (i) that the rock used in the model was prepared by Dr. Heuer from sand, plaster of paris and water; (ii) that he cured, instrumented and drilled a hole in the material; (iii) that then he subjected the rock with the hole in it to stresses by means of the testing machine until it failed and (iv) that he observed certain modes of failure.

While conceding that Dr. Heuer quite properly attempted to make a homogeneous material for his rock and was also trying to make an isotropic material, Dr. Hilf said that to relate the results of the model tests to a real life condition involves answers to the questions of whether the rock in the real situation is close to or far from being homogeneous or close to or far from being isotropic.²⁷⁸ Although acknowledging that an intact sandstone or an intact shale can be possibly near homogeneous, Dr. Hilf questioned whether the rock involved in Tunnel No. 3 could be isotropic with regard to strength because of the very nature of the deposition.²⁷⁹

²⁷⁶ The compressive strengths given in Table 1 of GX U were characterized by Dr. Hilf as very low rock strengths (Tr. 636). This assessment is borne out by GX V in which intact rock having a strength of less than 4,000 psi is placed in the very low strength category. See also GX W where rock with a compressive strength of less than 6,000 psi is classified as "soft" (Tr. 636-43).

²⁷⁷ The figure used by Dr. Heuer of 770 psi as the average rock strengths for the lowest 60 percent of the samples was considered to be about correct (Tr. 637).

²⁷⁸ Isotropic means that the material has the same properties in all directions (Tr. 649).

²⁷⁹ Concerning this aspect, Dr. Hilf stated: "As a sedimentary rock, it would have to be deposited in layers, so that it might be massive, but it would undoubtedly have different properties in different directions" (Tr. 650).

Of even more interest in comparing the prototype in the field and the laboratory model is the fact that Dr. Heuer had his model tunnel before he loaded it, or in the words of Dr. Hilf: "He had a hole in there, with a perfectly bald tunnel, and he loaded it, whereas in the ground, the stresses were already there, these stresses due to the overburden, and then the contractor, under this contract, bored the hole" (Tr. 650-1). To make any equivalence between the model tunnel and the ground tunnel, more is needed in Dr. Hilf's view than homogeneity and isotropy. The application of the principle of superposition must also be considered. In cases where the principle applies, it doesn't matter which operation is performed first, insofar as the net result is concerned. The principle of superposition is used with respect to steel and sometimes concrete but, as Dr. Hilf sees it "to use it in a rock material is maybe stretching it too far."²⁸⁰

There were a number of areas where Dr. Hilf agreed with the testimony given by Dr. Heuer. He agreed, for example, that without knowing anything about lateral stresses, it was reasonable to assume that the lateral stresses are equal to the vertical stresses. Dr. Hilf also agreed that theoretically the hori-

zontal stresses could vary from a half to maybe two or three or even more of the vertical stresses.

In addition, Dr. Hilf agreed with Dr. Heuer where in his testimony he referred to tangential stresses of approximately 2,000 psi which could be predicted at the tunnel wall. At the request of Government counsel Dr. Hilf undertook to explain tangential pressures in terms of the model in which he assumed a stress of about 1,000 psi around the model before the hole is drilled, noting that stresses at any point would all be 1,000 psi compressive in every direction in that block. When a hole of any size is drilled in that block, stresses are relieved at the place where the hole is and those stresses can no longer be in the direction radial to the hole. The stresses must be redistributed.

When the stresses are redistributed, the radial stress goes to zero as a result of drilling the hole while the tangential stresses all around the periphery of the tunnel doubles up with the result that if you started with 1,000 psi tangential stress at the boundary it would become 2,000 psi tangential stresses and the normal stresses or radial stresses would be zero. Illustrating when rock might be expected to fail as a result of stresses upon it being greater than its strength, Dr. Hilf states:

So remember the stress redistribution theoretically causes this overburden stress or geostatic stress or whatever you want to call it to say about double.

So if you had three hundred psi stress it would. the tangential would be about six hundred. So any strength of rock less

²⁸⁰ Tr. 648-51. Dr. Hilf considered that the failures Dr. Heuer saw were not attributed by him to stress relief because the procedures followed with respect to the model tunnel had caused Dr. Heuer to look at the failures from the standpoint of stressing from the outside and therefore overstressing, rather than looking at it from the inside when you are removing the restraining stresses by removing the material, i.e., stress relief (Tr. 664-65, 695-96).

than six hundred would be subject to a failure just like an unconfined, in an unconfined compression test.

(Tr. 659-60).

Referring to the testimony he had given concerning the stresses which would be created when the tunnel was bored, Dr. Hilf was asked upon cross-examination whether there would be a stress in the invert of the tunnel. Upon receiving an affirmative answer, Dr. Hilf was also asked whether if the stress exceeded the strength of the rock in the invert, the rock would fail. When Dr. Hilf again responded affirmatively, he was asked whether if there were a sufficient difference between the stress and the strength of the rock, the rock could move. This question also received an affirmative answer.

Immediately thereafter Dr. Hilf was interrogated as to which of the support systems in the contract dealt with upward movement in the invert. Dr. Hilf gave as his answer, "[F]ull circular steel rib."²⁸¹ Defending his answer Dr. Hilf stated that if a full circular rib would support everything, its support of the invert would not be coincidental.²⁸²

²⁸¹ Tr. 688. On direct examination Dr. Hilf had stated that full ring support would be adequate to support Tunnel Nos. 3 and 3A even under worse fallout conditions than had been encountered in the tunnels (Tr. 674-77).

The specifications provision relating to the installation of steel supports reads in part: "a. General.—Where structural steel supports are used to support the roof and sides of the tunnel, they shall be installed as shown on the drawings, as prescribed in this paragraph, and as approved by the contracting officer" (AF 1, Specifications, Par. 56, Structural Steel Tunnel Supports).

²⁸² Tr. 690-91. Interrogated as to where in the specifications or drawings there was an in-

He agreed, however, that installing the supports in the manner prescribed in the specifications for shotcrete,²⁸³ steel reinforcement sheet and shotcrete support,²⁸⁴ and rockbolts²⁸⁵ would not have protected against or prevented any uplift in the invert of the tunnel.

Dr. Hilf was examined at length with respect to the following provision from Paragraph 50²⁸⁶ which was read into the record:

Government testing indicates that many of the sandstones, shales and silt-

dication of the possibility of uplift in the invert, Dr. Hilf stated: "[T]he provision on the drawing for the full circle steel rib would indicate that it would have the capability of supporting the entire perimeter of the tunnel, including the invert" (Tr. 692).

The reason for providing full circle steel support was to be able to handle any kind of a contingency in the tunnel. *E.g.*, where the half circle steel support wouldn't stay up (Tr. 692-93).

²⁸³ Tr. 689-90. The applicable specifications provision reads in part: "a. General.—Where shotcrete is used to support the roof and sides of the tunnels it shall be applied to the surfaces of the tunnels except the surfaces in the tunnel inverts within the following limits: * * * (2) in the lower 70° of circular sections" (AF 1, Specifications, Par. 55, Shotcrete For Tunnel Support).

²⁸⁴ Tr. 691. In pertinent part the specification provision in question reads: "a. General.—Where steel reinforcement sheet and shotcrete support is used to support the roof and sides of the tunnel, they shall be installed as shown on the drawings, as prescribed in this paragraph, and as approved by the contracting officer" (AF 1, Specifications, Par. 56A, Steel Reinforcement Sheet And Shotcrete Support).

²⁸⁵ Tr. 691-92. The governing specification provision reads in pertinent part:

"a. General.—Where rock bolt supports are used to support the roof and sides of the tunnel they shall be of either the expansion-anchor type with both ends threaded, expansion-anchor type with fixed heads at one end and threaded at the other end, or slot-and-wedge type. The rock bolts shall be installed as shown on Drawing No. 13 (809-D-227) and 11 (809-D-330), as prescribed in this paragraph, and as approved by the contracting officer." (AF 1, Specifications, Par. 58, Rock Bolt Supports.)

²⁸⁶ AF 1, Specifications, Par. 50, Construction Of Tunnels, General. See Supplemental Notice No. 3 (9-11-70), p. 28.

stones to be excavated will deteriorate or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three. The contractor shall be responsible for providing a clean, undisturbed surface for placement of the lining. He may accomplish this by applying protective coatings under Paragraph 54, installing subinvert tunnel protection in accordance with Paragraph 60, by dewatering in accordance with Paragraph 51, or by removing any deteriorated or disintegrated material back to clean, undisturbed surfaces in accordance with Paragraph 59. If protective coatings or subinvert concrete is not installed, removal of substantial amounts of deteriorated or disintegrated materials is expected.

Upon direct examination Dr. Hilf stated that at the time the specifications for the instant contract were prepared he was the chief designing engineer and that to his knowledge that was the first time in any tunnel specification that the first portion of this paragraph was included in the specifications. He said the reason for its inclusion was the desire of the Bureau to improve the specifications based on the experiences it had already had in the tunnels Azotea, Blanco, Oso, and in Tunnel Nos. 1 and 2 of the Navajo Irrigation Project.

Noting that the Bureau had had trouble in some of the formations encountered in these other tunnels which were somewhat similar to the formations that would be penetrated in performing the instant contract, Dr. Hilf stated that the question came up as to how to alert the contractor to these problems. To his knowledge, the BOR was not thinking of particular kinds of fail-

ures or particular kinds of conditions but at least Dr. Hilf had hoped that the impression the whole sentence would convey would be that the Bureau had had problems with these materials deteriorating, used in a broad sense, just reducing in quality, or disintegrating²⁸⁷ by which was meant breaking into pieces without thinking of whether they were little or big pieces.

Responding to a question on cross-examination related to Paragraph 50 of the specifications, Dr. Hilf acknowledged that as reflected in the construction and materials report (GX U) the Bureau had only tested the core samples with respect to immersion in water and not with respect to deterioration or disintegration when exposed to air or stress relief.²⁸⁸ He also acknowledged (i) that the compressive strength shown on Table 1 (GX U) for 13 samples of rock from Tunnel No. 3 were not representative of the entire tunnel and (ii) that no tests had been performed on samples taken from under the Harris Mesa.²⁸⁹

²⁸⁷ Addressing what he considered to be testimony given by Dr. Heuer to the effect that disintegration was a superficial phenomenon, Dr. Hilf noted that the Sperry-Heuer Report (AX 4) appeared to use the term as he did (Tr. 667-69).

²⁸⁸ A simple standard test for water existed but none was available for either air or stress relief (Tr. 707).

²⁸⁹ Dr. Hilf considered that expense may have influenced the decision not to select samples from under the Harris Mesa. In his view, however, any samples selected from there would in all probability have fallen within the range of the test results reported because of the random nature of the sampling (Tr. 693-95, 705-06).

In answer to other questions posed upon cross-examination involving Paragraph 50, Dr. Hilf stated (i) that the application of protective coatings as provided in Paragraph 54 of the specifications would not have prevented the deep failures of the rock in Tunnel Nos. 3 and 3A as described by Dr. Heuer in his testimony, and (ii) that the installation of subinvert tunnel protection in accordance with Paragraph 60 would not have prevented such failures. Then Dr. Hilf was asked whether it was fair to say that none of the things mentioned in the portion of Paragraph 50, quoted *supra*, would have prevented those deep failures. In his response Dr. Hilf stated:

What you are asking me as I understand the question, what you said none of those things, if you mean by that providing a clean undisturbed surface for placement of lining and doing this by applying protective coatings, installing sub-invert or dewatering or by removing any deteriorated or disintegrated material back to clean undisturbed surfaces in accordance with the various paragraphs, no, those are superficial treatments.

(Tr. 698-700).

Asked about the stresses at the Navajo Tunnel site, Dr. Hilf referred to the contract drawings (Drawing No. 809-D-393 and 809-529-939) and in connection therewith stated (i) that in the Harris Mesa area the elevation is shown to be about 7,000 feet above mean sea level; (ii) that the tunnel grade in that vicinity is about 5,932 feet above mean sea level; and (iii) that there is therefore a little less than

1,100 feet of cover over the tunnel in the high area of the Harris Mesa.²⁹⁰

Addressing the question of what the significance to a contractor would be of the amount of cover reflected in the drawings and the compressive strength for samples tested as reported in GX U, Dr. Hilf stated that the vertical load on a plane in the ground below the surface of the ground is equal to the height of the fill above it times the weight of that fill, whether it is rock or soil or anything. Thereafter, Dr. Hilf said: "So that as a rule of thumb, Terzaghi ^[291] says, and Dr. Heuer says to use one pound per square inch for each foot of fill, and this is proper, because that is assuming that the one cubic foot of material weighs 144 pounds per cubic foot, which is approximately correct" (Tr. 647).

This principle was discussed by Dr. Hilf in a situation where it was assumed that there was 1,000 feet of cover and the average strength of rock in that area was approximately 1,000 psi. In these circumstances it would be known that the stress in the rock before tunneling would be of the order of 1,000 psi; that the result of tunneling is to make a hole; that when this occurs there will be a redistribution of stresses; and that there will be a necessity to support that tunnel.²⁹²

²⁹⁰ Except for the Harris Mesa, a mean for Tunnel No. 3 would involve 300 to 350 feet of cover (Tr. 645).

²⁹¹ Dr. Karl Terzaghi. See AX 67, p. 48.

²⁹² See discussion in text, *supra*, of Dr. Hilf's explanation of tangential pressures exerted where a stress of 1,000 psi around the model was assumed before the hole was drilled.

Dr. Hilf agreed with Dr. Heuer that the speed of failure of the rock would be difficult to predict. He noted, however, that if you have a high stress due to a very high overburden and a very weak rock, you would expect that it wouldn't take any time at all for the rock to fail once you relieve the restraining pressure. But in predicting the speed of failure you must consider not only the amount of the difference between the strength of the rock and the amount of the stress but you must also take into account the stress strain characteristics of the rock (*e.g.*, whether the rock is brittle or a more plastic material). The stress strain relationship is not specifically defined in the specifications, although some information pertaining to that aspect is contained in Table 1 of GX U. While the failures could be plotted from such information, you would not know the true stress-strain for the entire range involved.

As to the type of support contemplated by the specifications, Dr. Hilf stated that the support system provided for would have handled any type of rock fallout or rock failure that could have been expected in the tunnels. After adverting to the fact the specifications indicated that 80 percent of the support required would be other than rockbolts, Dr. Hilf said that a variety of supports had been provided because while the cover over the tunnels was known and while it was also known that the rock in the area was particularly weak, the Bureau didn't know exactly where it was going to

be overstressed or where the stresses would be greater than the unconfined compressive strength of the rock.²⁹³

In his testimony Dr. Hilf stated that the information available to the contractor prior to bidding on the instant contract included the Bennett Report (GX A)²⁹⁴ and the Cannon Report (GX X). In the latter report the excavation rate of progress in Blanco Tunnel was said to be inversely proportional to the amount of cover on the tunnel.²⁹⁵ Dr. Hilf was unable to say whether this was true with respect to Navajo Tunnel No. 3 (Tr. 706-07).

Asked upon cross-examination to say what had occurred at Navajo, Dr. Hilf stated:

Well, there (was) evidence from Dr. Heuer's testimony, and I have no reason

²⁹³ Appropos the size of the boring machine selected by the contractor, Dr. Hilf stated:

"[W]e established a pay line, a B line which we would pay for excavation and concrete and the contractor chose not to have a boring machine that size.

"Now, there's * * * nothing against the specifications in doing so, he could do that and he did" (Tr. 676).

²⁹⁴ For a discussion of the Bennett Report, see n.126 to n.129, *supra*, and accompanying text.

²⁹⁵ "In analyzing excavation progress made in Blanco Tunnel, it is interesting to note that generally the excavation was inversely proportional to the amount of cover on the tunnel. This was particularly evident when the cover exceeded 1,000 ft. Maximum cover on the tunnel was 1,870 ft. * * * Little fallout occurred in the crown presumably because of the support afforded by the rock bolts which were installed immediately behind the cutting head. The major cause of fallout is believed to be stress relief in the rock; however, a combination of factors including action of the mole side grippers, jointing, weak bedding planes, and lithological character of the rock contributed to the fallout and spalling * * * Use of the rock bolts was found to be more effective than circular steel ribs with lagging and contributed to the record progress." (GX X, "Record tunnel excavation with boring machines" by D. E. Cannon, Aug. 1967, p. 48).

to doubt him, because I wasn't there, that shear fractures or shear failures occurred and undoubtedly, if they occurred in intact rock it was because the tangential stress was greater than the strength.²⁹⁶

(Tr. 696).

2. *Digest of Testimony of Bert Levine* (Tr. 713-78)

Mr. Bert Levine, project construction engineer, Navajo Indian Irrigation Project, was the authorized representative of the contracting officer and therefore had responsibility for Tunnel Nos. 3 and 3A. In that capacity his supervisor was the Director, Design and Construction. After becoming an engineer,²⁹⁷ Mr. Levine had a variety of work experiences (e.g., employment by the Navy Department and the Corps of Engineers) before going with the Bureau of Reclamation in 1949. He was given a number of assignments within the Bureau before being made project construction engineer for the Navajo Indian Irrigation Project in 1963.

Much of Mr. Levine's testimony upon direct examination was confined to reading brief passages from exhibits contained in the appeal file and occasionally offering

²⁹⁶ Concerning the terminology employed, Dr. Hilf said that Mr. Mathews' term "geodynamic pressures," Dr. Heuer's terms (over-stressing or stress intensification) and his term "stress relief" all are referring to the phenomenon of failure where the strength of the rock is less than the stress on the rock (Tr. 657, 664-65, 680-82).

²⁹⁷ Mr. Bert Levine received a Bachelor of Science degree in civil engineering from the University of South Carolina in 1940 (Tr. 714).

comments upon them.²⁹⁸ By reason of his supervisory role, some 23 photographs of Tunnel No. 1 and one photograph of Tunnel No. 3 were identified by and offered in evidence through him.²⁹⁹ No substantive testimony was given by Mr. Levine, however, with respect to any of the photographs.³⁰⁰

After referring to a statement by the contractor concerning the installation of a shield over the mole (n.6, *supra*), Mr. Levine stated that the shield was installed on Oct. 4, 1971 (*cf.* n.53, *supra*).

Asked upon cross-examination as to why he had not accepted the invitation contained in the contractor's letter of Feb. 2, 1973 (AF 110), to observe a survey crew working in Tunnel No. 3 on Saturday, Feb. 3, 1973, Mr. Levine stated that historically the contractor and the BOR had exchanged survey information and that he had not seen any reason for his people being present as observers. He did not recall that a similar invitation had been received to attend the Brewer Survey. He

²⁹⁸ In addition to the photographic evidence GX Z (memorandum of Nov. 5, 1970, meeting between parties), GX AA (memorandum of pre-construction conference of Dec. 2, 1970), and GX ZZ (Rate of Advance for Boring Machine, Tunnel Nos. 3 and 3A) were received into evidence upon Mr. Levine's testimony.

²⁹⁹ The photographs of Tunnel No. 1 (GX BB through XX) were offered and received in evidence as relating to the second category changed conditions claim. The photograph of Tunnel No. 3 (GX YY) was received in evidence without restriction (Tr. 730-35).

³⁰⁰ The discussion of rock fallout in Tunnel No. 1 took place in connection with discussion of the size of the mole. Mr. Levine believes that Mr. Sperry was shown the project's photograph file at the time. This was over 3 months after the bids were opened (Tr. 728-29, 747-49).

could not say whether, if received, such an invitation would have been accepted, since the availability of personnel to go is always a factor to be considered. Mr. Levine also indicated that the Bureau would be more likely to accept an invitation to participate in a joint work survey than it would to simply witness someone else's survey as an observer (Tr. 772-77).

In his testimony concerning the size of the bored excavation, Mr. Levine noted that in the meeting of Nov. 5, 1970 (GX Z),³⁰¹ Mr. Sperry had advised that the excavation would be by mechanical mole excavating to a diameter of 20 feet 6 inches; that in the letter of Dec. 7, 1970 (AF 11), the contractor had stated that it would be excavating the tunnel with a mole to a 20 foot 6 inch-diameter; that on numerous occasions after the Nov. 5, 1970, meeting, Mr. Levine had expressed concern that the small diameter of the mole would only permit the installation of rockbolt type supports; that in the letter of Jan. 19, 1971 (AF 12), the contractor had stated that it still believed the 20 foot 6 inch-diameter size to be adequate for the support required;³⁰² and that in mid-March of 1971 Mr. Levine had attended a showing of the Dresser mole in Beaumont, Texas, at which time he had formed the impression³⁰³ that the Dresser mole

had a variable size cutter which would permit going up another 6 inches; that on Feb. 2, 1971 (AF 13), Mr. Levine wrote the contractor to say that the proposed excavated diameter appears to be adequate for meeting minimum dimensions for "A" line thickness for rockbolts but that the use of steel rib supports would require excavating to a larger diameter if normal tolerance is provided.³⁰⁴

When documents relating to Mr. Levine's testimony are examined, they show that during the same time period the contractor was advising the BOR that it contemplated excavating the tunnels to a 20 foot 6 inch-diameter, it was also informing the Bureau of its intention to rely exclusively upon rockbolts for tunnel support.³⁰⁵ At the meeting on Nov. 5, 1970, Mr. Sperry is reported to have stated that the contractor planned to use rockbolts exclusively for support (GX Z, p. 2). In the preconstruction conference on Dec. 2, 1970, Mr. Sperry is recorded as having said that the contractor did not intend to use shotcrete, steel reinforcement sheets or steel sets for tunnel support but intended to use rockbolts in a pattern placed approximately four feet behind the cutter head (GX AA, p. 3). Reliance upon rockbolts

³⁰¹ See text accompanying n.4, *supra*.

³⁰² See n.7, *supra*, and accompanying text.

³⁰³ The basis for the impression is not clear. Mr. Levine states:

"[W]e were * * * talking of the mole size and I got the impression, which may be a lack of communication, you can't determine, because I know Joe Sperry and I know he told

me what the facts were, I got the impression at that time that this mole was a variable size cutter, that we could expand the mole" (Tr. 722).

³⁰⁴ Tr. 722-23. See n.8, *supra*.

³⁰⁵ The record indicates that at the time the bids were opened, the BOR knew that the contractor and the three other lowest bidders contemplated using only rockbolts for support (see n.10, *supra*, and accompanying text).

for support was confirmed in the contractor's letters of Dec. 7, 1970 (AF 11), and Jan. 19, 1971 (AF 12).

In the Bureau's letter of Feb. 2, 1971 (AF 13),³⁰⁶ Mr. Levine stated that whether conditions in Tunnel Nos. 3 and 3A are suitable for an extensive use of rockbolt supports must be determined during and following the excavating process. Approximately 31½ months later, the project construction engineer was noting that it was apparent the contractor was planning to rely entirely on rockbolts for tunnel support.³⁰⁷

Another serious question confronting both the contractor and the Government was the type of anchorage required for the rockbolts if they were to adequately support the tunnel. Even before the major difficulties were encountered in the general vicinity of DH 116, the BOR had advised the contractor, by letter dated June 25, 1971 (AF 17), that rockbolt anchorage tests conducted by a Bureau of Mines geologist had disclosed that the anchorage obtained through use of the Pattin D-5 shell was inadequate. Consideration of the type of support methods that might be used to secure adequate anchorage for rockbolts continued during the shutdown period (AX 70). Inadequate anchorage of rockbolts continued to plague the contractor even after the resumption of

operations.³⁰⁸ In a letter dated Sept. 16, 1971 (AF 25), the BOR complained that the contractor was not adhering to an informal agreement to use tandem shells rather than single shells for rockbolts and to grout the rockbolts which did not attain and retain adequate torque. Almost 2 months later, however, the Bureau was advising the contractor that the grouted tandem expansion shell anchor was not approved because the use of such an anchor did not provide a safe roof support by reason of the excessive time required for the grout to cure.³⁰⁹

At the time of the Dec. 6, 1971, conference (AX 74), considerable progress had been made but the question of whether rockbolts were adequate as support for the entire tunnel was still very much in doubt (*see* n.27 and n.34, *supra*). By early March of 1972, however, Mr. Levine was in a position to advise the Director, Design and Construction, that the use of rockbolts for support had been found to be satisfactory since the epoxy anchor had been in use.³¹⁰

Upon cross-examination, Mr. Levine acknowledged that under date of Jan. 26, 1972, he had furnished to the Director, Design and Construction, a geology progress report (AX 69). Noting that Tunnel No. 3

³⁰⁶ See text accompanying n.8, *supra*.

³⁰⁷ AF 16. Mr. Levine testified that by that time he knew that the mole did not have a variable diameter and that it was restricted to a 20 foot 6 inch-diameter (Tr. 723-24).

³⁰⁸ In the report submitted to the contractor by A. A. Mathews, Inc., under date of Sept. 17, 1971 (AX 5), the consultants state that the presence of water is a direct consideration in the selection of bolt anchors where rockbolts are used. *See* n.18, *supra*.

³⁰⁹ See n.24 and accompanying text.

³¹⁰ See text accompanying n.47.

was excavated from Stations 824+00 to 845+47 primarily in siltstone and shale and that the project geologist had been on leave most of December, the report states:

Fallout 6-inches to one foot deep and 2- to 6-foot wide occurred in local areas primarily where shale was present in the arch. The fallout occurred immediately after excavation removed the underlying rock support. Stress relief-type fractures developed in the sides below springline from Stations 825+00 to 829+00. The rock is fractured to depth of one foot. Scaling revealed a bedding plane and shaly zone near springline from Stations 826+00 to 829+00. Fractures dipped towards this plane and fracturing is believed triggered by the gripper pressure of the mole on the shale. Fractures from Stations 825+00 to 826+00 are present below the gripper imprint and thicken from fourth-inch slabs at the top to estimated 6 inches thick at the bottom near invert.^[31]

3. Digest of Testimony of John Rogert (Tr. 825-57, 865-913)

Mr. John Rogert, a civil engineer with the Bureau of Reclamation,³¹² was responsible for the supervision of the inspection forces in Tunnel Nos. 3 and 3A until he left the Navajo Indian Irrigation Project

in January of 1973. At an earlier time he had exercised the same supervisory authority over the inspectors in Tunnel Nos. 1 and 2. Mr. Rogert made trips into Tunnel Nos. 3 and 3A almost every day that he was on the site and the contractor was working in the tunnel or tunnels. At the time he left the Navajo Indian Irrigation Project in January of 1973, the contractor had only completed about a third of the concrete invert lining in Tunnel No. 3. Inspectors prepared daily reports for every shift they worked in Tunnel No. 3, many of which were offered and received in evidence (GX AAA(1) through AAA(24)).

A substantial part of Mr. Rogert's testimony concerned Tunnel No. 1. For example, all of the photographs about which he testified (GX JJ, KK, LL, PP, QQ, RR, SS, UU, VV, WW, and XX) were pictures taken in Tunnel No. 1. In many areas he was asked to compare the conditions that he had observed in Tunnel Nos. 3 and 3A with those he had witnessed at an earlier time in Tunnel No. 1. All three of these tunnels were bored tunnels. Mr. Rogert testified that generally the rock failures and fallout he had observed in Tunnel No. 3 had occurred in the arch of the tunnel but that he had also observed fallout from the side ribs; that the rock failures and fallout occurred near the moling machine and away from the moling machine; that the rock failures and fallout observed in Tunnel No. 3A were similar to those he had seen in Tunnel No. 3;

³¹¹ Immediately thereafter the report states: "Popping rock was heard from Stations 833+00 to 836+00 on January 14. This section was excavated during the last week in December 1971. Popping occurred more frequently after passage of a loaded train. A few fractures developed in the roof in this section after support was installed. Occasional popping at the face was reported by inspectors as the excavation advanced from Station 825+00 to 839+00." (AX 69, Memorandum dated Jan. 26, 1972, Subject: Geology Progress Report, Dec. 1, 1971, Through Jan. 15, 1972—Navajo Indian Irrigation Project.)

³¹² Mr. Rogert has a Bachelor of Science degree in civil engineering from the University of Colorado (Tr. 826).

and that the rock failures and fall-out observed in Tunnel No. 1 were similar to those he saw later in Tunnel Nos. 3 and 3A.

Upon direct examination, Mr. Rogert testified that in Tunnel Nos. 3 and 3A there were dust problems, electrical problems, and mechanical problems, some of which were due to rock falling. He also testified that he had seen muck cars derailed in Tunnel No. 3 and that he had seen muck falling off the cars in that tunnel. Upon cross-examination he admitted, however, that all of these conditions had also been seen by him in Tunnel No. 1.³¹³

Some testimony was elicited from Mr. Rogert with respect to the amount of water encountered in Tunnel Nos. 3 and 3A and that experienced in Tunnel No. 1. He had observed water coming out of rock-bolt holes after they had been drilled and sometimes had noticed a slight amount of water coming through the walls and arch of the tunnel. Mr. Rogert testified that he believed GX LL showed water coming out of rockbolt holes but he could not say positively. Whatever the source of the water, it was collected near the heading or behind the heading in sumps and pumped out in a pipeline³¹⁴ to the outlet portal of Tunnel No. 3 and from there it was pumped to a drywash and sometimes even to a spoils area. Measurement of the flow of the wa-

ter in the pipeline varied from a low of three gallons, or less, to a maximum of almost 10 gallons per minute.³¹⁵ Mr. Rogert did not consider that to be a lot of water. In his opinion the water problems in Tunnel No. 1³¹⁶ were somewhat similar to the water problems in Tunnel No. 3, while the water problems in Tunnel No. 3A were considered to be only about half as much as those in Tunnel No. 3.

Mr. Rogert gave testimony as to the A and B lines and the system used by the contractor to keep the mole level and on line and grade. After establishing that the witness was familiar with how the contractor positioned the mole for excavation, a very large exhibit (consisting of one very large sheet and on top of that a clear plastic overlay) was offered and received in evidence as GX BBB. The exhibit shows how the actual mole excavation lines up with the A line and B line if the mole is perfectly level and the targets and laser beam are lined up properly as well as showing what occurs if the mole is not kept on target. In the latter event,

³¹⁵ Converting Mr. Rogert's estimate into gallons per hour, the flow of water in Tunnel No. 3 varied from 180 to 600 gallons per hour. In a letter dated Apr. 22, 1972 (AF 50), the contractor estimated that water in the vicinity of DH 116 of Tunnel No. 3 drained at a rate of from 20 to 40 gallons per hour. In a letter written some 10 months later (AF 57), the contractor estimated the water from a drain pipe grouted into DH 116 at Station 855+73 was continuing to drain at the near constant rate of 28 gallons per hour.

³¹⁶ The Final Construction Report for Tunnel No. 1 states: "The occurrence and seepage of groundwater did not present a problem in Tunnel No. 1" (GX KKK, Appendix, p. 11).

³¹³ Derailed muck cars and muck spilling out of cars were also seen by him in Tunnel No. 2 (Tr. 876).

³¹⁴ The pipeline is not visible in GX UU (Tr. 901).

tights would be likely to occur in the invert or in the arch or on either side of the tunnel depending upon whether the center of the target was above, below or to the left or right of the laser beam. Also noted by Mr. Rogert was the fact that if you have a combination of the target being off the laser beam and the machine being out of a level position, there would be increasingly more tights.

Upon redirect examination Mr. Rogert stated that with the mole laser system used in Tunnel Nos. 3 and 3A it would be possible for the mole to get off line and grade because the mole could rotate around the laser beam.³¹⁷ He was unable to say, however, whether the laser target system used in Tunnel No. 1 was designed in such a way that it would allow the mole to rotate around the laser beam. Also upon redirect examination Mr. Rogert stated that the laser system used in Tunnel No. 1 was a better system than that used in Tunnel No. 3³¹⁸ because the operator of the mole in Tunnel No. 1 had more control over positioning of the mole as a result of what was shown on the board right in front of him as well as having more control over keeping the mole level.³¹⁹

As to keeping the mole level Mr. Rogert was of the opinion that the

operator was told to check a carpenter's level on the mole but that the operator of the mole could not read the bubble to see if the mole was level unless he left the cab of the mole. Mr. Rogert had no recollection of having seen the roll indicator to which Mr. Sperry testified, however, and consequently gave no testimony concerning what function the roll indicator performed³²⁰ in assisting the operator to keep the mole level.

Mr. Rogert had observed the contractor's crews chipping tights in the invert on a number of occasions. Removal of the tights was part of cleaning up just ahead of the concrete placement after practically all of the loose material had been removed. About one third of the concrete had been placed in the invert at the time Mr. Rogert left the project in January of 1973. Upon cross-examination Mr. Rogert emphasized that his testimony in this area related only to Tunnel No. 3 and not to Tunnel No. 3A. As to Tunnel No. 1, however, Mr. Rogert stated that he had seen tights in the invert, in the arch and in the walls.

Testifying as to specification requirements, Mr. Rogert stated that he was familiar with the specifications for Tunnel No. 1 but not for

³¹⁷ Tr. 904. Upon recross-examination Mr. Rogert acknowledged that lots of things are possible (Tr. 907-08).

³¹⁸ Tr. 903. Upon recross-examination Mr. Rogert could not recall having given this testimony (Tr. 906).

³¹⁹ Mr. Rogert was unable to offer an explanation, however, as to how the laser system in Tunnel No. 1 indicated levelness of the mole (Tr. 912).

³²⁰ In his testimony upon rebuttal Mr. Sperry indicated that the roll indicator was an accurate instrument to determine whether the mole was level. Although upon direct examination he had stated that the carpenter's level was used to check the roll indicator, he changed this testimony upon cross-examination to say that the carpenter's level was used to check the mounting of the roll indicator for damage from rock fallout (Tr. 1294-98, 1329-30).

the Azotea Tunnel.³²¹ He expressed the view that the support requirements for Tunnel Nos. 3 and 3A were very similar to those for Tunnel No. 1. Mr. Rogert did not recall any provision in the specifications for Tunnel No. 1, however, which related to deterioration or disintegration.³²² While he did not consider the rock to be uniformly of one type, Mr. Rogert did consider that the rock in Tunnel No. 1 was generally the same as in Tunnel Nos. 3 and 3A (Tr. 878).

In his testimony Mr. Rogert noted that there were three or four occasions when the workers walked off the job in what were apparently "wildcat strikes"; that from time to time there were problems with the conveyor belt system for hauling muck; and that sometimes the job had to be shutdown temporarily when the rockbolt drills or cutterheads become inoperative during the week and had to be changed before work could be continued.³²³

4. Digest of Testimony of Malcolm Logan (Tr. 913-965, 906-1067)

Mr. Malcolm Logan was employed by the Bureau of Reclamation as a geologist³²⁴ in various capacities from 1945 until 1973. He was the chief geologist for the Bureau of Reclamation from 1969 un-

til his retirement in 1973. As chief geologist Mr. Logan was responsible for the technical adequacy and accuracy of the geologic data developed in the field and transmitted to the chief engineer's office for analysis and study with a view to the preparation of specifications for various projects.

In the course of carrying out its responsibilities for collecting geologic data and helping to develop the specifications, the geology branch conducted some field tests in the form of drill holes and took samples which were tested in a laboratory at Denver. At the hearing Mr. Logan acknowledged that he was the man in charge of the geology work reflected in the bid documents and that he and other people in the branch had had many meetings with the designers at which they supplied certain criteria and information such as the estimated length of tunnel that would require support as well as discussing the type of material that should be provided to the bidders (*e.g.*, examination of samples).³²⁵

During contract performance Mr. Logan visited Tunnel No. 3³²⁶ on three different occasions. The first

³²¹ Tr. 878-80. During excavation Mr. Rogert had been in the Azotea Tunnel on two occasions and in Blanco Tunnel on one (Tr. 876, 907).

³²² Tr. 880-1. See also n.9, *supra*.

³²³ Tr. 851-52. Some of the tools were damaged but a lot had been worn out (Tr. 851).

³²⁴ Mr. Logan was graduated from the University of Wyoming in 1941 with a B.A. degree in geology (Tr. 914).

³²⁵ The bulk of the technical data was included in the specification drawings. The complete drill logs (GX EEE(1)-EEE(12)) were available to bidders upon request. Samples of core were also available to bidders who wanted them to conduct their own tests. Two core samples were taken by the contractor (Tr. 930-37).

³²⁶ Three photographs of Tunnel No. 3 were the subject of testimony by Mr. Logan. These were taken on Sept. 2, 1971 (GX HHH), Sept. 17, 1971 (GX FFF), and Jan. 11, 1972 (GX GGG).

visit was from Sept. 13 to 15, 1971. Upon direct examination he testified that the tunnel face was then at approximately Station 855+26; that Drill Hole No. 116 was totally dry; that the boring machine was not operating; that water was ponded all around the area of the cutter-head; and that there was a considerable amount of muck down in the area in front of the machine. The second visit took place on Mar. 23 and 24, 1972, when the tunnel face was an approximately Station 782+00. On this occasion Mr. Logan observed failures in the sidewalls of the tunnel and bent pans and some cracking of the rock all along some of the crown, as well as water and muck in the invert. It was on this visit that Mr. Logan rode in the cab of the mole and was thus in a position to observe the tunnel from that vantage point.

The third visit to the site was on Feb. 26 and 27, 1973. The visit was made for the dual purpose of conducting a geologic examination of the portion of the tunnel not seen on prior visits and to discuss the invert heave problems.³²⁷ By the time of the third visit concrete had already been placed in the invert and there was a noticeable cracking of concrete in specific areas. The conditions observed by Mr. Logan were identified as occurring at approxi-

mately Stations 820+00 to 835+00, 842+00 and 853+00. The invert heave was attributed by Mr. Logan to stress relief³²⁸ producing openings in the shale into which the water ponded in the area entered causing the shale to swell.³²⁹

Mr. Logan did not agree with the conclusion expressed by Dr. Heuer that the materials report (GX U) did not indicate the sensitivity to water of the materials in the tunnel. In support of this position he cited the significant amount of clay materials shown on the last page of GX U,³³⁰ referred to the note³³¹ appearing on that page and read into the record an excerpt from a report submitted by the contractor's geologist, Mr. J. J. Hayes, prior to bidding in which he stated that "[t]he shale

³²⁸ In the opinion of Mr. Logan stress relief occurs whenever you remove the material to create the tunnel. He regarded questions related to redistribution of stresses and the intensity of stresses as involving primarily engineering questions in the field of rock mechanics rather than geologic questions (Tr. 1033-34, 1065-66).

³²⁹ Tr. 962-63. Upon cross-examination Mr. Logan stated:

"[I]n the shale, water could then enter those cracks and you have a much greater area for exposure to moisture, and therefore the action is speeded up and so it is not a straight line failure pattern. The more area that is exposed the faster the effect is of 'swelling,' deterioration, disintegration." (Tr. 1042).

³³⁰ As shown thereon, samples were taken from Drill Hole Nos. 113, 116, 117 and 118. The only samples showing Montmorillonite and other clay materials obtained in Tunnel No. 3 at tunnel depth is from DH 116 (Tr. 988-91). The results of the exploratory drilling at DH 116 are set forth in the geologic logs (GX EEE(10)).

³³¹ The note reads: "This range of materials described in this category covers the finer-textured materials that are commonly referred to in the field classifications in the geologic logs as 'shale' and occasionally as 'mudstone' and 'claystone,' as well as the more argillaceous siltstones" (GX U).

³²⁷ Responding to a question on cross-examination as to why there had been no invert heave in the area of DH 116 despite the presence of water, Mr. Logan stated that there was no large bed of shale in the invert of Tunnel No. 3 at that point but that there was fallout in the arch in that area as a result of stress relief and water causing the shale in the arch to swell (Tr. 998-1000).

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(siltstone) is very water reactive." ³³²

Upon cross-examination Mr. Logan stated that the type of geologic environment which would be encountered in Tunnel Nos. 3 and 3A could be predicted but that it would be difficult to correlate between drill holes. This assessment stemmed from Mr. Logan's view that all of the materials of which the tunnels were composed (sandstone, shale, and siltstone) was heterogeneous ³³³ and the variations were three dimensional (horizontally, vertically, and laterally). Despite his view that none of the materials involved were homogeneous, Mr. Logan testified at one point that a bidder should know of the water sensitivity of materials in Tunnel No. 3 (approximately 15,000 feet in length) from one sample taken at tunnel depth showing it contained Montmorillonite (Tr. 991-92).

Appellant's counsel interrogated Mr. Logan at length with respect to his travel report of Oct. 4, 1971, pertaining to his first visit to Tunnel No. 3 (AX 82). The stated purpose of the visit was to conduct a geologic examination relating to slow progress of excavation. The mid-September visit came after and was related to the contractor's changed conditions notice of July 29, 1971 (AF 19). In his testimony Mr. Logan stated the purpose of the visit was to observe the geologic

conditions ³³⁴ in the vicinity of DH 116 with a view to determining what the facts were so that if a claim on this reach were submitted, the BOR would have factual information on which to base a judgment as to the settlement of the claim, insofar as the geologic aspect was concerned.

In the language of the report, "The examination was directed toward outlining programs which the project geologic personnel should pursue in compiling data on the contractor's allegations of changed conditions." Immediately thereafter the report refers to proposed programs of data collection based on six findings developed during the field examination. After acknowledging that the six findings had been made by him and that they were not factual, Mr. Logan stated that the programs outlined were to determine whether the findings that had been developed during the field examination were correct or not. Following this Mr. Logan was interrogated on each of the six "findings" to determine the extent to which he considered that factual data developed by the project personnel showed the "findings" to be correct. Each of the "findings" are quoted below followed by a summary of Mr. Logan's testimony with respect to them.

(1) squeezing ground is not present in the tunnel and the localized linear

³³² Tr. 1057-58; n.71, *supra*.

³³³ Heterogeneous was defined as "[a] median in which properties of that material vary in varying directions" (Tr. 981-82).

³³⁴ Commenting upon the depositional character of the Nacimiento formation in which the tunnels were driven, Mr. Logan said the continental deposits involved should be classified as heterogeneous mixtures rather than homogeneous (Tr. 919-24).

cracking of the rock near spring line is related to machine operation.

Although noting that it had been quite awhile, Mr. Logan stated that to the best of his recollection the factual geologic data compiled by project personnel³³⁵ showed finding No. 1 to be correct.

(2) fallout in the tunnel arch is primarily related to the stratigraphic sequence in which lenses and relatively thin beds of shale, micaceous sandstone, etc. are present at or near the tunnel arch and do not have sufficient tensile strength to attain natural arching in the 20.5-foot-diameter tunnel.

The geologic data compiled by the project personnel subsequently was said to have demonstrated that finding No. 2 was correct.

(3) machine operation and associated rock failure in the spring line area is contributing—in a “ripple” effect—to localized failure conditions extending from tunnel arch to spring line.

Mr. Logan stated that the compilation of geologic data by project geologic personnel showed this finding to be partially correct in that based primarily upon direct observation of the mole it had been determined that only some of the failure along the spring line was attributable to the gripper. Mr. Logan was not sure that the failures attributed to the gripper had been identified by station but considered that it had been identified by location on the periphery of the tunnel as extending from a short distance above spring line to three to four feet below the crown.

(4) the presence of water and the related disintegration of the fine-grained

sedimentary rock are clearly evident in the tunnel, but were as clearly indicated in the specifications document.

The data compiled by the project geologic personnel subsequently was said to have demonstrated that “finding” No. 4 was correct.³³⁶

(5) the slow rate of progress, due primarily to mechanical failures, is promoting excessive rock failure through delays in establishing artificial arch support and in allowing the accumulation of water at the cutterhead to become a problem of machine operation.

Mr. Logan was unable to say whether this finding was subsequently confirmed as correct by data compiled by the project geologic personnel.³³⁷ Asked what sort of factual geologic data he would have expected the project geology personnel to compile with respect to that “finding,” Mr. Logan said it would have involved reporting damage to the machine occurring from rock fall.

(6) geologic conditions encountered in the tunnel to date do not differ from that portrayed by the specifications document.

Mr. Logan was also unable to say whether factual geologic data prepared by the project geologic per-

³³⁵ The record before us is devoid of the factual geologic data on which Mr. Logan's opinion is based with respect to “findings” 1, 2, 3, and 4. Tests conducted by the Government on NX core samples obtained from horizontal drill holes located below spring line of the tunnel where the grippers had exerted heavy pressure on the tunnel walls during tunneling operations were termed “generally inconclusive” (n.23, *supra*).

³³⁷ The following exchange took place:

“Q. Did your project geologic personnel disobey your instructions with respect to finding No. 5 and not compile any geologic data?

“A. Certainly. [sic] I don't know whether he did or not prepare any.” (Tr. 1035).

³³⁶ See n.22, *supra*, and accompanying text.

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sonnel had confirmed finding No. 6 as correct.³³⁸

The extent to which the grippers on the boring machine may have contributed to the fallout and other rock failures in Tunnel No. 3 was the subject of a considerable amount of testimony by Mr. Logan. Commenting upon the photograph taken on Jan. 11, 1972, near Station 831+25 (GX GGG), he stated that the picture showed slabby rock and that there was evidence of this type in many places throughout the tunnel when he observed it at a later time. After noting that the slabby-ness in the ribs of the invert was caused by stress relief, the subsequent redistribution of the stresses and a loosening around the periphery of the tunnel, he stated:

Now, I think much of it was the gripper, much of it was attributable to the gripper failure because it had a very low strength rock under it in the first place and the stress relief under the redistribution of stress and the peripheral zone in the tunnel is well known that the rock will move into the tunnel. You have further weakened that rock and then you are applying an artificial stress. We've been talking about natural stresses in the rock, but we were applying artificial stress to that rock and consolidated the rock and I saw this occurring when I was riding in the cab, where the material was consolidated at least a half an inch and in which streams of water were pouring down the leading and trailing edge of the grippers.^[339]

³³⁸ Tr. 1036-37. Upon direct examination Mr. Logan had summarized his position in this area by stating: "I would say that they encountered exactly what was portrayed in the specifications" (Tr. 964).

³³⁹ Substantially the same testimony was given upon cross-examination. Mr. Logan testi-

So I would attribute much of this type of fracturing in Exhibit GG—GGG as being affected by the grippers.

(Tr. 956a-57).³⁴⁰

A photograph taken at Station 856+03 on Sept. 2, 1971, was received in evidence as GX HHH.³⁴¹ Mr. Logan testified that the photograph shows some of the failure of the rock that is occurring beneath the gripper pad. Upon cross-examination Mr. Logan referred to his prior testimony in which he had stated that the grippers were only a part of the failure pattern and that they were not solely the cause of the failures.

Water immersion tests were conducted on samples of core taken from Tunnel Nos. 3 and 3A at varying depths. Referring to a picture taken of a core sample of clayey siltstone from Drill Hole No. 117

fied, however, that he did not see any rockbolts in the arch of the tunnel when he observed the action reported of the grippers; that he did not remember seeing any water above the spring line; that the material was dry above the gripper prior to gripping; and that the material appeared to be dry ahead of the gripper (Tr. 1024-26).

³⁴⁰ The following colloquy occurred on cross-examination:

"Q. * * * Where did the gripper pressures contribute to rock failures?

"A. I do not know the stations at which they did occur. In my opinion, they were a contributing factor to the fallout, on the sides, or in the spring line of the tunnel.

"Q. Yes, sir. And the only place that you saw that in order to form that opinion, was where the face was at Station 782 plus zero, zero in March of 1972?

"A. Yes." (Tr. 1054-55).

³⁴¹ The caption on the photograph reads: "Side gripper on the right side of boring machine gripping against the left wall at Station 856+03. Note siltstone back of gripper. The rock was broken on gripping and about 6 inches fell out when gripper was released" (GX HHH).

in Tunnel No. 3A (GX U), Mr. Logan said that the picture shows the disintegration and deterioration of the sample after 15 minutes of soaking in water. Mr. Logan also referred to the portion of Table 1 of GX U pertaining to Tunnel No. 3 in which three of seven core samples of sandstone taken from DH 113 at various depths are shown to have disintegrated on immersion during preparation for absorption test.³⁴² With respect to what is shown on Table No. 1 for Tunnel No. 3, Mr. Logan stated upon cross-examination that under the right hand column headed "Effects of Wetting by Immersion" (i) only one siltstone sample was reported for which the comment is made: "Expands slightly with cracks," and (ii) that no samples of shale were reported (Tr. 1037-38).

Mr. Logan was unable to remember whether a geology report relating to the site of the tunnels had been prepared but he believed that one had been. While not in a position to say whether a geology report had been furnished to the designers, he was certain that no geology report had been made available to the bidders. Asked about how the failure to furnish the geology report to bidders could be reconciled with his statement that they had been given the most complete information pos-

³⁴² After noting that the samples tested and reported on in Table No. 1 for Tunnel No. 3 (GX U) were sandstones primarily and that many of the samples had disintegrated, Mr. Logan stated that from the geological standpoint the unique part was for a sandstone to swell and slake apart as had occurred, after which he added: "We would know that the siltstones and shales would, because of the clay mineral content, and this is quite well understood" (Tr. 948-49).

sible, Mr. Logan said that that statement related to the most complete factual information possible and not to a highly interpretative document such as a geology report. He acknowledged, however, that such a report would be likely to contain an interpretation of how the rock might behave when a tunnel is moled through it (Tr. 983-84, 1007).

Included as part of the bidding documents were various contract drawings including Drawing No. 809-D-400 and Drawing No. 809-D-317. Referring to these drawings, Mr. Logan stated that the information shown thereon includes: (i) the alignment of the two tunnels; (ii) description of the various overburden materials comprised of loose materials and outcrops of the sandstone and siltstone and shale wherever visible; (iii) the depth of cover; (iv) a ground profile along the tunnel alignment with drill holes plotted thereon; (v) the logs of the drill holes and a sort of lithologic column giving depths in the drill holes; (vi) the locations where samples were taken for the petrographic examination and physical properties testing; and (vii) observations as to air slaking.³⁴³

5. *Digest of Testimony of Gordon C. Dalen*

(Tr. 1099-1145, 1152-73)

Mr. Gordon C. Dalen, a civil engineer for the Bureau of Recla-

³⁴³ Tr. 925-30. Mr. Logan considered that a protective coating of shotcrete would have protected against air slaking since it would protect the surficial material on the tunnel by maintaining a uniform moisture content (Tr. 1067).

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mation employed in the contract administration section, also testified as a Government witness. Mr. Dalen³⁴⁴ had been with the Navajo Indian Irrigation Project since the beginning of the tunnel work in Tunnel No. 1. He had been in Tunnel No. 1 and in Tunnel No. 3 on a number of occasions. He had visited Tunnel No. 3A at the time of the initial excavation and one other time.

Mr. Dalen had been assigned contract administration responsibility for Tunnel Nos. 3 and 3A and had written all of the final construction report for Tunnel No. 1 except for the appendix. The report included data as to various contract operations both sequentially and by type (*e.g.*, concrete work). Incident to his contract administration responsibilities, Mr. Dalen was involved in the determination of pay quantities and therefore kept track of concrete operations in Tunnel Nos. 3 and 3A.

Offered in evidence through Mr. Dalen were GX LLL, GX MMM, and GX NNN. The exhibits show the amount of concrete and cement used daily in Tunnel Nos. 3 and 3A (GX LLL) and in Tunnel No. 1 (GX MMM) as reflected in the official project records, together with some summary sheets prepared by Mr. Dalen. In these summary sheets Mr. Dalen has calculated the overruns for these tunnels.³⁴⁵ GX NNN

³⁴⁴ Mr. Dalen is a registered engineer in Colorado and in New Mexico and has a B.S. degree in civil engineering from Montana College (Tr. 1099-1101).

³⁴⁵ A neat line volume of excavation is obtained by multiplying the excavated diameter

is a comparison of the overruns for the three tunnels showing that the percent of the overrun³⁴⁶ based on neat line as excavated was 2.74 percent for Tunnel No. 1, 3.23 percent for Tunnel No. 3, and 3.18 percent for Tunnel No. 3A. With respect to Tunnel Nos. 3 and 3A, however, the same exhibit shows that the percent overrun paid for based on final pay for excavation was 8.29 percent for Tunnel No. 3 and 8.30 percent for Tunnel No. 3A.³⁴⁷

Rock failures were observed by Mr. Dalen in all three tunnels. While he did not recall the type of fallout (*e.g.*, whether it involved curved planes), Mr. Dalen did recall that in Tunnel No. 1 he had seen fallout from the top and sides of the tunnel and from right behind the cutterhead. He had also seen rock

of the tunnel (20 feet 6 inches in Tunnel Nos. 3 and 3A) times the length of tunnel involved to arrive at the neat line as excavated (excludes any overrun). A similar computation is made for the neat line volume of concrete. In that case, however, after the neat line quantity for excavation is obtained there must be deducted therefrom the finished diameter of the hollow portion of the tunnel (18 feet in all three tunnels) to arrive at the neat line quantity of concrete (Tr. 1107, 1114-15).

³⁴⁶ Speaking of overruns in concrete outside the neat lines and noting that that involved filling up the various voids of fallout areas, Mr. Dalen states: "I have taken the neat line quantity versus the total quantity and the difference between the two is what I called 'over-run of concrete'" (Tr. 1115-16).

³⁴⁷ After referring to the specification provision under which the contractor was to be paid to the B line irrespective of whether or not he had excavated to the B line, Mr. Dalen commented: "[W]hat I am trying to say is it actually ran 3.23 percent more than the neat line, as excavated, but based upon the pay quantities of what we actually paid for, was 8.29 percent, in other words, we paid for actually more than had fallen out. That was in Tunnels 3 * * * [in] 3A, the comparable is 3.18 percent for neat line, and 8.30 percent for actual pay" (Tr. 1117).

falling in Tunnel No. 1 away from the moling equipment (Tr. 119-20).

Upon cross-examination Mr. Dalen acknowledged that the final construction report for Tunnel No. 1 (GX KKK) states that the occurrence and seepage of ground water in Tunnel No. 1 did not present a problem (Tr. 1165-66). He also acknowledged that the report referred to some 14 or 15 drawings which were not included in the report.³⁴⁸ Although Mr. Dalen testified to some difficulties that the contractor had had with the trailing equipment and expressed the view that damage to that equipment had created some problems throughout the length of the tunnel with respect to the trailing floor, he was unable to put a percentage on the number of times he had observed problems of this nature. Mr. Dalen did consider that the difficulties the contractor had had with equipment had delayed excavation some. With respect to Tunnel No. 1 Mr. Dalen did not recall seeing any delays attributable to trailing equipment but he acknowledged that the Final Construction Report for Tunnel No. 1 (GX KKK) contains a summary of machine shutdown periods of 3 days or more and refers to some trouble with the muck cars coming partially open during transit and allowing the finely excavated muck

to spill out (Tr. 1121-24, 1153-56, 1170-72).

G. Digest of Testimony of Cecil Tackett

(Tr. 1174-1218, 1235-63)

At the time of the hearing Mr. Tackett was a consulting civil engineer in private practice. Prior to his retirement in 1974, however, he had been an employee of the Bureau of Reclamation for 26 years.³⁴⁹ His testimony related principally to Azotea Tunnel, Oso Tunnel, and Blanco Tunnel, all of which were part of the San Juan Chama Project. Mr. Tackett was in charge of the work on that project for 9 years from 1963 to 1972, when he was assigned to the chief engineer's office in Denver.

Mr. Tackett had never been in Tunnel No. 3 but he had been in Tunnel No. 1 on two occasions during excavation and once during concreting. Mr. Tackett testified that the material in Tunnel No. 1 was similar to the materials present in Azotea, Oso, and Blanco Tunnels.³⁵⁰ The judgment as to similarity was based on reading geology reports and his visual observations in Tunnel No. 1 and the three tunnels of which he was in charge.³⁵¹

³⁴⁹ Mr. Tackett went to work for the Bureau in 1948, immediately after receiving a B.S. degree in civil engineering from Kansas State University. He is a registered engineer in the States of Colorado and Oklahoma (Tr. 1174).

³⁵⁰ Mr. Tackett did not know the formation in which Tunnel No. 1 had been driven. He considered the four tunnels to be similar, however, because they were all comprised of shales and sandstones, sedimentary type of deposit (Tr. 1180).

³⁵¹ Azotea, Oso, and Blanco Tunnels were approximately 110 miles from Tunnel No. 3.

³⁴⁸ A motion by appellant's counsel to exclude GX KKK from evidence and strike all testimony with respect to it on the ground the exhibit was incomplete was denied on the ground that the report as finally submitted had apparently not included the missing drawings (Tr. 1161-64).

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Tunnel No. 1 was a bored tunnel and so were the Azotea, Oso, and Blanco tunnels. The boring machines used in the latter three tunnels ³⁵² had been manufactured by the Robbins Manufacturing Co. of Seattle, Washington, and had variable head sizes. In Mr. Tackett's opinion as an engineer, there were two advantages to having a boring machine with a variable head size. It permitted the contractor to enlarge the size and put in steel sets whenever ground was encountered that was difficult to support by rock bolting. The mole head could also be enlarged to eliminate tight spots when surveys disclosed there were a number of tight spots in the tunnel (Tr. 1191-97, 1248).

Rock failures including fallout were observed by Mr. Tackett in all three tunnels of which he was in charge. The bulk of the fallout occurred immediately or within 50 feet of the heading. Mr. Tackett did not recall any delayed fallout occurring in Oso Tunnel. In Blanco Tunnel where the fallout was the worst by a considerable margin, however, there was some fallout that would occur as much as 2 to 3 months later. Mr. Tackett described the void that remained after the worst type of fallout in Blanco as involving irreg-

ular shaped openings, holes in the spring line and in the crown. Mr. Tackett also said that he had observed fallout in Azotea Tunnel which was very similar to that he had described as occurring in Blanco Tunnel. Concerning tunneling in general he considered that it is important to consider both the strength of the rock and the amount of overburden.³⁵³

With respect to Azotea Tunnel, Mr. Tackett testified (i) that during the first 2 to 3 miles of excavation from the outlet portal the amount of cover varied from 150 to 400 feet and the amount of fallout was relatively small; (ii) that as the tunnel proceeded further under the mountain, the amount of overburden increased and the fallout increased; (iii) that the only portion of the Mancos shale that fell out very badly was where the overburden was the highest over the Mancos shale; (vi) that the final construction report attributed the fallout in one reach to neglect and moisture:³⁵⁴ (v) that the fall-

³⁵³ Tr. 1199-1203, 1239, 1249. On direct examination Mr. Tackett gave the following testimony concerning the relationship between rock failures and the amounts of overburden:

"Q. * * * [D]id you make any observations as an engineer relating to some sort of correlation between the overburden and the failure?

"A. Yes. After tunnelling had gone on for a period of time—and by that I mean a year or two. * * * [W]e had the three tunnels open at the same time, which made it easier to compare. But when we were near the end of the excavation we felt we could anticipate where we would have most fallout problems due to the amount of the overburden." (Tr. 1197, 1203).

³⁵⁴ Tr. 1198-99, 1250-54. The final construction report states: "[I]n general the heavy fallout of shale beds through the Mesaverde formation could be attributed to neglect and moisture" (GX QQQ, p. 92).

The final construction reports for Azotea (GX QQQ), Oso (GX RRR), and Blanco (GX SSS) were all prepared under Mr. Tackett's supervision (Tr. 1177-79, 1190).

³⁵² The size of the bore at Azotea varied with the smallest and largest size being respectively 12 feet 6 inches and 13 feet 5 inches. At Oso the two bore sizes were 10 feet and 10 feet 7 inches while at Blanco Tunnel there were four bore sizes excavated with the minimum size being 9 feet 11 inches and the maximum size being 10 feet 7 inches or 10 feet 8 inches (Tr. 1179, 1187-89).

out that occurred was the result of stress relief; and (vi) that the common terminology used by the personnel of both the contractor and the Government to describe the fallout in the tunnel was stress relief.

In his testimony concerning Blanco Tunnel, Mr. Tackett stated (i) that the invert heave in that tunnel was much worse than in Azotea Tunnel; (ii) that in his opinion the invert heave had been caused by the amount of overburden in that particular reach;³⁵⁵ (iii) that the contractor was paid for removing the invert heave in Blanco Tunnel;³⁵⁶ (iv) that occasionally the fallout would follow a joint but none of it looked as if it had fallen out to a bedding

plane;³⁵⁷ and (v) that the contractor had installed rockbolts to within 2 to 3 feet of the cutterhead³⁵⁸ (Tr. 1239-44).

The final construction reports on Azotea (GX QQQ), Oso (GX RRR), and Blanco (GX SSS) tunnels were received in evidence over the stated objection of appellant's counsel that the proffered exhibits were not relevant to the issues involved in the appeal. In ruling upon the objection the hearing member found that the exhibits offered by the Government were relevant to the appellant's second category changed conditions claim (a position advanced by Government counsel) and that since at least one of appellant's witnesses had testified concerning one or more of the tunnels to which the final construction reports pertained, the exhibits in question had some relevance even aside from the second category changed conditions claim. In admitting the exhibits, however, he noted that the differences in bore size³⁵⁹ between the various tunnels as well as other differences between the San Juan Chama Project tunnels and the Navajo Indian Irrigation Proj-

³⁵⁵ Appellant's counsel states: "In Mr. Tackett's opinion the invert heave in the Blanco Tunnel was caused by the amount of overburden (Tr. 1244). Since overburden would create vertical stress and since maximum stresses at the tunnel wall occur at the ends of a diameter of the tunnel perpendicular to the maximum stress direction (Tr. 460), it is obvious that overburden did not cause invert heave. For the invert to heave the maximum stress direction must be horizontal" (AOB 51).

Mr. Tackett testified that he was not a geologist and not an expert in rock mechanics or rock theory (Tr. 1259).

³⁵⁶ Upon cross-examination the following exchange took place:

"Q. You had to approve or initiate that change order, didn't you?

"A. Yes, sir.

"Q. * * * Did you know the amount of overburden that there would be in that particular reach before you advertised for bids for that contract?

"A. Yes, We had profiled the ground surface prior to preparing drawings.

"Q. And then after the contract was executed, and the contractor excavated through that reach, even though you knew the amount of burden, long before the contracts was executed, you paid the contractor for removing the heave which resulted from this known condition of overburden?

"A. We paid him in this particular reach. * * * I don't remember how long it was." (Tr. 1243-44).

³⁵⁷ The Final Construction Report on Blanco Tunnel shows that there was fallout to bedding planes as well as to joints (GX SSS, p. 51). As to questions relating to what the rock fallout areas looked like and how far behind the cutterhead support was installed, Mr. Tackett had not refreshed his memory before testifying (Tr. 1240-42).

³⁵⁸ This testimony was based upon Mr. Tackett's unrefreshed recollections (Tr. 1242). The Final Construction Report for Blanco Tunnel states: "Support in the mole-excavated tunnel was installed approximately 12 feet in back of the mole cutterhead" (GX SSS, p. 56).

³⁵⁹ In Mr. Tackett's opinion as an engineer, rock in a tunnel twice as large as another tunnel in the same formation is going to react differently (Tr. 1187-88).

ect tunnels (including the formations in which they were driven) could affect the weight to be accorded to Government Exhibits QQQ, RRR, and SSS (Tr. 1183-91).

Mr. Tackett was examined at some length with respect to whether the final construction reports (GX QQQ, GX RRR, and GX SSS) were available to the public prior to bidding. In the course of his testimony he stated: (i) that he did not know whether bidders on Tunnel Nos. 3 and 3A had been advised as to the availability of these reports or of the Final Construction Report on Tunnel No. 1 (GX KKK); (ii) that during the time he was project construction engineer on the San Juan Chama Project between 1969 and 1972, the Bureau had adopted the policy of making the final construction reports available to the public; (iii) that these reports are available in the Bureau of Reclamation library in Denver; (iv) that they were available when he went to Denver in 1972; and (v) that he didn't know when the practice of having final construction reports in the library had started.³⁶⁰

Also offered and received in evidence was GX TTT, a summary of overbreak in the tunnels involved in the San Juan Chama Project. The exhibit states that the amount of

overbreak³⁶¹ or fallout is expressed as a percentage of the neat line excavation (mole head size) and that the data is only for the mole excavated sections. For Azotea Tunnel the exhibit shows the neat line excavation volume³⁶² is 317,781.18 cubic yards, the volume of overbreak is 19,037.62 cubic yards and the percentage of overbreak is 6 percent. The comparable figures for Blanco Tunnel shown in the exhibit are 118,971.28 cubic yards, 13,957.56 cubic yards, and 11.7 percent. No corresponding figures are shown for Oso Tunnel³⁶³ as Mr. Tackett was unable to complete the computations prior to the hearing. Explaining the absence of the work papers containing the computations made to arrive at the figures shown in GX TTT,³⁶⁴

³⁶¹ As defined by Mr. Tackett, overbreak in a moled tunnel is anything outside of the theoretical excavation that would be made by the size of the cutterhead. Overbreak in a conventional tunnel means anything outside the B Line (Tr. 1247).

³⁶² In preparing GX TTT the neat line excavation was computed by using the diameter of the cutterhead (Tr. 1246).

³⁶³ Oso Tunnel had very little fallout. Mr. Tackett attributed this to the fact that "700 feet was about the maximum overburden, and most of it ran in about the four to five hundred foot range" (Tr. 1204).

Cf. with the following statement concerning Blanco Tunnel:

"Fracturing from stress relief occurred in the invert and lower quadrants of the tunnel where overburden exceeded 500 feet. The fallout, fractures, and stress relief increased as the depth of overburden increased above 500 feet and was influenced by the particle makeup of the shale. The excavated shale in the reach where overburden was less than 500 feet in depth had very little fallout, fractures, or stress relief."
(GX SSS, p. 51).

³⁶⁴ With respect to GX TTT, Mr. Tackett acknowledged upon cross-examination that if the contractor in Azotea or Blanco tunnels were poor steerers and got off line and grade the method of computation employed in the

—Continued

³⁶⁰ Tr. 1235, 1258-63. The following exchange occurred upon redirect examination:
"Q. * * * Are those Final Construction Reports made available to the public?"

"A. I believe they are. They're in the Bureau of Reclamation library in the Denver Office."
(Tr. 1258).

Mr. Tackett stated that they were not in a condition to bring to the hearing. He also noted that all the information needed to make such computations is contained in the final construction reports (GX QQQ, GX RRR, and GX SSS).³⁶⁵

7. Digest of Testimony of William Groseclose

(Tr. 1219-21)

Also called as a Government witness was Mr. William Groseclose, Chief of the Division of Construction in the Office of Design and Construction, Bureau of Reclamation, in Denver. Identified by Mr. Groseclose and received in evidence was GX UUU, a report prepared by the Bureau of Reclamation, concerning machine tunnel excavation that the Bureau had accomplished.

Upon direct examination Mr. Groseclose testified that a variable mole head size was currently being used on Tunnel No. 5³⁶⁶ of the Navajo Indian Irrigation Project. Mr. Groseclose was not cross-examined.

exhibit (n.362, *supra*) would show a percentage of overbreak even though there was not one ounce of fallout in those tunnels (Tr. 1245-46).

³⁶⁵ Tr. 1204-06, 1213. Concerning GX TTT, appellant's counsel noted that the absence of the work papers to support the figures shown in the exhibit would go to its weight rather than to its admissibility (Tr. 1213-14).

³⁶⁶ Testifying upon rebuttal, Mr. Sperry stated that a variable head size mole was not being used in Tunnel No. 5. Although it was clear that Mr. Sperry's statement was based upon hearsay, the testimony was received in evidence (Tr. 1298-1301). Following receipt of this testimony, the hearing member verified that Mr. Groseclose was no longer in San Francisco and hence not available to be recalled as a witness in the hearing (Tr. 1321).

8. Digest of Testimony of Gaylor Hay

(Tr. 1222-33)

Mr. Gaylor Hay, a civil engineer employed by the Bureau of Reclamation, was the Government's principal witness with respect to quantum. At the time he testified Mr. Hay was the office engineer on the Auburn Folsom South Project. Prior to that he had had extensive experience in making computations relative to contract adjustments and carrying out other responsibilities commonly associated with contract administration. While assigned to the contract administration section in the Denver Office of the Bureau, Mr. Hay had been involved in the review of the differing site conditions claims filed by the contractor with respect to Tunnel Nos. 3 and 3A. In March of 1974 he had visited the Navajo Indian Irrigation Project Office in Farmington, New Mexico, and the contractor's field office near Bloomfield, New Mexico.

Following the completion of the trip Mr. Hay submitted a travel report to the Director of Design and Construction under date of Apr. 29, 1974 (GX VVV). Listed in the report as among the principal facts emerging from the study of the contractor's records³⁶⁷ were

³⁶⁷ The major cost overruns as set forth in the memorandum are:

"(1) \$400,000 in direct cost during tunnel excavation, which is 16 percent of the budgeted cost.

"(2) \$1,500,000 in direct cost during concrete tunnel lining, which is 120 percent of the budgeted cost.

"(3) \$400,000 in direct cost on work outside
—Continued

(i) that the contractor's cost of performing the original contract work would exceed the estimated costs by more than \$3,600,000 (\$600,000 of which is covered by the contingency amount included in the bid); (ii) that as of the time of the review, the contractor stood to lose about \$1,500,000 on the contract; (iii) the contractor had delayed in providing support behind the cutterhead on the mole;³⁶⁸ and (iv) the contractor's cost records, particularly the bid computations, rather than supporting the contractor's claims of differing site conditions, tend to refute the claim.

Transmitted with the travel report was a seven-page report setting forth in greater detail the results of a review of the contractor's cost records³⁶⁹ in various areas including the basis upon which the bid was predicated with respect to the rate of progress anticipated for

the tunnels, which is 60 percent of the budgeted cost.

"(4) \$1,400,000 in plant and general and administrative costs, which is 70 percent of the budgeted cost." (GX VVV, memorandum, p. 2).

³⁶⁸ The memorandum states:

"d. The contractor in preparing his bid recognized the necessity of temporary support immediately behind the cutterhead on the mole, which he referred to as a tetsom (Temporary Tunnel Support Over Mole). I understand, however, that during performance of the contract such a provision was not made until October 4, 1971, after he had completed excavation through Reach 1 of the Drill Hole 116 claim." (GX VVV, p. 2).

³⁶⁹ The report states: "Mr. Eldridge showed us the supporting computations for the claims for Drill Hole 116 and for in-situ stress. He explained that these computations had been taken primarily from the contractor's cost records, with the equipment cost being recomputed to agree with Paragraph 17 of the specifications" (GX VVV, report, p. 5).

excavation³⁷⁰ and for concrete placement,³⁷¹ the time required for completion of the work³⁷² and the amount included for home office overhead.³⁷³ Attached to the report relating to the review of the contractor's cost records were five exhibits containing information copied from the contractor's records with respect to the original bid and reestimates of costs and budget information,³⁷⁴ as well as copies of

³⁷⁰ "Included in the original bid computations was one sheet which indicated that the contractor anticipated excavating with the mole at a rate of 120 feet per working day" (GX VVV, report, p. 1).

³⁷¹ "On concrete placing, the bid anticipated that the tunnel invert would be placed at the rate of 300 feet per day working one shift, and the arch would be placed at the rate of 300 feet per day working three shifts. Actual progress on invert placement was about 277 feet per day in Tunnel 3 and 154 feet per day in Tunnel 3A. On arch placement, actual progress was about 238 feet per day in Tunnel 3 and 191 feet per day in Tunnel 3A." (GX VVV, report, p. 2).

³⁷² "The bid computations verified that the contractor had intended to complete the work in considerably less time than was allowed in the specifications. Specifically, he anticipated that a Project Manager would be required for 32 months and Equipment Superintendent and Engineer for 24 months (the specifications allowed 37 months)" (GX VVV, report, p. 2).

³⁷³ "The bidding documents indicated that there would be no home office overhead charge to the job. The profit or margin used in computing the bid was 16 percent so there was room to pick up home office costs and profit if the jobsite costs had not overrun. * * *

"A subsequent review of other records would indicate that the in-house charge designated depreciation probably includes home office overhead costs related to equipment ownership." (GX VVV, pp. 2, 6).

³⁷⁴ "Mr. Eldridge furnished what he said were the original bid computations * * *. He also gave us a copy of the contractor's original budget, which he explained was in agreement with the original bid breakdown. * * *

"* * * The budget amounts on the monthly summaries are based on the original estimated unit cost and the actual quantities for each item of work." (GX VVV, report, pp. 1, 3).

an intercompany memorandum, "Subject: Head Office Service Charge", a Monthly Cost Summary (Jan. 31, 1974) and a Monthly Cost Summary (Feb. 28, 1974). In addition to the information obtained from the contractor's records at the time of his March 1974 visit, and attached to his travel report, Mr. Hay also secured upon discovery a copy of the contractor's "Navajo Indian Irrigation Project Cost Summary, June, 1974," when he went to the contractor's office in San Mateo (GX XXX).

Proceeding upon a number of stated assumptions as set forth in GX WWW,³⁷⁵ including the assumptions that the contractor had encountered a differing site condition which resulted in early rock failures, that the contractor's original estimated costs with the amount included for contingencies was a reasonable measure of what his costs should have been and that the contractor's cost data shown in the Monthly Cost Summary dated June 30, 1974 (GX XXX), was sufficiently accurate to compute an

equitable adjustment, Mr. Hay calculated that in the assumed circumstances the contractor would be entitled to an equitable adjustment for differing site conditions in the amount of \$145,910 (GX WWW; Tr. 1228-32). Mr. Hay was not cross-examined.

C. Discussion

1. Contract Indications

In support of its request for an equitable adjustment under the "Differing Site Conditions" clause, the appellant refers to indications in the contract upon which it relies to establish its first category differing site conditions claim. The contract indications so relied upon are:

1. The tunnels could be moled.
2. Neither early nor full perimeter support was indicated.
3. The tunnels could be supported by any one of the specified methods.
4. Only surficial deterioration or disintegration was indicated in Paragraph 50.
5. Water sensitivity of shale/silt-stone.
6. Air slaking (AOB 1-8).

In the view we take of the case, only items 2 and 4 merit detailed consideration. Our comments on the remainder of the items will be relatively brief.

Item No. 1.—The appellant states: "Implicit in this condition was the concomitant condition that the tunnels could be moled without unusual difficulty or expense" (AOB 1). That the tunnels could be moled is clear and undisputed. The basis for inferring that because

³⁷⁵ Among the assumptions were the following:

"3. Early rock failures were the sole reason for cost variances during excavation but cost variances during concrete placement were due in part to other causes.

* * * * *

"5. The early rock failures resulted in cost overruns in concrete placing, plant costs, and in G & A expressed in the same proportion as the cost overruns during the excavating and supporting work.

* * * * *

"8. The 'Budget Amount' shown on the contractor's 'Monthly Cost Summary' is in agreement with his original estimate except that the original estimate contained \$800,000 to cover contingencies which was not distributed to the appropriate items in the budget." (GX WWW, p. 1).

tunnels can be moled they can be moled without unusual difficulty or expense is not apparent, however, where, as here, the contractor had the option to mole the tunnel with a boring machine or employ conventional tunneling methods and, in addition, had been given a considerable amount of discretion as to the manner of proceeding (e.g., choice of boring machine, guidance system, size of bore, type of cutterhead).

Item No. 3.—The specified methods to which the appellant refers are contained in Paragraph 55 (Shotcrete for Tunnel Support), Paragraph 56 (Structural-Steel Tunnel Supports), Paragraph 56A (Steel Reinforcement Sheet and Shotcrete Support), and Paragraph 58 (Rock Bolt Supports). Concerning these the appellant states that the contract in effect says: "Here are four acceptable and adequate means of support any one of which will work, plan to use any one you choose" (ARB 18). We note the Government's estimate in the specifications, however, that approximately 80 percent of Tunnel Nos. 3 and 3A would be supported by other than rockbolts (n.123, *supra*).

Item No. 5.—The appellant says that there was nothing in the contract to indicate the degree of sensitivity or the rate of reaction to water of the rock through which Tunnel Nos. 3 and 3A were to be moled. Also noted by the appellant is the fact that the "Construction and Foundation Material Test Data" (GX U) showed that sandstones would be more water sensi-

tive than the shales and siltstones, while in performing the contract the opposite was true. There is no allegation that the test results shown on GX U for the materials actually tested were inaccurate; nor is there any indication that the test results shown thereon misled the personnel of the contractor who were involved in the preparation of the bid estimate for the underground work. In a report submitted prior to bidding (AX 1), the contractor's geologist emphasized that it was the shale (siltstone) which was very water reactive (n.71, *supra*). This report was considered by Mr. Sperry in preparing the bid estimate in which he anticipated fallout in the siltstone (nn.168&174, *supra*).

Item No. 6.—The appellant states: "[T]his distintegration of the surface of the rock when exposed to air was indicated in the logs as well as in Paragraph 50 of the Specifications (AOB 8). It does not appear that the Government would contest the accuracy of this statement so long as it is understood that in its view neither Paragraph 50 nor other provisions of the contract are to be seen as indicating that only surficial deterioration or disintegration would be encountered in performing the contract.

Central to the resolution of this dispute is the proper interpretation to be placed upon the 14th paragraph of Paragraph 50 of the contract specifications and the paragraphs of the specifications dealing

with particular types of support, as well as the significance to be accorded to the fact that one of the methods of support shown on the contract drawings is full circle steel rib. Since the stated absence from the contract of anything indicating that early or full perimeter support would be required (Item 2, *supra*) and the presence in the contract of the provision quoted below from Paragraph 50 (Item No. 4, *supra*) are seen as complementary to one another and both are considered to be related to the contract drawing showing full circle steel rib support, these matters will be treated together in the ensuing discussion.

In especially pertinent part, Paragraph 50 of the specifications reads as follows:

The tunnels shall be supported where conditions encountered are such as to require support. Approved types of support are shown on the drawings.

Where conditions in the tunnels are suitable for rock bolt supports the contracting officer will approve the use thereof. Rock bolts shall be furnished and installed in accordance with the provisions of Paragraph 58 and payment therefor will be made at fixed unit prices as prescribed therein * * *.

Where the ground conditions in the tunnels are such that the use of supports is required, the contractor may at his option use either shotcrete support or structural-steel supports or an approved combination thereof, or steel reinforcement sheets and shotcrete support. * * *

* * *
Shotcrete support shall be in accordance with Paragraph 55. Structural-steel tunnel supports shall be in accordance with Paragraph 56. Steel reinforcement

sheets shall be in accordance with Paragraph 56A.

* * *
Under Schedules No. 2 and 2A the tunnels are to be constructed to the requirements of the machine-bored tunnel sections as shown on Drawing No. 11 (809-D-330).

* * *
Government testing indicates that many of the sandstones, shales and siltstones to be excavated will deteriorate or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three. The contractor shall be responsible for providing a clean, undisturbed surface for placement of the lining. He may accomplish this by applying protective coatings under Paragraph 54, installing subinvert tunnel protection in accordance with Paragraph 60, by dewatering in accordance with Paragraph 51, or by removing any deteriorated or disintegrated material back to clean, undisturbed surfaces in accordance with Paragraph 59. If protective coatings or subinvert concrete is not installed, removal of substantial amounts of deteriorated or disintegrated materials is expected.

(AF 1, Specifications, Supplemental Notice No. 3.)

On cross-examination Dr. Hilf acknowledged that the four methods of tunnel support given in Paragraph 50 all refer to support for the roof and sides of the tunnels. In the course of the same questioning Dr. Hilf also acknowledged (i) that stresses created when the tunnel was bored would be present in the invert; (ii) that if the stresses exceeded the strength of the rock the rock would fail; and (iii) that if there were sufficient differences between the stress and the strength of the rock, the rock could move. Re-

sponding to a question as to which of the support systems dealt with upward movement of the invert, Dr. Hilf said: "[F]ull circular steel rib." Dr. Hilf conceded, however, that placing or installing shotcrete, steel reinforcement sheet and shotcrete support or rockbolts in the manner prescribed in the contract would not have protected against or prevented any uplift in the invert of the tunnels (nn.281-85, *supra*, and accompanying text).

The appellant contends that the portion of Paragraph 50 which refers to Government testing (quoted above) indicates that only surficial deterioration or disintegration would be encountered in tunneling (AOB 33). The Government flatly disagrees, stating that it is absurd to limit the phrase "deteriorate or disintegrate" to a surficial condition (GPB 43).

Appellant's expert witness, Dr. Heuer, interpreted the language in question from Paragraph 50 as indicating that problems of deterioration or disintegration due to air or water or stress relief could be solved by the application of protective coatings, by the use of subinvert or by pumping water out of the tunnel and not allowing it to flow in the invert. Dr. Heuer also testified (i) that the problems he had described (the overstressing and large fractures falling out) could not have been solved or prevented by any of those means and (ii) that the cited subparagraph does not provide for control of what he had seen in the tunnel. (*See* text accompanying n. 256, *supra*.)

The Government points out, however, that prior to the hearing Dr. Heuer had at various times used the term "deterioration" in a way clearly not restricted to surficial conditions. Referring to a chart on page 556 of AX 4 showing circumferential stress distribution about the tunnel, the Government states: "[E]ven the contractor's own consultants show by line 'd' on the chart that *deterioration* is a process which would occur well beyond the surface of the bored tunnel" (GPB 43-44). Also stressed by the Government is the fact that in the final report prepared by A. A. Mathews, Inc. (AF 77), the term "degree of failure" has been substituted for the term "degree of deterioration" which had been used in an earlier draft of the report, a page from which was identified by Dr. Heuer at the hearing and which was received in evidence as GX P (n.75, *supra*). The Government comments: "Thus, as can be seen by comparing these two exhibits, even Dr. Heuer used the word 'deterioration' to depict conditions which were clearly not limited to surficial problems" (GPB 45). In addition, the Government refers to a letter from Mr. Hungett (a portion of which we have previously quoted at n.76, *supra*), in which Mr. Hungett states: "The perennially troublesome word 'deterioration' continues to bother me" (GPB 42).

We find that the references in the exhibits upon which the Government relies to support its argument (the use of the term "deterioration"

in a chart included in AX 4, the employment of the term "degree of failure" in AF 77 and the earlier use of the term "degree of deterioration" in GX P) were all made in the context of describing hypothesized ground behavior in the light of model studies conducted by Dr. Heuer and observations made in Tunnel No. 3. In this context there is no discussion of nor any reference to the Government testing provision of Paragraph 50. That provision is both quoted and discussed later in the May 1973 report, however, where the terms "deterioration" and "disintegration" are said to describe a surface phenomenon (AF 77, pp. 61-62). It may have been the use of the word "deterioration" sometimes in a general sense and at other times in a restrictive sense in the same report that caused Mr. Hungett to refer to the term as "perennially troublesome."

Upon direct examination the Government's expert witness, Dr. Hilf, was asked for his interpretation of the Government testing provision of Paragraph 50, *supra*. Dr. Hilf prefaced his response by noting that prior to the time the specifications were written, the Bureau had experienced some trouble in formations (those involved in Azotea, Oso, and Blanco Tunnels and Tunnel Nos. 1 and 2) somewhat similar to the formations to be penetrated in performing the instant contract and that a question had come up as to how to alert contractors to these problems. Immediately thereafter Dr. Hilf stated:

To my knowledge, we were not thinking of particular kinds of failures or particular kinds of conditions, we were thinking of—and I think at least I had hoped at that time that the impression of the whole sentence was that we had problems with these materials lessening in quality of deteriorating, used in a broad sense just reducing in quality or distintegrating which we meant breaking into pieces without thinking of whether they were, whether they were little pieces or big pieces.

They were distintegrating, they were breaking up into pieces by action of air, water and stress relief.

(Tr. 667).

Upon cross-examination Dr. Hilf conceded that none of the measures specified in the Government testing provision of Paragraph 50 would have prevented the deep failures of rock to which Dr. Heuer had testified. As to these he stated, "those are surficial treatments." (*See text accompanying nn.286-90, supra.*)

With respect to the above testimony, the Board notes that if at the time the invitation for bids was issued in the fall of 1970, the BOR knew of deep failures of rock which had occurred in its earlier tunnels, it is at least surprising that the Bureau should have devised a provision to "alert" contractors to the difficulties encountered in such earlier tunnels without including therein any remedial measures for the treatment of deep rock failures, while including several such measures for remedying failures of a surficial nature.

We have previously referred to Dr. Hilf's testimony that full circle steel ribs could have been used as

support to control upward movement of the invert. Dr. Hilf also considered that the provisions on the drawings for full circle steel rib support (Drawing 809-D-330) indicated that it would have the capability of supporting the entire perimeter of the tunnel. As to the relationship between the provision for half circle steel rib support and full circle steel rib support, Dr. Hilf said that if the half circle steel rib support would not stay up, you would put the full ones in. According to Dr. Hilf the reason for providing for full circle steel rib support was in order to be able to handle any kind of a contingency in the tunnel (n.282, *supra*, and accompanying text).

It is undisputed that the contract drawings show full circle steel rib support. In their testimony appellant's witnesses asserted that the pattern of rock bolt support eventually developed was more effective in controlling the deep rock failures which occurred following excavation, however, than would have been the case if full circle steel rib support had been utilized. Dr. Heuer testified that installing steel sets would not have alleviated most of the problems because the problems developed before the steel sets could have been installed any closer to the heading of the tunnel than the contractor had installed the rockbolts. Treating the same subject in the May 1973 report (AF 77), Dr. Heuer states: "Steel ribs and wood blocking are a passive support which do not actively strengthen

and restrain the rock, and as such would allow more fracture development and rock failure than the pre-tensioned rock bolt system used by the Contractor" (n.261, *supra*, and accompanying text).

Appellant's expert, Mr. Mathews, testified that one principle that has generally been accepted where you have "geodynamic pressure" is that you have to permit the ground to relieve itself, to come in in order to reduce the pressure to a value which could be tolerated. Thereafter he stated that given that requirement, it would have been possible to support the tunnel with full circle steel ribs. Mr. Mathews qualified his answer by stating that full circle steel rib support installed in the manner specified in the contract would not have supported the rock in Tunnel No. 3 (n.269, *supra*, and accompanying text).

Testifying with respect to the adequacy of full circle steel rib support authorized by the specifications, Dr. Hilf pointed out that for such support only minimum sizes were given but sizes up to 8 inches could have been used. He also noted that even in cases where the rock was much weaker than the overburden pressure, the full circle steel rib supports would be sufficient. Apparently in answer to a question raised by Mr. Mathews, Dr. Hilf stated that the full circle steel rib support would not be installed smack against the tunnel but that there would be lagging in between where there was any tendency for the material to come

in and that that would cushion the forces on the supports (Tr. 677).

In his testimony, Dr. Hilf never directly addressed the question of whether full circle steel rib support could be installed any closer to the heading than the rockbolts had been installed; nor did he undertake to say whether, if installed, the full circle steel rib support would be more effective or even, as effective, as the rockbolt support system used by the contractor. With respect to the latter question, however, Dr. Hilf read into the record a passage from an article by D. E. Cannon, Project Construction Engineer, Bureau of Reclamation. The article is entitled "Record Tunnel Excavation with Boring Machines." In the course of analyzing excavation progress made in Blanco Tunnel, Mr. Cannon states: "[U]se of rock bolts was found to be more effective than circular steel ribs with lagging and contributed to the record progress" (GX X, p. 48; Tr. 671-74).

It is clear from the record that the four lowest bidders on the work covered by the instant contract all contemplated that they would support virtually the entire length of the tunnels with rockbolts. In a memorandum written more than a month before excavation with the mole had commenced in Tunnel No. 3, the project construction engineer wrote the Director, Design and Construction, to say: "[T]he four low bidders made only token bids for the tunnel support system, which indicates that they planned to use rock bolts" (n.10, *supra*). The wide range in the prices submitted by the

lower and the higher bidders indicate that the bidders differed radically in their views as to the difficulties likely to be encountered in performing the contract work. We note, for example, that the total bid price submitted by the highest bidder is almost double the amount bid by the appellant (GX Y).

2. *Prebid Investigation*

The Government has put squarely in issue the adequacy of the contractor's prebid investigation by charging that in preparing the bid estimate the appellant (i) ignored Paragraph 50, (ii) ignored overburden, (iii) disregarded the immediate fallout which had occurred in Tunnel No. 1 of which it had knowledge prior to bidding, and (iv) provided for the exclusive use of rockbolts for support for the tunnels despite the indication in the specifications that 80 percent of the length of the tunnels would require support other than rockbolts. While these charges have sometimes been couched in general terms, it is obvious that the Government considers Mr. Sperry to have been the person principally responsible for the appellant's failure to consider (or act in a way consonant with) data furnished by the Government. Sometimes Mr. Sperry is specifically identified as at GPB 25 where the following statement appears: "For the purposes of bidding Navajo 3 and 3A, Fluor may well have been at the mercy of the inexperience of Mr. Sperry."

Before considering the specific points raised by the Government, it would perhaps be well to briefly re-

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fer to some of the factors taken into account by the contractor in the bid estimate for the underground work for Tunnel Nos. 3 and 3A, as well as what knowledge can properly be imputed to the contractor at the time of the bid submission.

Among those actively participating in the prebid investigation, in addition to Mr. Sperry, were Mr. J. F. McCreight (chief engineer) and Mr. J. J. Hayes (company geologist). According to Mr. Sperry's testimony the contractor's personnel investigating the site were shown the job by Mr. Rogert of the Bureau of Reclamation. The things looked at included the rock cores from the exploratory holes, the rock outcroppings on the site, the plans and specifications, the mole used on Tunnel No. 1 and the materials and foundation report (GX U). The papers read by Mr. Sperry included the Bennett report (GX A) and the Hayes report (AX 1).

In undertaking to say what the contractor should have known about the conditions likely to be encountered in Tunnel Nos. 3 and 3A, the Government attaches a great deal of significance to what is revealed in the final construction reports for the three bored tunnels in the San Juan Chama Project, as represented by the reports on Azotea Tunnel (GX QQQ), Oso Tunnel (GX RRR), and Blanco Tunnel (GX SSS). The Government asserts that the final construction reports for these three tunnels were available to the public at the time Navajo 3 and 3A were bid, citing the testimony of Mr. Tackett at Tr.

1258 (GPB 25). The colloquy between Government counsel and Mr. Tackett at Tr. 1258 does not establish that these final construction reports were available to the public at the time of bidding; nor does any other testimony elicited from Mr. Tackett or any other witness. With respect to this subject, Mr. Tackett testified that at some time during the period when he was project construction engineer on the San Juan Chama Project between 1969 and 1972, the BOR had adopted the policy of making the final construction reports available to the public; that these reports are available in the BOR library in Denver; that they were available when he went to Denver in 1972; and that he did not know exactly when the practice of having the final construction reports available in the BOR library had started (n.360, *supra*, and accompanying text).

There are weaknesses in other elements of the Government's proof respecting the availability of these final construction reports. For example, according to the reports themselves, Blanco Tunnel (GX SSS) was constructed during the period 1965-69, while Azotea Tunnel (GX QQQ) and Oso Tunnel (GX RRR) were not completed until 1970. As the invitation for bids with respect to Tunnel Nos. 3 and 3A was opened on Sept. 22, 1970 (AF 1), a question arises as to whether the reports (particularly those for Azotea and Oso Tunnels) had even been furnished to the BOR library in Denver by the time the bids were required to be submitted.

Another question that arises with respect to the final construction reports introduced into evidence in these proceedings is the question of why the Government should have made so sustained an effort to prove that the final construction reports for the three tunnels involved in the San Juan Chama Project (GX QQQ; GX RRR; and GX SSS) were available to the public in the BOR library in Denver and so little effort to show that the Final Construction Report for Tunnel No. 1 (GX KKK) was available. The point is considered to be of some significance since it is undisputed that the three San Juan Chama Project Tunnels were approximately 110 miles from Tunnel No. 3 and that the largest bore size involved in any of these tunnels was 13 feet 5 inches. By way of contrast, Tunnel Nos. 1, 3, and 3A were all part of the Navajo Indian Irrigation Project and were almost identical with respect to the size of the bore ranging from 19 feet 10 inches to 20 feet 10 inches in Tunnel No. 1 (GX KKK, p. 69) and being 20 feet 6 inches in Tunnel Nos. 3 and 3A (GX YYY). We also note that construction was apparently completed in Tunnel No. 1 by 1967, and that the final construction report for that tunnel was transmitted to the Chief Engineer by letter from Bert Levine, Project Construction Engineer dated Jan. 5, 1968 (GX KKK).

a. *Consideration of Paragraph 50*

In asserting that the appellant ignored Paragraph 50 (GPB 6), the Government appears to have over-

looked the testimony given by Mr. Sperry upon cross-examination respecting the manner in which the Government testing provision of Paragraph 50 (quoted above) should be interpreted. It was his testimony that in the context of that provision the terms "deterioration" and "disintegration" refer to superficial things and that none of the remedial measures specified therein would have prevented the deep-seated failures that occurred at Navajo Tunnel No. 3 (Tr. 112-14).

b. *Failure to consider overburden (cover)*

It is undisputed that the contract drawings showed the amount of cover over the tunnels and that in preparing the bid estimate Mr. Sperry did not consider this factor. The explanation offered for not doing so was that in Mr. Sperry's experience up to that time overburden was not normally considered in a rock tunnel.³⁷⁶ In support of its position that overburden should have been considered in preparing the bid estimate, the Government points to the testimony of witnesses for the appellant (Dr. Heuer and Mr. Mathews) and for the Government (Dr. Hilf and Mr. Tackett).

Dr. Heuer testified that in September of 1970 (time of bid submission), he would have been able

³⁷⁶ Mr. Sperry's lack of concern over support problems attributable to depth of cover may have been simply a reflection of the conventional ideas prevalent at that time (i.e., loads on rock tunnels are independent of the depth of cover over the tunnel). According to Dr. Heuer, this view prevailed generally because at normal tunneling depths the in situ stresses are normally low with respect to the intact ground strength (AF 36, III-6).

to predict the rock failures of the type he had described from the information shown in the plans and specifications (depth of cover), the information available to bidders upon request (GX U) and the amount of stress which would develop when the tunnel was excavated through a mountain where there was 1,000 feet of cover (GPB 28-32). Dr. Heuer emphasized, however, that while in 1970 he would have been able to predict the fractures he had described, he would not have been able to predict how fast they would form. Dr. Heuer also made a point of saying that he had not testified that a common contractor (as opposed to people well versed in rock mechanics) could have predicted the failures which occurred (nn.253&54, *supra*, and accompanying text). The testimony given by Dr. Heuer in this area was corroborated by the Government's expert Dr. Hilf who testified (i) that the amount of cover and the compressive strength of the samples of rock tested (GX U) were significant factors to consider in determining the need for support following excavation and (ii) that the speed of failure would be difficult to predict. (*See text accompanying nn.290-92, supra.*)

The Government also cites the testimony of Mr. Mathews on the predictability of rock failures (GPB 32, 83). In response to a question from the hearing member, Mr. Mathews gave as his opinion that a person would have to have had a "very strong qualification in

geology" in order to have foreseen the possibility of "geodynamic pressure" developing in Tunnel No. 3. Immediately thereafter he added, however, that if he had been estimating the job for the contractor in 1970, he did not think he would have expected the development of "geodynamic pressure" and that he knows he would not have if it had not been for his prior experience in Azotea Tunnel. (*See text accompanying nn.268&273, supra.*) The Board notes that at the time of the hearing Mr. Mathews had had 40 years of experience as a professional engineer of which it was estimated more than 50 percent was related to tunneling and underground work (n.262, *supra*).

To support its position the Government quotes extensively from the testimony given by Mr. Tackett (GPB 18-21). An examination of the quoted testimony discloses, however, that Mr. Tackett did not conclude that overburden was an important factor to consider in assessing the prospects of rock failures occurring in the three tunnels of which he was in charge (Azotea, Blanco, and Oso) until near the end of their excavation. In his testimony Mr. Tackett noted that all three of the tunnels were open at the same time (n.353, *supra*). Stated positively, Mr. Tackett's knowledge of the importance of considering overburden in rock tunnels was gained through personal experience in three tunnels excavated prior to Tunnel Nos. 3 and 3A. No basis is perceived for imputing knowledge

so gained to Mr. Sperry or to the other contractor personnel associated with him prior to the time the bid was submitted in September of 1970, since the evidence fails to show that the final construction reports for the tunnels in question were available to the public before the time arrived for the opening of bids.

The Board also notes that in administering the contract for which he was responsible, Mr. Tackett does not appear to have employed the standard now urged upon us by the Government. Testifying upon cross-examination with respect to Blanco Tunnel, Mr. Tackett acknowledged that he had initiated or approved a change order under which the contractor concerned was paid for removing the invert heave even though he considered the invert heave to have been caused by the amount of the overburden and even though the amount of the overburden was known prior to bid submission (n.356, *supra*, and accompanying text).

After noting that the contractor's prebid investigation team included a geologist (Mr. Hayes) and its chief engineer (Mr. McCreight), the Government states that it does not know what the available data revealed to Mr. Hayes with respect to stress induced failures because he did not testify at the hearing (GPB 32). While it is true that Mr. Hayes did not testify, the report he made is in evidence as one of appellant's exhibits. The language employed in that report indicates that he did not anticipate pressures developing

from overburden or from any other cause. Thus, in his report to Mr. McCreight dated Aug. 31, 1970, Mr. Hayes states: "Since no conditions conducive of high pressure or badly fractured, loose ground are likely in this formation no permanent steel rib support requirements are indicated" (AX 1, p. 3).

The observations made by Mr. McCreight long before the hearing are not as specific as those of Mr. Hayes. It is at least highly doubtful, however, that at the time of Mr. McCreight's participation in the prebid investigation, he considered overburden a factor for consideration in evaluating the prospects of fractures and fallout developing in rock tunnels. At the important meeting between representatives of the contractor and the Bureau on Dec. 6, 1970 (AX 74), Mr. McCreight is recorded as having stated that knowledge of stress redistribution occurring whenever a tunnel was driven was unknown to the contractor (n. 28, *supra*, and accompanying text).

Based upon the foregoing discussion, the Board finds (i) that none of the contractor personnel named by the Government as involved in the bid submission had considered the amount of cover over the tunnels in evaluating the prospect of fractures and fallout developing in the rock upon excavation; (ii) that the testimony of the Government witness Tackett shows that the conclusions he reached respecting the relationship existing between the amount of overburden and rock failures were based upon personal

experience in particular tunnels with no evidence that the results of the experience in such tunnels had been communicated to the contractor prior to bid submission; and (iii) that of those witnesses relied upon by the Government to establish a relationship between the amount of overburden and the amount of rock failure likely to be experienced only the appellant's expert, Dr. Heuer, and the Government's expert, Dr. Hilf, were sufficiently well versed in rock mechanics to have predicted the likelihood of rock failures occurring from the information furnished to bidders or available to them and not by reason of personal experience in other bored tunnels. So finding, we conclude that the failure of Mr. Sperry to consider the amount of overburden in preparation of the bid estimate pertaining to Tunnel Nos. 3 and 3A was reasonable in the circumstances obtaining in September of 1970.

c. *Fallout, progress and support in Tunnel No. 1 as shown in Bennett Report*

In the Government's view the appellant is not the only contractor in a machine bored tunnel who encountered the type of rock failures forming the basis for this appeal. Cited in support of this position is the undisputed fact that Mr. Sperry had read the Bennett Report (GX A) pertaining to Tunnel Nos. 1 and 2. According to the report there were reaches in Tunnel No. 1 in which the shales began dropping almost

immediately and other reaches where water seepage caused shale to fall out in large pieces (GPB 17-18, 22-23). Also undisputed is the fact that the San Jose formation in which Tunnel Nos. 1 and 2 were driven is comparable to the Nacimi-ento formation in which Tunnel Nos. 3 and 3A were driven (n.126, *supra*; AX 1).

Particularly germane to this discussion is the following passage from the Bennett report:

The shales reacted the same in both tunnels in that they tried to reach stability. The difference appears in the amount of time it takes the shale to begin air slaking. In either tunnel it would generally take 1 to 2 days to begin falling, even after its initial exposure. However, once exposed, differences occurred. In Tunnel 1 the shale would begin dropping immediately after a new reach was exposed. It was believed that this was due to the compressive effects of the cutterhead. After the mole passed, the shale would almost spring into the tunnel and, unless immediately supported, would continue falling.

(n. 72, *supra*).

In the course of responding to a question posed by the hearing member, Mr. Sperry noted the reference in the report to the "compressive effects of the cutterhead" after which he stated that the gauge cutters on the mole used in Tunnel No. 1 were so designed that they cut at an angle which tended to overstress the rock that was to remain (Tr. 1373-75). Earlier in his testimony Mr. Sperry had stated that the mole used in Tunnel No. 1 was one of the things examined in the prebid investigation (Tr. 36).

Prior to the hearing the Bureau had questioned the contractor with respect to the above-quoted passage from the Bennett report. In its reply the contractor simply assumed that the third sentence in the quotation was in error and that the shale in Tunnel No. 1 began dropping immediately. The answer also assumed, however, that the particles which fell due to the "compressive effects of the cutterhead" would be of the same general size as the muck produced by the machine, *i.e.*, generally 1½ inches or smaller in dimension), and not falling blocks 6 to 8 inches thick and 2 to 3 feet wide as had occurred in Navajo Tunnel No. 3 (nn.126-29, *supra*, and accompanying text).

Although the Government appears to doubt that Mr. Sperry should have been confused by the Bennett report in the area in question (GPB 70-71), it has not even attempted to reconcile the third and fifth sentences in the passage quoted above. The Government attaches a significance to the reference in the Bennett report to the shale dropping immediately which is not merited by anything else in the report or in the record before us. Leaving entirely aside the garbled nature of the language used in the portion of the report quoted above, there is nothing in the report to show why immediate fallout in Tunnel No. 1 attributed by the author of the report to "the compressive effects of the cutterhead" should be equated to the immediate fallout which occurred in Tunnel Nos. 3 and 3A and for which the

claim is made that the strength of the rock was less than the stress on the rock. (*See* n.296, *supra*, and accompanying text.)

Similarly with respect to the reaches in Tunnel No. 1 where the shale fell out in large pieces and that fallout was attributed by the author of the Bennett report to water seepage, we note the testimony of Dr. Heuer that while water had had a part in what had happened in the vicinity of DH 116, it was not primarily responsible for the magnitude of the stresses that had occurred (text accompanying nn.257&58, *supra*). Previously, in the May 1973 report, Dr. Heuer had stated that water had not caused the formation of fractures penetrating deep into the rock and that it was the formation first of cracks in the rock due to overstressing which had provided free water with access to deep within the siltstone/shale material (n.73, *supra*, and accompanying text).

The Government also raises questions as to the rationality of the contractor assuming that rockbolts could be used so extensively in Tunnel Nos. 3 and 3A and on planning to achieve so much greater progress than had been realized in Tunnel No. 1, since the ground conditions in the tunnels were so similar and the contractor in Tunnel No. 1 had experienced so much difficulty in using rockbolts (GPB 23). One weakness in this argument is that the type of support installed depends not only on ground behavior but also on the construction equipment used. For example, the ex-

treme difficulty the contractor had in installing rockbolts in Tunnel No. 1 was attributed by Mr. Sperry to the fact that because of the configuration of the mole used in that tunnel the contractor could not get rockbolts in around the mole and could not get anchorage for their rockbolts (Tr. 107).³⁷⁷ Another weakness in the argument is that it fails to take into account the advance in mole and rockbolt anchor technology that had occurred between the time excavation was completed in Tunnel No. 1 in 1966 (Tr. 777) and the time excavation was commenced in Tunnel No. 3 in mid-May of 1971. The significance of the development of the epoxy resin type rockbolt anchor was attested to by the project construction engineer in a memorandum to the Director, Design and Construction, dated Mar. 9, 1972, in which he states that "the use of rock bolts for support has been satisfactory since the epoxy anchor has been in use" (text accompanying n.47, *supra*).

d. *Contractor's exclusive reliance upon rockbolts despite Government's forewarnings*

The Government strongly questions the contractor's decision to use rockbolts as the exclusive means of supporting the tunnels in the face of the indications in the specifications that approximately 80 percent

of the tunnels would require support other than rockbolts³⁷⁸ (GPB 38, 43, 69). It is even more critical of the contractor's decision to excavate the tunnels to a 20-foot 6-inch diameter using a mole with a fixed cutterhead which in effect precluded the contractor from resorting to any support system for the tunnels other than rockbolts (GPB 28, 39, 54, 63-64). Lastly, the Government charges that in making the decision to rely exclusively upon rockbolts for support and to excavate the tunnels by using a mole with a fixed cutterhead to a diameter of 20 feet 6 inches (*i.e.*, so small a diameter that only rockbolts could be used for support), Mr. Sperry had been unduly influenced by his experience in River Mountains Tunnel, a moled tunnel constructed for the BOR at an earlier time on which Mr. Sperry had been the project engineer (GPB 68-80).

Except for the arguments made by the Government with respect to the River Mountains Tunnel, the most striking aspect of the Government's position in this area is the extent to which it has chosen to ignore the active role the contracting officer or his duly authorized representative played in approving the contractor's plans to rely exclusively upon rockbolts for support

³⁷⁷ As noted by appellant's counsel, the Government has wrongly characterized the testimony as referring to Tunnel Nos. 3 and 3A (ARB 13). In fact, Mr. Sperry testified that the rockbolt grips on the Dresser mole could be tilted forward to support the rock within about 4 to 6 feet behind the dust seal. (*See* n.166, *supra*, and accompanying text.)

³⁷⁸ Government witness Rogert testified that the specifications for Tunnel No. 3 gave the contractor the option to choose rockbolts or other means of support with the approval of the contracting officer (n.9, *supra*, and accompanying text). We note the absence from the record of any evidence indicating that the contracting officer ever found that the conditions in Tunnel Nos. 3 and 3A were unsuitable for the use of rockbolts.

and to excavate the tunnels using a fixed cutterhead mole to a diameter of 20 feet 6 inches. It is clear from the record that the Bureau's approval of the contractor's plan to use only rockbolts in the tunnels for support was based on the provisions of Paragraph 50 of the specifications from which the following is quoted: "Where conditions in the tunnels are suitable for rock bolt supports the contracting officer will approve the use thereof."

It is quite true, of course, as the Government says, that Paragraph 50 did not allow the contractor unfettered discretion in the use of rockbolts and that rockbolts were allowed only where conditions were suitable and upon approval by the contracting officer (GPB 69-70). There is no indication in this record, however, that either the contractor or the Bureau acted as if the contractor had unfettered discretion to use rockbolts. Testifying upon cross-examination, Mr. Sperry acknowledged that the contractor had taken a calculated risk in assuming that all the support problems could be cared for by using rockbolts (n.175, *supra*). While it is clear from the bid submitted that the contractor contemplated using rockbolts for whatever support was required in the tunnels (GX I, p. 48; n.10, *supra*), it is equally clear that the project construction engineer knew that use of rockbolts for support need not be approved unless conditions in the tunnels were determined to be suitable. The contractor was reminded of the contractual limitations upon the use of rock-

bolts in the Bureau's letter of Feb. 2, 1971, in which the project construction engineer stated (i) that whether conditions in the tunnels were suitable for the extensive use of rockbolts would be determined during and following the excavating process and (ii) that where ground conditions in the tunnel were unsuitable for the use of rockbolts other types of support would be required as indicated in Paragraph 50 (text accompanying nn.8&9, *supra*). In the conference between the parties on Dec. 6, 1971, the contractor was given permission to proceed with the rock bolting program but subject to later review (n.34, *supra*, and accompanying text). By Mar. 9, 1972, however, the doubts of the Bureau as to feasibility of using rockbolts as support for Tunnel No. 3 had been resolved in the contractor's favor. In a memorandum to the Director, Design and Construction, on that date, the project construction engineer reviewed the progress made by the contractor since the Dec. 6, 1971, conference after which he stated: "We have found that the use of rock bolts for support has been satisfactory since the epoxy anchor has been in use" (text accompanying n.47, *supra*).

In many respects the actions the parties took involving the contractor's decision to employ a fixed cutterhead with a 20-foot 6-inch bore paralleled those taken in connection with the contractor's rock bolting program. As early as the Nov. 5, 1970, meeting (GX Z), the contractor advised the Bureau of its intention to use a mechanical mole to

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excavate the tunnels to a diameter of 20 feet 6 inches³⁷⁹ or to 6 inches larger than the "A" line. Mr. Levine testified that on numerous occasions after the Nov. 5 meeting, he expressed concern to Mr. Sperry over the small diameter of the mole because it would only permit the installation of rockbolt type supports. In a letter to the Bureau dated Jan. 19, 1971, however, the contractor reaffirmed its confidence in the 20-foot 6-inch diameter of the bore, stating: "We still believe that this size is adequate for the support that will be required" (n.7, *supra*). In the Bureau's letter to the contractor under date of Feb. 2, 1971, the project construction engineer stated that the proposed excavated diameter appears to be adequate for meeting minimum dimensions for "A" line thickness for rockbolt supported sections but went on to note that the use of steel rib supports would require excavating to a larger diameter if normal tolerance is provided (n.8, *supra*, and accompanying text).

After attending a showing of the Dresser mole (the mole used in Tunnel Nos. 3 and 3A), in Beaumont, Texas, in March of 1971, the concerns of Mr. Levine were assuaged by the impression he formed that the mole exhibited would have a variable size cutterhead. The basis for the impression is not clear. Testifying upon rebuttal, however, Mr. Sperry unequivocally stated

that the Dresser mole used on the project was neither proposed nor discussed as a variable head mole (nn.186&303, *supra*, and accompanying text). By the time that excavation of Tunnel No. 3 commenced in mid-May of 1971, however, Mr. Levine knew that the mole did not have a variable size cutterhead and that it was restricted to a 20-foot 6-inch diameter (n.307, *supra*, and accompanying text). The fact that the contractor was employing a fixed cutterhead mole with a 20-foot 6-inch diameter was known to the Bureau, of course, at the time the contractor was given permission to proceed with the rockbolting program on Dec. 6, 1971, subject to later review, as was true also on Mar. 6, 1972, when the project construction engineer expressed satisfaction with the use of rockbolts for support (nn.34&47, *supra*, and accompanying text).

e. *River Mountains Tunnel*

Whether and, if so, to what extent the contractor's appraisal of the conditions likely to be encountered in Tunnel Nos. 3 and 3A may have been affected by Mr. Sperry's experience in River Mountains Tunnel present questions of a somewhat different nature. Succinctly stated, the Government's position is that in preparing the bid estimate for the instant contract, Mr. Sperry was "bidding River Mountains Tunnel all over again" (GPB 71).

The Government undertook to make a statistical comparison between River Mountains Tunnel on the one hand and Tunnel Nos. 3

³⁷⁹ The Government's expert witness Dr. Hill testified that there was nothing in the specifications against the contractor making the choice that he had made (n.293, *supra*).

and 3A on the other. Using the report Mr. Sperry had prepared on River Mountains Tunnel (GX G), the contractor's bid estimate (GX I), the materials report (GX U), the rate of progress in machine-bored tunnels (GX UUU) and production comparisons in Tunnel Nos. 3 and 3A (AX 91), the Government shows (i) that the rock in River Mountains Tunnel was not only of a different type but that it was also much stronger than the rock in Tunnel Nos. 3 and 3A; (ii) that the former tunnel had significantly less overburden than did the latter tunnels; (iii) that River Mountains Tunnel had a bored diameter of 12 feet whereas Tunnel Nos. 3 and 3A had a bored diameter of 20 feet 6 inches; and (iv) that in the former tunnel the progress achieved by the contractor had averaged 108 feet per working day with only 10 percent of the tunnel requiring support as compared to an anticipated progress of 100 to 120 feet per day in Tunnel Nos. 3 and 3A.

With respect to item (iv), *supra*, the Government asserts that since the tunnels involved in the instant contract are similar to Tunnel No. 1 (n.174, *supra*), the comparison should be between the progress made in Tunnel No. 1 and that made in Tunnel Nos. 3 and 3A. The average progress achieved in Tunnel No. 3 of 52 feet per working day is almost identical to that achieved in Tunnel No. 1 of 51.5 feet per working day, while progress attained in Tunnel No. 3A of 95 feet per working day is almost double that obtained in Tunnel No. 1. The

Government also argues that the course of action followed in River Mountains Tunnel at an earlier time explains the actions of the contractor in failing to consider full circle steel rings for rock support in Tunnel Nos. 3 and 3A and moling these tunnels with only a one-inch tolerance in the invert so that tightts there could be removed without disturbing overhead rock support (GPB 72-73, 78).

In preparing the bid estimate on Tunnel Nos. 3 and 3A, Mr. Sperry was unquestionably influenced to some extent by his experience in River Mountains Tunnel on which he had been the project engineer. Asked by the hearing member to summarize the factors he had considered in disregarding or at least not proceeding on the basis of the Government's estimate that approximately 80 percent of the length of the tunnels would require support other than rockbolts, Mr. Sperry stated that a large factor had been the company's success at River Mountains Tunnel in steering the mole and in supporting the rock with rockbolts. Immediately prior to this testimony and in response to the same question by the hearing member, however, Mr. Sperry had stated: "Well, the main factor was the way we interpreted the rock conditions from what we saw on the job, not only the cores but the topography, the mesa land at the job-site itself and the way that stood and the way it was so massive" (Tr. 1373).

While, according to his testimony, Mr. Sperry's experience at River

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Mountains Tunnel was a large factor in his decision to disregard the Government's estimate that 80 percent of the tunnel support required would be other than rockbolts, it is clear from the above quoted testimony that it was not the main factor in the decision reached respecting the nature of the support required in Tunnel Nos. 3 and 3A; nor can it be assumed that these were the only two factors which influenced Mr. Sperry's decision in that regard. For example, it appears reasonable to conclude that the manner in which Mr. Sperry interpreted the Government testing provision of Paragraph 50 (discussed, *supra*) would have influenced him toward disregarding the Government's estimate that approximately 80 percent of the support required would be other than rockbolts.

There are other factors to consider, however, in assessing the extent to which the actual bid submitted by the contractor may have been influenced by Mr. Sperry's experience at River Mountains Tunnel. In addition to Mr. Sperry, there were other contractor personnel who actively participated in the prebid investigation and in the preparation of the bid estimate. As to these other persons, the Government has not even alleged that their judgment concerning the bid to be submitted was influenced in any way by Mr. Sperry's experience in River Mountains Tunnel.

In its brief the Government acknowledges that Mr. Sperry's ex-

perience may have influenced only his judgment for it states: "Another piece of information which perhaps was within the exclusive domain of Mr. Sperry's knowledge and upon which he states he relied to a very large extent in estimating this job, was his experience at River Mountains Tunnel where he was the project engineer" (GPB 71). Certainly there is nothing in the report of the company's geologist, Mr. Hayes (AX 1), to indicate that his judgment respecting conditions likely to be encountered in Tunnel Nos. 3 and 3A had been influenced by reason of conditions experienced by Mr. Sperry in River Mountains Tunnel. In fact, the latter tunnel is not even mentioned in the report. There is a discussion, however, of the information disclosed in the Bennett report (GX A) with respect to Tunnel No. 1. In any event, it is deemed highly significant that the three next lowest bidders submitted bids on the common assumption that the tunnels to be driven would be supported virtually throughout with rockbolts (n.10, *supra*).

We find that the decision of the contractor to rely exclusively upon rockbolts for support of the tunnels and to excavate them to a diameter of 20 feet 6 inches using a fixed cutterhead mole were matters within the exercise of the contractor's discretion where, as here, the record is devoid of any finding by the contracting officer, or his duly authorized representative, that conditions

in the tunnel were not suitable for the use of rockbolts.

3. *Conditions Encountered*

In this section we will not attempt to capsule the detailed testimony to which we have previously related in this opinion. We will undertake to give examples of rock failures and fallout with special emphasis upon the locations within Tunnel No. 3 where such failures and fallout occurred according to the reports submitted by the contractor's consultants, as well as endeavoring to highlight the testimony or other evidence considered to be necessary to the conclusions reached. In addition we will (i) describe the phenomenon of rock failure in the language employed by witnesses for the appellant and for the Government; (ii) examine the material differences, if any, between the condition indicated in the contract and those encountered in performance; (iii) relate the efforts made by the Government to investigate the differing site conditions claim; and (iv) consider additional Government's defenses to the claim asserted.

a. *Rock failures and fallout during contract performance*

Moling of Tunnel No. 3 began May 13, 1971, at Station 873+88. Within the first 280 feet of moling a triangular wedge of rock fell from the crown immediately behind the mole's dust shield before the crown bolts could be placed. These wedges resulted from fractures through intact rock propagating to a shale parting at an estimated height of 2

feet above the crown, as shown in photographs 1 and 2 of AX 5. Cracks below springline are also present for most of the distance between Stations 872+25 and 873+00 as shown in photograph 3 of AX 5. Apropos this reach of Tunnel No. 3, the Bureau of Reclamation's geologic tunnel mapping states: "Fallout 0.5' to 2.0' deep, 1' to 4' wide occurred in arch immediately after passage of cutter head of mole" (AX 87(6)).

The 150-foot length of tunnel between Station 871+00 and Station 869+50 contains cracks and spalling in the crown, which developed after the rock bolts, circumferential pans, and chain link fabric were placed. Photographs 5 and 6 of AX 5 show the pans to have buckled with rock slabs being held up by the chain link fabric. Commenting on this reach the project geologist states: "Fallout 0.5' to 2.5' deep, 1' to 4' wide occurred in arch immediately after passage of cutter head of mole" (AX 87(6)).

In the last 3 days of June 1971, the contractor advanced the tunnel an average of 160 feet per day. In July, however, the average rate of tunnel advance was 39 feet per working day. No tunnel advance was even attempted between July 14 and Aug. 20, 1971, when the contractor and its consultants were attempting to find solutions to the problem of rock fallout in Tunnel No. 3. On July 1, 1971, fallout in the arch of from 1 foot to 3 feet deep and from 1 foot to 2½ feet deep occurred at Station 859+00 to 859+20. For July 2 to July 8, 1971,

fallout in the arch was reported of $\frac{1}{2}$ foot to 2 feet deep and 6 feet wide at Stations 858+05 and 808+75 and at Stations 857+45 to 857+86. On July 9 to 12, 1971, fallout in the roof was estimated to be 9 feet above the arch at Stations 856+50 to 856+90, it being noted that for the stretch of tunnel between Stations 855+50 and 856+96 sides fractured by gripper were permitted to ravel before applying shotcrete (AX 87(6)).

At approximately Station 859+40 fallout occurred before the crown bolts could be placed. On the weekend of July 23 to 26, a large roof fall (estimated to be 80 to 100 cubic yards) occurred near the trailing end of the mole, some 30 to 40 feet behind the face. Shale over the crown fell out up to the overlying sandstone and formed a void approximately 6 to 8 feet high by 25 feet long. The void which formed was slightly wider than the tunnel bore. During this time the sidewalls spalled and slabbed badly along the full length of the mole, both ahead and behind the mole gripper plates (AF 77A; AX 5).

Of the approximately 1,735 feet of machine bored tunnel driven prior to the resumption of operations on Aug. 20, 1971, some form of fracturing or rock fall is present in all except an approximately 900-foot length between Station 869+50 and Station 860+50. Photograph 4 of AX 5 shows the condition of the crown in this section of the tunnel. Even after support was placed, problems attributable to

rock failure and fallout sometimes developed. One photograph of the crown at Station 870+50± shows large slabs which spalled after crown support was placed being held by chain link fabric (AX 5, Photograph 5). Another photograph of the crown at the same station shows buckling of pans related to spalling after crown support was placed (AX 5, Photograph 6). This same stretch of tunnel had presented problems as soon as excavated, however, for the project geologist states: "Fallout 0.5' to 2.5' deep, 1' to 4' wide occurred in arch immediately after passage of cutter head of mole" (AX 87(6)).

Not all rock failures or falls, however, were in the arch. This is clear from the picture taken at Station 859+80± showing cracking in the lower sidewall below fan line (AX 5, Photograph 7) and the picture taken at Station 859+40± showing fall and cracking in sidewall, right side (AX 5, Photograph 8). The geologic mapping for Tunnel No. 3 shows fallout from the sidewalls to be $1\frac{1}{2}$ feet deep in the vicinity of Station 859+40 (AX 87(6)).

When driving of the tunnel resumed after the shutdown, progress was very slow with excavation averaging less than 10 feet per day during the balance of August and less than 12 feet per day for the 11 days worked in September.³⁸⁰ On Aug. 25, 1971, the fallout in the

³⁸⁰ On the geologic mappings the project geologist notes that 19 shifts were lost between Sept. 17 and Sept. 28, 1971, due to labor problems (AX 87(5)).

roof was estimated to be 5 feet deep (AX 87(6)). During October progress improved somewhat with an average rate of advance for the 19 days worked being approximately 30 feet per day. In November, however, the average daily rate of advance was less than 25 feet. When on Nov. 5, 1971, the contractor reached Station 847+75 a cave-in at Station 855+60 caused the loss of nine shifts. On Nov. 19, 1971, the contractor stopped tunneling operations at Station 846+02 for 1 week in order to go back and shotcrete and rockbolt between Station 848+00 and Station 855+60 (AX 87(5)). The 20 days worked in December saw the contractor achieving an average daily progress of almost 60 feet per day.

Tunneling conditions improved greatly during January, February, and March of 1972, when average progress achieved per working day for those months was approximately 84 feet, 108 feet, and 81 feet, respectively. In April of 1972, however, serious problems were encountered including soft invert and the average advance plummeted to 31 feet per working day. Some improvement occurred in May when the average daily advance increased to 48 feet per working day. A dramatic increase took place in June when an average progress of 160 feet per working day was achieved. On July 5, 1972, the tunnel was advanced by 259 feet and on the following day 94 feet of tunnel was driven before the inlet portal at Sta-

tion 721+90 was holed through at 8:10 p.m. (AX 87(9)).³⁸¹

All of the photographs involving stationing included in the Sperry-Heuer report (AX 4) relate to excavation of Tunnel No. 3, as is true also with respect to the May 1973 report (AF 77A).

Failures in the arch typically developed immediately behind the cutting head, ahead of the rock bolt installation.³⁸² The time of failure in the walls varied widely. At times, these failures occurred close behind the cutting head, ahead of the gripper plates. Typically, these failures became visible a short distance behind the tunneling machine, over the trailing floor, but fallouts would not occur until some time later, as much as a few days or weeks behind the advancing face. Examples of this type of failure are shown in Figure 6 (Sta. 859+80, shear dis-

³⁸¹ Muling in Tunnel No. 3A commenced on Aug. 18, 1972. During the remainder of the month, the average daily rate of advance was only 37 feet. In September, however, progress greatly improved with an average daily rate of advance of 103 feet. Before hole-through on Oct. 12, 1972, an average daily rate of advance of 143 feet was achieved (AX 87 (7) and (8)).

³⁸² With respect to failures in massive material in the arch, the May 1973 report states:

"In most of the tunnel, fractures developed in the arch immediately behind the cutting head and ahead of the position at which rock bolts could be installed. Spalls and slabs of rock as large as 6 to 8 inches thick and 2 to 3 feet in lateral dimensions were common. (See Figs. 21 and 22.) In some instances, these slabs were removed or allowed to fall before bolt installation. In other cases, the slabs remained in place and bolts were installed through the slabs. In places along the tunnel, the arch remained intact and circular until after the bolts were installed, but fracturing developed later, forming slabs and spalling between bolts." (AF 77A, pp. 39, 40).

placements, July 1971); Figure 20 (Sta. 830+50. Failure in south wall around shaly lens, February 1973); Figure 31 (Sta. 775+70. Wedge-shaped fallout in upper quarter-arches, February 1973); and Figure 33 (Sta. 822+00. Fracturing in north wall, February 1973) (AF 77 A, pp. 40, 41). *See also* Figure 5 of AX 4 showing rockbolt installation and fracturing in arch at heading (Sta. 851+75). Respecting rock failures experienced in the vicinity of Station 851+75, the geologic mappings state: "Fallout in the roof two to three feet deep, 10 to 20 feet wide" (AX 87(5)).

Extensive cracking developed in massive dry materials in the walls and invert of Tunnel No. 3 under the highest cover. Sometimes the cracking was closely spaced and resulted in spalling of approximately rectangular pieces of several inches in size (Figure 24).³⁸² The caption of the photograph reads: "Sta. 850+00. South wall, intense, closely spaced fracturing. Lower wall and invert have moved inward. Invert has been excavated lower to allow invert concrete placement. February 1973" (AF 77A, p. 40). For another illustration of the same type of failure, see the photograph taken at Station 839+00 (AX 4; Fig. 6).

In other cases, however, large slabbing of this class developed, as shown in Figure 28 ("Cracking in lower north wall approximately 270

ft. behind heading, Sta. 845+60, December 9, 1971") and Figure 29 ("Cracking in lower north wall approximately 680 ft. behind, Sta. 849+70, December 9, 1971"). Fractures of this type usually appeared within several hours to a few days behind the advancing face, and continued to grow over a period of days. Raveling of spalls and complete loosening of slabs bounded by these fractures typically developed over a period of days and weeks behind the advancing face. Examples of the growth of these failures are shown in Figure 12 (Sta. 828+80. Large scale slabbing in south wall, February 1973) and in Figure 13 (Sta. 826± Jan. 18, 1972. Initial stages of crack development in lower south wall, approximately 300 feet and 6 days behind heading) (AF 77A, p. 40). *See also* AX 4, Figure 7 (Large scale slabbing in lower sidewalls—Sta. 828+00).

Rock failures in the arch and walls associated with siltstone/shale in the presence of water was also a problem in Tunnel No. 3. In these cases failures in the siltstone/shale were a matter of concern because of their magnitude and the speed with which they developed. Failures of this type developed in both the crown and sidewalls shortly after excavation, ahead of bolt installation, and often ahead of the mole gripper plates. Where the mole was stopped in some situations of this type, fallout in the crown developed several feet behind the cutter head. Siltstone/shale surfaces

³⁸² In the caption the photograph is incorrectly labeled Fig. 25. In the text of the report, however, the photograph is correctly referred to as Fig. 24 (AF 77A, p. 40).

exposed to water continued to soften and slake as long as exposed and unprotected. Examples of this general type of failures are shown in Figure 17 (Sta. 846+00. North wall, arch in sandstone, wall and invert in siltstone/shale, February 1973); Figure 18 (Sta. 780+00. Large wedge-shaped fallout in wall. Coarse sandstone in arch, fine sandstone and siltstone in walls, February 1973); Figure 19 (Sta. 857 looking upstream into area of large fallout near DH116 where water was first encountered in tunnel. Heading was shut down in this area from July 14 to Aug. 20, 1971. Picture taken February 1973); Figure 23 (Approximate Sta. 855, early September 1971. Major failure and fallout in crown at heading); Figure 30 (Sta. 805+10. Fallout in north wall at location of siltstone/shale seam. February 1973); and Figure 32 (South wall, Sta. 769+20. Failures around shale/siltstone lens at Springline. February 1973) (AF 77A, p. 41). A sketch of failure associated with shale in the presence of water is shown in Figure 9 of AX 4. Photographs of such failures included with the report are Figure 10 (Fallout from arch and sidewall in shale overlain by water-bearing sandstone at Sta. 855+37 to 855+60) and Figure 11 (Fallout from sidewall in shale overlain by water-bearing sandstone, Sta. 846+00).

Fracturing in the lower portion of the sidewalls and in the invert became more prominent after the tunnel emerged from under the Harris Mesa and paralleled an edge of the mesa, suggesting high horizon-

tal stresses. (See Figure 27. South wall, Sta. 772+25. Deep-seated fractures dipping down into wall, February 1973.) In some locations of the tunnel, failure developed in the walls ahead of the gripper pads (Figure 16. Cracking in south wall ahead of gripper. Sta. 822+50. Jan. 20, 1972) (AF 77 A, pp. 51, 53).

In most of the length of Tunnel No. 3 between Station 747 and Station 855, the invert had moved into the excavation at some time following excavation. Visual inspection of the tunnel shows a high degree of fracturing in the lower wall throughout the tunnel length with high invert. An example of such an area is Figure 26 (Sta. 810+90. Large scale fracturing in lower south wall. Siltstone/shale material in lower wall has moved inward and is as much as 6 inches inside "A" line. February 1973).

Following excavation, progressive failure developed in the tunnel in different locations. Pans in the arch buckled after installation due to rock movement and failure, as shown in Figure 34 (Sta. 827+15. February 1973) and Figure 35 (Sta. 793+00. February 1973) (AF 77A, pp. 43, 44).

Except for Mr. Mathews all of appellant's witnesses gave stationing for some of the rock failures and fallout to which they testified. According to Mr. Sperry he saw extensive failures in the rib area ahead of the grippers in the vicinity of Station 821+00. These failures were reported by him to Mr. Lincoln and Mr. Rogert of the BOR.

On one Saturday in January of 1972, Mr. Sperry saw a crack in the invert so large he put his arm down as far as the elbow but could not get to the bottom of it as the crack was curved. The crack in the invert also occurred in the vicinity of Station 821+00 (n.173, *supra*, and accompanying text). According to Mr. Sperry, the entries in his diary for late December of 1971 and early January of 1972 (AX 90) show that the arch was coming down but that the support system of bolts and pans was taking the weight (n.188, *supra*, and accompanying text). During the period in question tunnel excavation was proceeding from Station 835+26 to Station 833+00 (AX 87 (5)). An entry from Mr. Sperry's diary for Mar. 24, 1972 (AX 92), shows that on that date some ties were submerged between Stations 790 and 785; that the invert was very wet; and that water was dripping from the bolts over mole (n.189, *supra*, and accompanying text).

Offered in evidence through Mr. Green were eight photographs taken from the contractor's album (AX 16), all of which relate to conditions existing prior to concrete placement and all but one of which (AX 16A showing typical placement of arch forms) were assumed to have been taken on Mar. 17, 1973. This is the date shown on AX 16F, a photograph depicting Tunnel 3 rib tights at Station 781+75. Mr. Green also testified as to concrete failures in the arch in sections of Tunnel No. 3 where the invert concrete had been

removed pursuant to Order for Change No. 1. By the change order the contractor was directed to remove the concrete invert between Stations 812+42 and 824+00 and between Stations 833+00 and 844+46 of Tunnel No. 3 (n.63, *supra*). On cross-examination, however, Mr. Green was unable to recall how much additional concrete had been placed in Tunnel No. 3 by reason of rock failures observed by him (nn.201-03 and accompanying text).

In the great majority of instances, however, testimony identifying rock failures and fallout by station was given by the appellant's expert witness, Dr. Heuer. In addition to the photographs and sketches from the reports discussed above (AX 4, AX 5, and AF 77A) for which specific stationing was given, Dr. Heuer testified extensively with respect to photographs introduced at the hearing as separate exhibits as to which he cited either specific stationing or approximate stationing or the time period in which the photographs had been taken (nn. 245-47 and accompanying text).

There is other evidence of record in which rock failures and fallout are identified by station either specifically or approximately. For example, there is the contractor's letter of June 7, 1973, by which the Bureau was notified of rock fall from the crown of Tunnel No. 3A near the outlet portal.³⁸⁴ It was estimated that 40 to 50 cubic yards of

³⁸⁴ The Bureau's geologic mappings show the outlet portal for Tunnel No. 3A to be at Station 1018+44 (AX 87(8)).

rock had fallen out pulling out or breaking off the rockbolts within the fallout area. The letter also noted that a major portion of the reinforcing steel already in place was severely damaged. Six weeks later the Bureau was notified of the arch heaving in several areas of Tunnel No. 3 between Stations 812+50 and 844+50 (nn.102-05, *supra*, and accompanying text).

b. *Description of rock failure and fallout*

Appellant's expert witness Dr. Heuer testified that the conditions the contractor encountered in Tunnel Nos. 3 and 3A were attributable principally to a shear type of failure which was said to mean that the material has been overstressed³⁸⁵ and deforms in a shearing motion. In the report submitted concerning his initial visit to Tunnel No. 3 on July 16, 1971 (AX 20), Dr. Heuer had noted the presence of fresh fractures in intact rock and the fact that crown fallouts generally occur immediately behind the dust shield, about 4 feet back of face and about 8 feet ahead of the rock-bolt augers.

In order to explain shear type fractures, Dr. Heuer drew six sketches (AX 32-37) showing rock failures in the two common failure modes (shear failure mode and ex-

tension failure mode). Also offered to show fracture around tunnels due to overstressing were AX 38 (extension fracturing) and AX 39 (shear fracturing).

According to Dr. Heuer, one of the distinctive things about a shear fracture is the curved failure surface, while another distinguishing mark is the every fresh appearance of the fracture (a fresh fracture through virgin intact rock). As to the curved failure surface, Dr. Heuer called attention to Figure 5 of AX 4 and to AX 43 and to the fact that in these exhibits can be seen irregular sawtooth surfaces formed in the crown after wedges isolated by shear fractures have fallen into the tunnel. As illustrative of the fresh fractures through virgin rock, Dr. Heuer pointed to AX 22 and to Photograph 2 of AX 5 (Tr. 453-55).

Commenting upon AX 51A and C and AX 52, Dr. Heuer stated that these photographs show that material above a crack has moved inward; there has been a shearing displacement. Describing the effects of a failure observed in a 1½-inch diameter hole drilled radially up into the crown of Tunnel No. 3 at Station 851 on Oct. 26, 1971, and using a sketch to illustrate his testimony (AX 58), Dr. Heuer said that looking up the hole a short distance you see the hole has been offset by a sliding shearing motion along a crack up in the rock.

In his testimony, Dr. Heuer emphasized that the maximum stresses at the tunnel wall occur at the ends of a diameter of a tunnel perpen-

³⁸⁵ In a report to the contractor dated Oct. 2, 1973 (GX Q), a second consulting firm engaged by the contractor states: "[T]he failures were caused by over-stressing—i.e. large in-situ stresses and peaked-up tangential stresses in the tunnel walls with respect to the strength of the rocks involved" (text accompanying n.112, *supra*).

dicular to the maximum stress direction (Tr. 460).³⁸⁶ He did not consider that the rock failures he had described were caused by (i) unusually high stresses in the sense of stresses that were higher than those which might have been anticipated, (ii) stress relief, or (iii) fallouts along joints or bedding planes (nn.250&51, *supra*, and accompanying text).

In Dr. Heuer's view the type of failures to which he had testified had not been indicated in the contract. In this connection he noted that the main problems during excavation was the rapid rate of failure and that there were no provisions in the contract which call for placing support any closer than the contractor had actually installed it. Also noted by Dr. Heuer were the progressive failures after excavation that he had observed and which were charted in the large drawings which had accompanied the May 1973 report (AF 77A).

Queried about the deterioration, disintegration, and fallout which had occurred in the vicinity of DH 116, Dr. Heuer stated that while water had had a part in what happened there, it was not primarily responsible for the magnitude of the failures that had occurred.³⁸⁷ Dr. Heuer also stated that the

water problems at Navajo were more severe than he had seen elsewhere in tunnels.³⁸⁸

With respect to the problems he had described, Dr. Heuer expressed doubt that they would have been alleviated to any great extent if the tunnel had been supported by steel, noting that practically speaking it did not appear that steel sets could be installed any closer to the heading than the contractor had installed the rockbolts.

Drawing a sketch to illustrate his testimony (AX 9), Mr. Sperry described the rock failures and fallout observed by him as characterized by the following special features: (i) The rock falling out always broke to curved surfaces away from the heading; (ii) the failures were through virgin rock unless a parting between different rock types was involved in which case the failures would be through the virgin rock and through the parting; (iii) the failures sometimes occurred along the trailing floor or even down behind the trailing floor, which would be 500 feet, or more, behind the heading; and (iv) there were offsets involving failures in the lower sidewalls.

Mr. Green also drew a sketch (AX 12) to illustrate the type of rock failures observed by him which included: (i) Failures in the arch, (ii) failures on the face of

³⁸⁶ The principle is illustrated in AX 4, Fig. 17 and AF 77A, Fig. 11. Dr. Heuer prefaced his testimony in this area by stating: "[T]he position of the great stress or overstress around the tunnel depends upon the location or the relative magnitude of the horizontal and vertical stresses in the ground" (Tr. 460).

³⁸⁷ Testimony given by Mr. Logan appears to support this view (nn.327-29, *supra*, and accompanying text).

³⁸⁸ Based upon his observations in the two tunnels, Mr. Mathews considered the water conditions in Tunnel No. 3 to be similar to those present in Azotea tunnel. Mr. Mathews had observed very little water in Azotea tunnel (n.272, *supra*, and accompanying text).

the tunnel with typical failures involving rock that had failed 4 or 5 feet above the invert; (iii) failures up to a layer of shale; and (iv) failures observed in the rib section 4 to 5 feet above the invert. Some of the failures in the arch seen by Mr. Green involved failures to bedding planes.³⁸⁹ Some of the failures had curved surfaces and some of the cracks in what appeared to be homogeneous material were considered to be new failures. Failures observed that were not to distinct bedding planes were failures in one material. Failures were observed in the rib section ahead and behind the grippers.

Based on the observations made in the tunnel and the reports reviewed by him, Mr. Mathews concluded that for the most part the rock failures experienced by the contractor in Tunnel No. 3 were due to "geodynamic pressures." These were defined by him as "pressures on the tunnel structure that are mobilized when the stresses from the surrounding rock exceed, exceed its strength" (Tr. 564). Later in his testimony, Mr. Mathews stated that "geodynamic pressures" are exerted all the way around a periphery and in Navajo Tunnel No. 3 it is a matter of record that the bottom did come up (n.270, *supra*). In the course of responding to a question about the relevancy of considering cover in submitting a bid, Mr. Mathews stated that "geodynamic

pressure" is not present at shallow depth (n.273, *supra*).

Mr. Mathews knew that the failures he observed were due to "geodynamic pressures" because he observed the cracking that was described in detail by Dr. Heuer and which he considered to be unique to a failure resulting from geodynamic pressures. Elaborating upon this answer upon cross-examination, Mr. Mathews stated: "Well, it's the shape of the fractures that indicate the reason for the failure * * * these fractures running up on a curved surface that had nothing to do with the bedding planes, that fractured in intact rock" (n.265, *supra*).

Mr. Mathews considered that the occurrence of "geodynamic pressures" in a moled tunnel was a very rare phenomenon. He noted that prior to September of 1970, he had observed the phenomenon only once before and that was in Azotea tunnel. There, however, the fallout did not occur immediately, as it did in Tunnel No. 3 (n.268, *supra*, and accompanying text). Mr. Mathews stated that the failures in Tunnel No. 3 were not the result of defects in the rock but were the result of "geodynamic pressures." Mr. Mathews also stated that the falling rock about which he had testified did not involve homogeneous and isotropic materials.

The term "stress relief" was used by Government witnesses to describe situations where the strength of the rock was less than the pressures on the rock. Commenting upon the terminology employed by

³⁸⁹ According to Dr. Deere one of the problems a contractor using a boring machine should have considered was the difficulties involved in providing rapid support to the weak horizontally bedded rocks (n.109, *supra*).

the witnesses for the appellant and for the Government at the hearing,³⁹⁰ Dr. Hilf observed that Dr. Heuer's term "overstressing" or "stress intensification," Mr. Mathews term "geodynamic pressures" and the term "stress relief" all are referring to the phenomenon of failure where the strength of the rock is less than the stress on the rock (n.296, *supra*).

Dr. Hilf acknowledges that the speed of failure of the rock would be difficult to predict but went on to note that if you have a high stress due to a very high overburden and a very weak rock, it would not take any time at all for the rock to fail once you relieve the restraining pressure. Asked to say what had occurred at Navajo, Dr. Hilf said that he had no reason to doubt Dr. Heuer's testimony that shear fractures or shear failures had occurred and that, if they occurred in intact rock, it was because the tangential stress was greater than the strength (text accompanying n.296, *supra*).

c. Materiality of difference

We have previously discussed the interpretation the contractor placed upon the Government testing provi-

sion of Paragraph 50 of the specifications. Consistent with that interpretation, the contractor anticipated that only superficial deterioration and disintegration would be encountered. Testifying at the hearing, Mr. Sperry stated that some fallout was anticipated in the siltstone, as well as in the contact between two different types of material. Some fallout was also anticipated from water. It was estimated that in some portions of the tunnel the standup time would not be over 50 feet. The bid estimate did include some time for rock support and some delay time, including the fallout anticipated from water. Not anticipated by the contractor, however, was fallout or fractures occurring through virgin rock and in good sandstone or the depth of the fallout experienced in the tunnels (nn.165-68 and accompanying text).

Apparently, as a corollary of this view of what the contract indicated, the four low bidders on the work covered by the instant contract made only token bids for the tunnel support system, causing the project construction engineer to conclude that they planned to use rockbolts (n.10, *supra*). Commenting upon this aspect of the case in the May 1973 report (AF 77A), Dr. Heuer states: "[N]one of the support prices listed by the four low bidders is adequate to cover the cost of installing a support system such as steel ribs, shotcrete, or the Bernold system. Nor are the excavation unit prices submitted by

³⁹⁰ In the early stages of contract performance Dr. Heuer appears to have equated the term "overstressed" with the term "stress relief." In a letter to the contractor dated Nov. 2, 1971, he refers to slabbing as representing "a desirable stress relief" (n.43, *supra*). The use of the latter term by the contractor's personnel appears to have been common during that period for a memorandum pertaining to a conference between the parties on Dec. 6, 1971 (AX 74) states: "[T]he contractor took the position that the sidewall fallouts were almost entirely due to stress relief." (See text accompanying nn.30&31, *supra*.)

these contractors high enough to cover this support installation" (text accompanying n.82, *supra*).

All of the consultants advising the contractor had similar views as to what the contract indicated with respect to rock failures and fallout. In Mr. Mathews' view the contract indicated that the contractor should only have to consider support due to loosening of the ground by which he meant loosening of the ground due to rock defects (text accompanying n.268, *supra*). After referring to the contract specifications, Dr. Heuer says: "[T]hese provisions, however, say essentially nothing about the nature of the anticipated support problem—i.e., rock failures—which were expected except that problems of surface deterioration and disintegration were to be expected" (text accompanying n.130, *supra*). In a letter to the contractor dated Feb. 10, 1974 (n.145, *supra*), Dr. Don U. Deere states: "The emphasis in the specifications was on shallow, surficial disintegration which would require protective coatings and protection from falling rock blocks" (n.150, *supra*).

The Government does not dispute the fact that in performing the contract the contractor encountered shear fractures or shear failures (text accompanying n.296, *supra*). The Government's expert witness Dr. Hilf acknowledged that none of the remedial measures specified in the Government testing provision of Paragraph 50 of the specifications (characterized by him as surficial treatments) would

have prevented the deep failures of the rock in Tunnel Nos. 3 and 3A, as described by Dr. Heuer (text following n.289, *supra*).

The fact that much of the fallout from the crown occurred immediately upon excavation is clear from the views expressed by Government personnel at various times during contract performance. Immediate fallout, particularly from the crown, was either reported or anticipated by the project geologist (n.158, *supra*), a Bureau of Mines geologist (n.24, *supra*), and the project construction engineer (n.311, *supra*, and the accompanying text). The significance of such fallout occurring immediately was emphasized by Dr. Heuer who states: "[T]he major impact of the rock failures experienced in Tunnel No. 3 in increasing Contractor's costs was the fact that rock failures occurred in the crown directly over the machine concurrent with machine advance, and before the rock bolts could be installed" (AF 77A, pp. 69-70).

Instances of immediate fallout in Tunnel No. 3 included a triangular wedge of rock which fell from the crown immediately behind the mole's dust shield within 280 feet of machine boring in from the portal and the fallout from the crown which occurred at approximately station 859+40 before the crown bolts could be placed (text following n.12, *supra*). Not all major fallout occurred immediately, however, as is clear from the large rock fall which took place on July 23 and 24, 1971 (80 to 100 cubic yards), near the trailing edge of the mole

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and some 30 to 40 feet behind the face (text preceding n.13, *supra*, and accompanying n.88, *supra*).

Severe fallout also occurred in the ribs of Tunnel No. 3. Appellant's witness Green recalls that in one instance the fallout was so severe that he put in over 70 railroad ties as cribbing between the grippers and the rib of the tunnel in order for the grippers to get any kind of bearing on the rib (Tr. 333-34).³⁹¹ Heaving of the invert was a serious problem in Tunnel No. 3 (nn. 62&270, *supra*, and accompanying text).

According to Dr. Heuer, the major significance of the rock fallout was in disruption of the heading advance. The heading advance was said to have been slowed by fallout from the crown, by equipment damage from falling rock, by mucking of fallen material from under the mole and by the installation of the extra rockbolts which were required (AF 77A, p. 59).³⁹² See also Mr. Green's testimony at Tr. 344-47 as to the effect of rock fallout and failure upon the contractor's operation.

d. *Government Investigation of Differing Site Conditions Claim*

Mr. Logan, chief geologist for the Bureau of Reclamation, visited Tunnel No. 3 during contract performance on three occasions. Of

³⁹¹ "Fallouts from the walls were so severe on occasion that the tunnel advance was stopped while rock bolts (and sometimes shotcrete) were installed" (AF 77A, p. 60).

³⁹² "[A]reas of large and continuous rock failure and fallout about the tunnel required the greatest concentration of rock bolts and resulted in the slowest heading advance" (AF 77A, p. 59).

particular interest to the Board is the testimony he gave with respect to his first and second visits. The first visit took place on Sept. 14 and 15, 1971. The results of this visit were reported by Mr. Logan to the Director of Design and Construction, in a memorandum dated Oct. 4, 1971 (AX 82).

The purpose of the visit, as stated in the report, was to conduct a geologic examination of tunnel conditions relating to slow progress of excavation (n.22, *supra*). In the testimony given at the hearing, however, Mr. Logan stated that the purpose of the visit had been to observe the geologic conditions in the vicinity of DH 116 in order ascertain the facts so that with respect to any claim submitted the BOR would have factual information on which to base a judgment as to settlement of the claim, insofar as the geologic aspect was concerned. According to the report, the examination had been directed toward outlining programs which the project geologic personnel should pursue in compiling data on the contractor's claim of changed conditions. The report also refers to proposed programs of data collection based on six "findings" developed during the field examination.

Mr. Logan acknowledged upon cross-examination that the six "findings" had been made by him and that they were not factual. He stated that the programs outlined were to determine whether the "findings" that had been developed during the field examination were

correct or not. As to each "finding" Mr. Logan was asked whether the geologic data compiled by the project personnel subsequently had shown the particular "finding" to be correct. He testified that the data so compiled supported "findings" 1, 2, and 4; that such data partially supported "finding" 3; and that with respect to "findings" 5 and 6, he was unable to say whether these "findings" had been confirmed as correct by data compiled by the project geologic personnel. (See text accompanying nn.335-38, *supra*.)

In reviewing this testimony by Mr. Logan, we find it at least surprising that in an official report of travel he should have used the term "findings" to describe conclusions reached by him which he acknowledged were not factual. It is clear that the programs of data collection outlined for the project geologic personnel could as easily—and more properly—have been stated as questions to be answered rather than as "findings" to be confirmed. We say "more properly" because relating the programs of data collection to questions posed would have obviated the danger of project geologic personnel being influenced in the conclusions they reached by opinions expressed by the chief geologist for the Bureau which he had termed "findings."

Even more surprising was the cavalier attitude displayed by Mr. Logan toward the programs of data collection outlined for the project personnel in order to determine whether the "findings" he had developed during a 2-day field exami-

nation were correct. Upon cross-examination, Mr. Logan acknowledged that he did not know whether factual geologic data prepared by the project geologic personnel had confirmed as correct finding 5 ("the slow rate of progress, due primarily to mechanical failures, is promoting excessive rock failure through delays in establishing artificial arch support and in allowing the accumulation of water at the cutterhead to become a problem of machine operation") or finding 6 ("geologic conditions encountered in the tunnel to date do not differ from that portrayed by the specifications document").

Although interrogated about his apparent indifference to validating the "findings" he had made (n.337, *supra*), Mr. Logan offered no explanation for his failure to follow up with the project geologic personnel to see what data they had prepared in these important areas relating to the changed conditions claim. Whatever the reason for lack of followup, it does not appear to have been due to lack of time since Mr. Logan's initial visit to Tunnel No. 3 occurred in mid-September of 1971 and excavation in Tunnel No. 3 was not completed until July of 1972 with excavation of Tunnel No. 3A not being completed until October of that same year.

Mr. Logan's second visit to Tunnel No. 3 took place on Mar. 23 and 24, 1972, when the tunnel face was at approximately Station 782+0. During this visit, Mr. Logan observed failures in the sidewalls of the tunnel and bent pans and some

cracking of the rock all along some of the crown, as well as water and muck in the invert. It was on this occasion that Mr. Logan rode in the cab of the mole and consequently was able to observe the tunnel from that vantage point.

Mr. Logan attributed many of the failures he observed in the sidewalls to the action of the grippers. It was his testimony that the artificial stress exerted by the grippers against the sidewalls consolidated the rock at least half an inch, causing streams of water to pour down the leading and trailing edge of the grippers. Interrogated about this testimony, Mr. Logan stated that he did not see any rockbolts in the arch of the tunnel when he observed the action reported of the grippers; that he did not remember seeing any water above spring line; that the material was dry above the grippers prior to gripping; and that the material appeared to be dry ahead of the grippers (n.339, *supra*, and accompanying text).

Offered in evidence upon rebuttal was an entry from Mr. Sperry's diary for Mar. 24, 1972 (AX 92), from which the following is quoted: "Some ties submerged between Stations 790 and 785. Invert very wet. Bolts over mole again dripping water. Told CRP to drill drain holes between pans." Concerning this entry Mr. Sperry stated that the instruction was issued to the tunnel superintendent to avoid having the water dripping from the rockbolt holes conducted by the steel pans (attached to the rockbolts) to the

ribs where it would run down the ribs causing the mole grippers to slip to some extent. When the water ran down the ribs, it sometimes ran onto the top of the gripper pads and if the grippers were extended the water had no place to go except to conduct itself to the leading or trailing edge of the grippers and run down there (n.189, *supra*, and accompanying text).

In a number of important respects the testimony offered by Mr. Logan varies from that given by Mr. Sperry. Mr. Logan could not recall seeing any rockbolts in the arch of the tunnel when he observed the action reported of the grippers, while in his diary for Mar. 24, 1972, Mr. Sperry refers to the "[b]olts over mole again dripping water." As previously noted, Mr. Logan could not recall seeing any water above springline. He also testified that the material was dry above the grippers prior to gripping and that the material appeared to be dry ahead of the grippers. According to Mr. Sperry, however, the instruction issued to the tunnel superintendent to drill drain holes between the pans was for the purpose of having the water drip down on the invert rather than having it run down the ribs of the tunnel. This action was taken to avoid having the water dripping from the rockbolt holes conducted by the steel pans to the ribs where it would run down the ribs causing the grippers to slip to some extent.

With respect to the questions raised by the above discussion, we

have resolved the conflicts in the testimony offered by Mr. Logan and that given by Mr. Sperry by accepting the testimony of Mr. Sperry. In so deciding, we have given controlling weight to the fact that Mr. Sperry's testimony is supported by a contemporaneous entry in his diary and to the further fact that Mr. Logan was not recalled as a witness to refute Mr. Sperry's unequivocal testimony in the areas in question.

e. Other Government Defenses

We have previously noted the principal arguments advanced by the Government with respect to the proper interpretation to be given the Government testing provision of Paragraph 50 of the specifications and the effect to be given to the contract drawings, showing full circular steel ribs as one of the contemplated means of support for the tunnels. We leave aside for the present the arguments the Government has made with respect to quantum (*e.g.*, damages to the rock attributable to the grippers, contractor's responsibility for many, if not all, of the tights and inadequacy of the mole and laser target system).

In its posthearing brief the Government acknowledges that in the specifications it did not attempt to quantify the effects of stress relief in the area where the tunnels would be bored. This was said to be the result of there being no standard test for testing a core for stress relief (GPB). Later in the brief the Government refers to Mr. Mathews

as being preoccupied with problems associated with predicting "how much relief" would occur in rock which was subjected to stress relief or "geodynamic pressure," after which it notes Mr. Mathews' statement that he had no ideas to how much relief one would have had to allow in Navajo 3 to use steel supports satisfactorily. Immediately thereafter the brief states:

[O]f course, the Bureau did not know either and made no quantitative representations as to "how much relief" would occur. Mr. Mathews and Dr. Hilf both alluded to the fact that there is no practical way to quantify stress relief or geodynamic pressure. The point is, the Bureau did indicate to the contractor the amount of overburden, the weak nature of the rock, and that "movement of the surrounding materials" would occur, that the materials would deteriorate or disintegrate rapidly when stress relieved, and that 80 percent of the tunnel could require a support system other than rock bolts.

(GPB 57-58).

Quantifying stress relief or "geodynamic pressure" present in the areas through which the tunnels were to be excavated may have been difficult or even impossible. The record before us suggests, however, that being able to quantify the amount of stress relief or "geodynamic pressure" present in an area to be excavated is not the only way to alert a contractor to the likelihood of encountering problems of the sort which confronted the contractor in Tunnel No. 3. We note, for example, the excerpt from the specifications for the VAT Tunnel

which is essentially the same as the Government testing provision of Paragraph 50 of the instant contract but with additional language warning prospective contractors of possible fracturing due to overloading and extremely short standup time (nn.191-92 and accompanying text).

Another argument advanced by the Government concerns the fact that the contractor was actually paid for excavating more material than was actually removed from the tunnels either by excavation or rock failure (GPB 4, 37-38). Cited in support of this position are GX LLL, GX MMM, and GX NNN, as well as the testimony of Mr. Dalen at Tr. 1105 to 1117. The Government says it has difficulty comprehending a claim for an equitable adjustment based on a theory of a differing site condition when on the average the difficulties to which the contractor refers occurred within the pay lines established by the contract. As appellant's counsel has observed, however, the claim is not based upon the volume of material excavated but upon the behavior of rock attributed to shear failures through intact rock (ARB 15).

D. Decision

1. *Contract Indications* *Ruling upon evidentiary inferences* *sought by appellant*

The appellant asserts that the Board should draw inferences adverse to the Government by reason of the failure to have its project con-

struction engineer testify in important areas³⁹³ and by reason of the failure to call as witnesses two Government employees who attended the hearing.

With respect to the testimony given by the project construction engineer, the Board notes that he gave no significant testimony with respect to what the contract indicated and none at all with respect to conditions normally inhering in work of this character or even the conditions actually encountered in Tunnel Nos. 3 and 3A. As to this the appellant asserts that had Mr. Levine testified with respect to the conditions encountered by the appellant in the tunnels, that testimony would have revealed that those conditions differed materially from those indicated in the contract and from those generally recognized as inhering in work of that character. At the very least, according to the appellant, the Board is entitled to and should draw that inference from the Government's failure to have its project construction engineer testify about the subject of this appeal (AOB 52-53).

The two Government employees who attended the hearing but did not testify are identified in appellant's brief as Mr. Kenneth Cooper, project geologist, and Mr. J. S.

³⁹³ Although Mr. Levine did testify, he gave little or no testimony in the critical areas involved in this appeal. This could not be attributed to lack of knowledge since he was the project construction engineer throughout contract performance, as well as being the authorized representative of the contracting officer throughout such period.

Dodd, head of the rock mechanics division or head of geology in 1974. Noting that Mr. Cooper was in Tunnel Nos. 3 and 3A frequently enough to have mapped the geology, on almost a daily basis, for the Bureau's official geology drawings of the tunnels (AX 87), appellant's counsel asks: "As with Bert Levine, why didn't Mr. Cooper testify about the subject of this Appeal, a subject with which he was most familiar and, of all of the Government employees, the most qualified? Who better than Mr. Cooper to describe the rock conditions encountered?"

Immediately thereafter appellant's counsel asserts that the unexplained failure of the Government to call Messrs. Cooper and Dodd as witnesses supports an inference that had they testified they would have testified adversely to the Government's defense in this case, citing *Wingate Construction Co.*, ASBCA No. 9913 (Dec. 30, 1965), 65-2 BCA par. 5298, at pp. 24, 923-24, and cases there cited (AOB 53).

Denying that an adverse inference should be drawn against the Government because of its failure to call Messrs. Cooper and Dodd as witnesses, Government counsel distinguishes the *Wingate* case on the ground that there it was the contractor who had the burden of proof and who failed to call witnesses to support his claim, while in this case the Government, in the posture of a defendant, was not required to call any witnesses, let alone any specific witnesses. Government counsel states: "It was for the

Government to judge which evidence of Appellant's it deemed necessary to refute and by which means" (GPB 89). While the Government has not specifically addressed the adverse inferences the appellant asserts should be applied by reason of the Government's failure to have Mr. Levine testify in key areas, the arguments that Government counsel advances are broad enough to encompass the situation involving Mr. Levine and we shall so treat them in ruling upon the questions presented.

In the comparatively early case of *Thermo Nuclear Wire Industries*, ASBCA No. 7806 (July 9, 1962), 1962 BCA par. 3427, the rule for invoking the inferences the appellant seeks to have applied in this case was stated in the following terms at page 17,557:

There is a rule of law that if a witness is not called who could extend help to the trier of the facts, and said witness is under the control of the party who does not call him, and there is no explanation made as to why said witness was not called, an inference can be drawn by the fact finder that if the witness had been called, or the evidence presented, the testimony would have been unfavorable to the party who could have called him.

[1] While there may be circumstances in which the determination of whether to invoke an inference adverse to the interest of one of the parties will turn on the question of where the burden of proof lies, we do not consider it necessary to predicate our ruling on that ground in this case. Here the Government's decision to question Mr. Levine in

only very limited areas and the decision not to call Messrs. Cooper and Dodd as witnesses are considered to be reconcilable with the theories on which the Government's case was tried. Succinctly stated, the Government's principal defense is that no differing site conditions were encountered because the Government testing provision of Paragraph 50, the showing of full circular steel rib as an authorized form of support on a contract drawing and the Government's estimate that approximately 80 percent of the support required for the tunnels would be other than rockbolts, were contract indications which placed the contractor on notice of the conditions later encountered in Tunnel Nos. 3 and 3A. Another principal defense interposed by the Government for which a considerable amount of evidence was offered was that a second category differing site condition had not been encountered.

Under the theories relied upon by the Government in presenting its case, the evidence to be offered through Messrs. Levine, Cooper, and Dodd may have been seen as cumulative of testimony offered by others considered to be better qualified (*e.g.*, the extensive testimony given by Dr. Hilf as to what the contract indicated) or in a better position to give credible testimony concerning the second category differing site condition claim (*e.g.*, not only did Mr. Tackett testify at length with respect to the conditions encountered in tunnels exca-

vated prior to Tunnel Nos. 3 and 3A but it was with respect to these prior tunnels that the Government made a concerted effort to show that the contractor should have known of the conditions encountered in them by reason of the final construction reports allegedly available to prospective bidders prior to September of 1970).

Also for consideration is the fact that the appellant could have adduced testimony from all three of the Government witnesses if it had chosen to do so. It is a long-established rule in board practices that either party may call a person under the control of the other party without making the person so called its witness for the purposes of impeachment. This is a common practice among the several boards and has been recognized by the Court of Claims. *See*, for example, *Charles T. Parker Construction Co. v. United States*, 193 Ct. Cl. 320, 332 (1970).

Since the failure of the Government to elicit testimony from Mr. Levine in significant areas and its failure to call Messrs. Cooper and Dodd as witnesses can be explained by the theories on which the Government's case was tried and since, in any event, the appellant could have called all three of such Government employees without making them its witnesses for the purposes of impeachment, the Board finds that the Government's failure to examine one of its witnesses in certain areas and its failure to

call as witnesses other Government employees attending the hearing will not support an inference that had the one witness been examined in areas as to which he did not testify or had the other Government employees named been called as witnesses, the testimony they would have given would have been adverse to the Government.

Resolution of Substantive Question

We now turn to consideration of the question of what the contract advertised for bids indicated in the context of the "Differing Site Conditions" clause. Resolution of this question will entail consideration of the 14th paragraph of Paragraph 50 of the Specifications, Drawing No. 11 (809-D-330) and the Government's estimate that 80 percent of the support required for the tunnels would be other than rockbolts.

The importance the Government attaches to the cited specification provision is evident from its post-hearing brief in which the Government testing provision is quoted and discussed at pages 36 and 37 as well as being discussed or referred to at pages 39-43 and pages 46 and 58. Since the appellant also places great reliance upon the same provision to support its case, the full text of the paragraph in question is quoted below:

Government testing indicates that many of the sandstones, shales and siltstones to be excavated will deteriorate or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three. The contractor shall be responsible for providing a clean, undisturbed surface for placement of the lining. He may accomplish this by applying protective coatings under Para-

graph 54, installing subinvert tunnel protection in accordance with Paragraph 60, by dewatering in accordance with Paragraph 51, or by removing any deteriorated or disintegrated material back to clean, undisturbed surfaces in accordance with Paragraph 59. If protective coatings or subinvert concrete is not installed, removal of substantial amounts of deteriorated or disintegrated materials is expected.

(AF 1, Specifications, par. 50).

The Government argues that Paragraph 50 should not be construed to mean that the effects of air, water or stress relief or a combination of the three are limited to the surface of the excavation; that it would be absurd to limit the phrase "deteriorate or disintegrate" to a surficial condition; and that in reading the contract as a whole it would be absurd to think that the Government was preoccupied with only surficial problems when one considers the fact that the Government forwarned the contractor that 80 percent of the tunnel was estimated to require support systems other than rockbolts (GPB 42-43). Pointing to the undisputed fact that one of the methods of support provided for in the contract (Drawing No. 809-D-330) was the use of full circle steel rings, the Government notes Dr. Hilf's testimony that the full steel rings would have supported the tunnel in even worse conditions than were encountered and Mr. Mathews' as knowledge upon cross-examination that full steel rings with lagging would have supported the tunnel (GPB 51, 52). The Board also takes note of the fact that Paragraph 50 says that the

tunnels here involved are to be constructed to the requirements of the machine bored sections as shown on Drawing No. 11 (809-D-330).

Asserting that the language quoted above from Paragraph 50 clearly indicates that only surficial deterioration or disintegration was contemplated, the contractor points out that the remedial measures specified therein involve only surficial treatments, as was acknowledged by the Government's expert witness Dr. Hilf upon cross-examination. With respect to the use of full circle steel rib support, the Board notes that the text of all four paragraphs pertaining to support only provide for support of the roof and sides of the tunnels. As to the type of support authorized by the specifications, the Board also notes that where conditions in the tunnels were suitable for the use of rockbolts, the contracting officer was to approve their use.

From the arguments advanced by the parties in support of their respective positions and the wide disparity in the bids received in response to the invitation for bids under which the instant contract was awarded, it appears to the Board that there is considerable merit in the position of both parties viewed as of the time of the opening of bids. While we cannot be certain about the matter, it appears likely that generally speaking the higher bidders interpreted the contract specifications and drawings along the lines now urged upon us by the Government, while the contractor

and the next three lowest bidders interpreted the same documents in the manner now contended for by the appellant.

The fact that full circle steel rib was approved for use as a means of support for the tunnel is not any indication, of course, of the extent to which its use might be required. We note, for example, that bidders having a mole equipped with a variable size cutterhead may have contemplated that very little, if any, of the tunnel would require the use of full circle steel ribs for support and, consequently, submitted only token bids for such support, contemplating the use of rockbolts throughout virtually the entire length of the tunnels. Other bidders may have considered that full circle steel ribs for support would be required only if anchorage for half circle steel ribs could not be obtained.

In any event, it appears that the aggregate effect of Paragraph 50 only specifying remedial measures suitable for surficial treatment, the language in the text of the specification paragraphs dealing with support not referring anywhere to full circle steel ribs, and the same paragraphs only providing in the text for support for the roof and sides of the tunnels may have caused the four lowest bidders to conclude that the use of full circle steel ribs was not contemplated to any significant degree. With respect to the Government's estimate that 80 percent of the support required would be other than rockbolts, we deem it sufficient

to note that this was clearly not a contract requirement, as was acknowledged to be the case by Government witness Rogert in his testimony.

As to these several matters, a number of questions have been generated by the specification provisions and by the Government's role in administering the contract in this case for which no answers considered satisfactory to the Board are to be found in the record before us. If, as the Government's expert witness Dr. Hilf testified, the reason for including the Government testing provision in Paragraph 50 was to alert bidders to difficulties experienced by contractors on earlier tunnels for the Bureau of Reclamation and if, as appellant's witness Mathews testified, major fallout had occurred in Azotea Tunnel attributed by him to "geodynamic pressure" prior to the opening of bids on the instant contract, why did the paragraph designed to alert bidders to what difficulties might be expected specify remedial measures for deterioration and disintegration suitable only for surficial treatment?

If what Mr. Mathews termed "geodynamic pressure" is exerted all the way around a periphery of a tunnel and if, except for the use of a different terminology, Dr. Hilf agrees with this appraisal, then why in the text of the four paragraphs of the specifications dealing with support, did the Bureau restrict support to the roof and sides of the tunnels?

In a number of important respects the arguments advanced by the Government concerning the effect to be given (i) to the Government testing provision of Paragraph 50; (ii) to its estimate that 80 percent of the tunnels would require support other than rockbolts; and (iii) to the including of full circle steel ribs as an authorized means of support, all fail to take into account the extent of the Government's involvement in matters which it now characterizes as "absurd." Based upon the evidence of record, it appears to be clear that at the time the bids were opened the Government knew that the contractor as low bidder, and the next three lowest bidders as well, all contemplated supporting the tunnels by relying virtually entirely upon rockbolts. Yet with such knowledge in its possession at the time bids were being evaluated (October 1970), it recommended that award be made to the contractor as low bidder, supporting its recommendation by noting that although the bid submitted was one third lower than the engineer's estimate, the company was experienced and well qualified.

In February of 1971 the Bureau advised the contractor by letter that the proposed excavated diameter of 20 feet 6 inches appeared to be adequate for meeting minimum dimensions for "A" line thickness for rockbolt supported sections but that use of steel rib supports would require excavating to a larger diameter if normal tolerance was to be

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provided, noting in the same letter that whether conditions in Tunnel Nos. 3 and 3A were suitable for an extensive use of rockbolt support must be determined during and following the excavating process. In mid-May of 1971, knowing that the contractor would be excavating with a boring machine having a 20-foot 6-inch diameter bore and a fixed cutterhead, the Bureau raised no objection to the contractor proceeding with excavation of Tunnel No. 3. When the job was shut down for 5 weeks in mid-summer of 1971, the Bureau issued no instructions to the contractor to discontinue the rockbolting program in order to cope with the differing site condition which the contractor contended had been encountered. Although during the important conference between the parties in early December of 1971, it appears that serious consideration was given to requiring the contractor to resort to the use of full circle steel ribs support wherever difficulty was experienced in developing adequate anchorage, the Bureau's decision was to allow the contractor to continue with its rockbolting program subject to later review. The review followed and by the first week in March of 1972, the project construction engineer was in a position to report to the Chief, Design and Construction that some 5,334 feet of Tunnel No. 3 (over one third of the length of the tunnel) had been satisfactorily supported by rockbolts.

By the above comments we are not implying that the Bureau was

derelict in making the award to the contractor or in authorizing it to continue with its rockbolting program. As to the making of the award to the contractor as low bidder, it would no doubt have been extremely difficult not to do so where the next three lowest bidders submitted bids predicated almost entirely upon the use of rockbolts as support for the tunnels.

With respect to the contractor being allowed to continue with the rockbolting program even after the notice of differing site conditions was received, it appears that the Government was confronted with the choice of either permitting the contractor to proceed with the support system upon which its bid had been based or else directing the contractor to take whatever action was required to modify the boring machine to make the use of full circle steel rib support feasible without knowing whether the contractor would be in a position to install the full circle steel rib any closer to the heading than the contractor was installing the rockbolts. In this connection we note that while Dr. Hilf testified that the use of full circle steel rib would have supported the tunnels in even worse conditions than had actually been encountered and that full circle steel rib had been included as a means of supporting the tunnels in order to cover any contingency, he never addressed the question of whether the full steel rings, if installed, would have been more effective than the

rockbolting program eventually developed by the contractor; nor is there any indication in his testimony that Dr. Hilf gave any consideration to how costly it would have been for the contractor to use full circle steel rib support for all the major rock failures encountered to which appellant's witnesses had testified. Certainly there is nothing in this record to warrant concluding that the mere depicting of full circle steel rib support on a contract drawing gave the Bureau carte blanche authority to require its use wherever and whenever the Bureau considered the use of such a support system to be preferable.

Our purpose in summarizing the principal events surrounding the contractor's decision to support Tunnel Nos. 3 and 3A entirely with rockbolts utilizing a boring machine with a 20-foot 6-inch bore and a fixed cutterhead has been to highlight the pervasive nature of the Bureau's involvement in those decisions about which it was kept fully informed and as to which it had contractual authority to withhold its approval if conditions in the tunnels were not found suitable for the use of rockbolts.

[2] The Government asserts that the Government testing provision of Paragraph 50, the Government's estimate that 80 percent of the support required for the tunnel would be other than rockbolts, and that the including of full circle steel rib as an authorized support on the contract drawings, all negate any contract indications that the deterioration and disintegration in

the tunnels would be only surficial in nature. To support its position to the contrary, the appellant relies upon the fact that the remedial measures outlined in the Government testing provision of Paragraph 50 only provide surficial treatments for the deterioration and disintegration referred to therein and to the fact that the text of the four specifications dealing with support only provide for support for the roof and sides of the tunnels.

Although with respect to the question presented the contract appears to be susceptible to more than one reasonable interpretation, the Board finds the contract to have indicated that the deterioration and disintegration of rock encountered in driving the tunnels would be primarily of a surficial nature, capable of being remedied by the application of surficial measures, and that the use of full circular steel ribs for support would not be required to any significant degree. In reaching this conclusion, the Board has given great weight to the fact that this appears to have been the interpretation placed upon the contract in the disputed area by the four lowest bidders, as evidenced by the fact that all of them made only token bids for the tunnel support systems, indicating that they planned to use rockbolts. In support of this holding, we call attention to the decision in *WPC Enterprises, Inc. v. United States*, 163 Ct. Cl. 1, 6, 7 (1963), from which the following is quoted:

[T]he Government, as the author, has to shoulder the major task of seeing that

within the zone of reasonableness the words of the agreement communicate the proper notions—as well as the main risk of a failure to carry that responsibility. If the defendant chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and especially of the specifications.

[3] A question has also been raised by the parties as to whether a first category differing site condition must be established by showing misrepresentation or at least a positive representation or whether it can be shown by inference. Clause 4 of the General Provisions describes a first category differing site condition as involving “subsurface or latent physical conditions at the site differing materially from those indicated in this contract.” Addressing this question in the case of *Foster Construction Co. A. v. United States*, 193 Ct. Cl. 587, 593 (1970), the Court stated:

[F]or this part of the Changed Conditions Clause to apply, it is not necessary that the “indications” in the contract be explicit or specific; all that is required is that there be enough of an indication on the face of the contract documents for a bidder reasonably not to expect “subsurface or latent physical conditions at the site differing materially from those indicated in this contract.”

See also our decision in *PHL Contractors*, IBCA-874-11-70 (Oct. 23, 1973), 80 I.D. 667, 688, 73-2 BCA par. 10,293, at 48,600-01. In this regard we note that all of the cases cited by the Government in its posthearing brief—including *Parker Construction Co. v. United States*, 193 Ct. Cl. 320 (a sec-

ond category changed conditions case)—were decided prior to the issuance of the *Foster* decision. The decision in *Foster* is considered to be dispositive of the question presented and together with our decision in *PHL* was relied upon by the Board for the finding made above with respect to what the contract indicated.

2. Conditions Encountered

a. Conditions encountered in Tunnel No. 3.

In order to prevail upon its differing site conditions claim the appellant must show that in driving the tunnels with which we are here concerned, it encountered what it has described as shear failures through virgin rock with resulting problems and that the conditions so encountered were materially different than those indicated in the contract. Underscoring one aspect of the shear failure encountered, appellant’s counsel states: “These curved failure surfaces through intact, virgin rock would be a distinctive feature of shear failures due to overstress—i.e., due to a stress state (stress difference) which is high with respect to the rock strength” AOB 22).

Under “Discussion,” *supra*, and earlier in this opinion, we have examined a number of shear failures and fallouts encountered in driving Tunnel No. 3 with citations to the stations involved being given in most instances. According to appellant’s proof shear type failures occurred in the arch, in the walls and

in the invert of Tunnel No. 3. Sometimes they occurred immediately upon excavation. At other times they involved progressive failures which took place days, weeks and even months after excavation had occurred. Also included as part of the differing site conditions claim for which some proof was offered is the additional work involved in connection with the placement of concrete in the arch and in the invert as a result of the inward movement of the tunnel attributed to shear failure due to overstress.

The evidence offered by the appellant shows shear failures due to overstress in diverse situations including (a) *in the arch*: Fallout in the siltstone and shale extending several feet above the crown to more competent sandstone, fractures in the arch at the heading, major failure and fallout in crown and heading, shearing offsets in lower quarter arch, pans having buckled after installation, and tight. (b) *In the sidewalls*: Extensive failure in the ribs ahead of the grippers, and fractures above and below the fan line angling back into wall isolating a wedge behind the fan line. (c) *In the invert*: Movement into tunnel some time after excavation requiring the removal from the invert of additional material in order to provide the specified thickness for the concrete lining, and large crack in invert. (d) *In the arch and sidewalls*: Fallout from the arch and sidewalls in shale overlain by water bearing sandstone, and failure in the sidewalls of tunnel showing bent pans and some cracking of the rock

along the crown. (e) *In the sidewalls and invert*: Failure in massive dry material, and closely spaced fractures in the lower walls and invert which has moved inward.

Although failures in the arch typically developed immediately behind the cutting head of the mole, ahead of the rockbolt installation, there were notable exceptions. For example, the largest fallout in Tunnel No. 3 of 80 to 100 cubic yards occurred during the period of July 23-26, 1971, some 9 days after the shutdown on July 14, 1971. Dr. Heuer attributed the magnitude of the fallout in the vicinity of DH 116 to overstressing (shear failure due to overstress) of the rock causing fractures or cracks to form in the material which allowed the water to get back into the mass of shale or siltstone. Concerning the effect of such action Dr. Heuer states: "The whole mass of rock shale or siltstone material was deteriorating and disintegrating and the fall was not a surficial process" (Tr. 505-06; cf. n. 73, *supra*). Government counsel did not cross-examine Dr. Heuer in this area and the testimony he gave with respect to the cause of the large fallout occurring in the vicinity of DH 116 is uncontradicted.

From the reports in evidence it is clear that Dr. Heuer considered that the areas of continuous and most disruptive fracture and fallout in the arch during excavation, and the most extensive progressive failure after excavation, correlate closely with the area of maximum depth of cover over the tunnel and pre-

sumed maximum rock stresses (AF 77, p. 52). Appellant's witness Mathews considered that "geodynamics pressure" (as used by Mr. Mathews the term is equivalent to Dr. Heuer's term "overstressing"), is not present at shallow depth and that for any given type of rock it would be necessary to be down to some depth before the "geodynamic pressure" would develop (n. 273, *supra*).

According to Dr. Heuer one distinctive thing about a shear failure is the curved failure surface, while another is the very fresh appearance of the fracture (a fresh fracture through virgin intact rock). Illustrative of this fresh fracture through virgin intact rock are AX 22 and photograph 2 of AX 5. Mr. Mathews agreed that it is the shape of the fractures that indicates the reason for the failures, adding that these fractures running up on a curved surface had nothing to do with bedding planes and that they involve fractures in intact rock (n. 265, *supra*).

In Dr. Heuer's opinion the failure of rock due to overstressing in the shear mode which he had described had not been indicated in the contract and these shear type failures could not have been resolved or solved or prevented by the surficial measures enumerated in the Government testing provision of Paragraph 50 or by any other measures authorized by the contract including full circular steel ribs.

All of the appellant's percipient witnesses expect Mr. Mathews sup-

ported some of their testimony with sketches and photographs. In the case of Dr. Heuer there were a number of sketches and a great number of photographs. A total of 85 photographs pertaining to Tunnel No. 3 were either offered by the appellant at the hearing or had been included as part of reports made earlier by the appellant which are in evidence. For almost three quarters of the photographs exact or approximate stationing was given. Some 74 of the photographs were used by Dr. Heuer to support the testimony he gave respecting the shear fractures encountered in Tunnel No. 3.

While Messrs. Sperry, Green, and Mathews gave important testimony in limited areas on the question of liability, the appellant has relied very heavily upon the testimony of Dr. Heuer to establish its case. At the hearing Dr. Heuer emphasized characteristics associated with the failure of rock due to overstressing in the shear mode (hereafter simply overstressing or shear type failures) including (i) the typically immediate failure in the arch following excavation; (ii) the two hall marks of shear failure—the curved failure surface and the fresh fracture in intact rock; and (iii) the significance of the amount of cover over the tunnel. These same features had been stressed in the reports authored or co-authored by Dr. Heuer (AX 4; AX 5; AF 36; and AF 77A).

All of these characteristics are singled out for mention in Dr. Heuer's handwritten report of July 17, 1971 (AX 20), concerning his ini-

tial visit to the tunnel on the preceding day from which the following fragmentary remarks are quoted: (i) "crown fallouts generally occur immediately behind dust shield, about 4' back of face"; (ii) "most striking was the fact that fractures generally cut through 'intact' rock, generally with 'curved' or 'dished' failure surfaces"; (iii) "breach occurred through fresh rock, not along joints"; and (iv) "[d]epth of cover over No. 3 is typically 400 ft. or less, but one length of $\pm 4,000'$ reaches 1,170 ft. of cover." In the same report Dr. Heuer notes the instances of progressive failure that he had observed in Tunnel No. 3, stating: "Shear movement and buckling of pans in many places has occurred after bolts and pans were placed. * * * [S]hear displacement low on sidewalls with crumpling and shearing in crown—16" wide sheet metal pans (on rock bolts) in arch show buckling due to compressive movements, some have occurred recently, far behind heading." Shear failures occurred not only in shale but also in sandstone, as is clear from the report: "[S]hear fractures were visible in sandstone, showing off set approaching 1" (nn.237-239, *supra*, and accompanying text).

A comparison of what Dr. Heuer said in his various reports (*e.g.*, May 1973, AF 77A) and what he said from the witness stand 3 years later with what he observed on his initial visit to Tunnel No. 3 in mid-July of 1971, reveals that throughout the entire period he has given

the same analysis as to the principal cause of the rock failures encountered in Tunnel No. 3 and has cited the same type of objective evidence to support his findings as to the cause of the failures. Over the years the analysis has been refined and extended as one might expect. For example, the relationship between cover and rock failures was expressly stated in the report forwarded to the project construction engineer on Dec. 27, 1971, from which the following is quoted: "[S]upport problems may be expected when the depth of cover (expressed in feet) approaches one-half the unconfined strength of the ground (expressed in psi)" (AF 36, III-6).

In other areas of admittedly much less importance, Dr. Heuer has not always shown the same consistency. Since we are here concerned with the extent to which we will accept the evidence offered by Dr. Heuer in various areas, we shall briefly examine the positions he has taken on other matters as a witness, at conferences or in correspondence with a view to determining their consistency and also their merit in the light of other evidence of record.

At the hearing Dr. Heuer undertook to say what the term "stress relief" meant to him (n.250, *supra*, and accompanying text). Dr. Heuer was not asked about and consequently gave no testimony with respect to his letter to the contractor dated Nov. 2, 1971, concerning Tunnel No. 3 in which he stated:

"The slabbing represents a desirable stress relief and will not result in overall instability of the tunnel if proper support is installed to prevent unchecked progressive deterioration of the tunnel excavation (n.43, *supra*). A little over a month later he attended a conference on Dec. 6, 1971, at which the contractor personnel are recorded as taking the position that "the sidewall fallouts were almost entirely due to stress relief" (text accompanying n.30, *supra*). As late as Jan. 31, 1973, the contractor was still saying that the contract documents did not indicate that "rock displacements of the magnitude encountered as a result of stress relief could be anticipated" (n.64, *supra*).

It is possible, of course, that Dr. Heuer and Mr. Mathews simply adopted and used the term "stress relief" because that was the term the Government was using to refer to rock failures and that the question of whether that usage was proper in a technical sense did not become a matter of real concern until the question of the interpretation to be placed upon the Government testing provision of Paragraph 50 became an issue of paramount importance. In any event, it is not necessary to resolve the question of whether the term "stress relief" or "geodynamic pressure" or "overstressing" or "stress intensification" is the proper term to apply to the rock failures which occurred, since, as the Government's expert witness Dr. Hilf observed with respect to such terms, "all are referring to the phenom-

enon of failure where the strength of the rock is less than the stress on the rock" (n.296, *supra*).

With respect to the question of whether the rock encountered in the tunnels was homogeneous and isotropic, there appears to be somewhat similar inconsistencies. Neither of these terms is used by Dr. Heuer in the report submitted on his initial visit to Tunnel No. 3. The language of the report appears to rule out any possibility that the rock could be characterized as either isotropic or homogeneous (n.237, *supra*). These terms are not used in Dr. Heuer's report of September 1971 (n.15, *supra*), but in his report of December 1971, the term "homogeneous" is used to describe ground said to approximate that in which Tunnel Nos. 3 and 3A are to be driven (n.36, *supra*). The description of the ground given in a paper co-authored by Dr. Heuer and Mr. Sperry (AX 4) which was prepared early in 1972, appears to completely negate the view that the ground through which Tunnel No. 3 had been driven up to that time could be characterized as either homogeneous or isotropic (n.142, *supra*).

At the hearing Dr. Heuer testified that because of the relatively flat dip of the structure of the beds, any time you had a section that was relatively homogeneous and isotropic that would continue for a long distance in the tunnel with no interbedding of any other material and that an example of homogeneous and isotropic materials in the tunnel would be sections consisting of pure

sandstone (text preceding n.260, *supra*). Appellant's witness Mathews stated flatly that the falling rock he had testified about did not involve homogeneous and isotropic materials (text following n.270, *supra*).

The Government's expert witness Dr. Hilf questioned whether the rock involved in Tunnel No. 3 could be isotropic with regard to strength because of the very nature of the deposition (n.279, *supra*, and accompanying text). Although Dr. Hilf also acknowledged that an intact sandstone and an intact shale could be possibly near homogeneous, there is no testimony by Dr. Heuer where he explicitly states that he considers the shale encountered in Tunnel No. 3 to have been homogeneous and there is no evidence in the record indicating that any significant amount of the portions of the tunnels designated as the claim reaches were composed of pure sandstone.

On this record the Board concludes that there is insufficient evidence in the record to support a finding that any significant portion of the claim reaches of the tunnels were composed of material which could be properly characterized as either isotropic or homogeneous in nature.

In the Sperry/Heuer report (AX 4) the authors state that most of the mole down time could have been expected from a prototype piece of equipment operating in such unexpectedly adverse conditions. In an earlier draft of the report, however,

the authors had stated "[m]ost of the mole downtime could be expected of a prototype piece of equipment" (n.100, *supra*). As it appears that the earlier draft of the Sperry/Heuer report (GX YYY, III-2) was prepared prior to the time Dr. Heuer was thinking of a claim presentation (n.248, *supra*), the Board accepts the earlier version of the report as a more accurate appraisal of the principal cause of mole down time.

While not involving any inconsistency in the positions taken by Dr. Heuer during the course of or following contract performance, we shall also undertake to examine (i) the question of the weight to be accorded to the large drawings which accompanied the May 1973 report (AF 77A), and as to which Dr. Heuer testified; (ii) the extent to which the water encountered in Tunnel No. 3 can properly be said to have been greater than should have been anticipated; and (iii) the extent to which, if any, failures of the rock in the tunnels can be considered to have been failures to bedding planes.

Testimony given with respect to the large drawings pertaining to the tunnels which accompanied the May 1973 report (AF 77A), consisted of that given by Mr. Sperry involving rock failures during excavation of Tunnel No. 3 (below the profile) and that given by Dr. Heuer concerning progressive failures after excavation in Tunnel Nos. 3 and 3A (above the profile). The line of demarcation between the testimony given by Mr. Sperry and that given

by Dr. Heuer was related to the fact that Mr. Sperry had left the job before the events reflected in what is shown on the drawings above the profile had occurred.

It was Mr. Sperry's testimony that what was shown below the profile on the drawings pertaining to Tunnel No. 3 (Drawing Nos. R2093 and R2094) was a kind of summary of the excavation progress and the conditions encountered during excavation. The value to be attached to this portion of the drawings is questionable on two principal grounds. First, if what is shown is, in fact, a summary, a question arises as to the failure to introduce into evidence or at least make a proffer of the records on which the summary is based. Secondly, and more importantly, the approach followed on the drawings of simply dividing rock failures into four categories (major distress, continuous fallout, intermittent or moderate fallout, and little to no fallout) is of little assistance to fact-finding where it is undisputed that rock failures encountered in the tunnels included not only those attributed to the claimed differing site conditions but to those of a surficial nature as well which the contractor should have anticipated and provided for in its bid.

Somewhat similar considerations apply to the rock failures and fallout shown above the profile for Tunnel Nos. 3 and 3A as to which Dr. Heuer testified. While Dr. Heuer testified that the bar chart shown on the drawings (Drawing Nos. R2093, R2094, and R2095) was

based on notes taken by him during a visit to the tunnels on Feb. 2 or 3, 1973, the notes on which the bar chart were based were neither offered nor proffered in evidence. We note, moreover, that although the data shown on the drawings with respect to high invert requiring removal of tightts was said to have been furnished to Dr. Heuer by the contractor (n.249, *supra*), the data on which this portion of the drawings was based is not in evidence.

In the course of the hearing appellant's counsel noted that the absence of work papers to support a document offered in evidence goes to its weight rather than to its admissibility (n.365, *supra*). We are of the same view. In assessing the weight to be given to these drawings, the Board has taken into account the fact that while the testimony given with respect to them by Mr. Sperry was of a minimal nature and only somewhat more extensive by Dr. Heuer, there are many things shown in the drawing (particularly the details shown above the profile) which are corroborated by other testimony and a number of exhibits (especially the photographs) in evidence. In these circumstances we consider the drawings to be of some probative value and they will be taken into account in reaching our decision.

Dr. Heuer testified that the water problems encountered at Navajo were more severe than he had seen elsewhere in tunnels. Appellant's witness Mathews testified, however, that the water conditions he had

observed in Tunnel No. 3 were similar to those he had seen earlier in Azotea tunnel and that he had observed very little water in Azotea tunnel (n.272, *supra*, and accompanying text). Appellant's witness Sperry testified that he had anticipated that some water and moisture would be encountered in the tunnels and that the bid estimate had included some delay time for the fallout anticipated from water (text accompanying n.167, *supra*). On this evidence the Board finds that the water problems encountered in the tunnels were not usually severe and that they had been anticipated and provided for in the bid estimate.

Testifying with respect to the causes of the rock failures he had described, Dr. Heuer stated that the failures were not due to fallout along joints and bedding planes, although he acknowledged that there were places in the tunnels where fractures forming in intact rock would propagate back into virgin rock around the tunnel until they intersected a nearly horizontal bedding plane terminating there. Photographs 1 and 2 of AX 5 and Figure 2.14, pages 2-28 of AX 38 were said to illustrate this type of situation (text accompanying nn.251 & 252, *supra*). Appellant's witness Green testified, however, that some of the arch failures that he had seen in the tunnels involved failures in bedding planes (text preceding n.196, *supra*).

We do not consider that the apparent difference between the testimony of Dr. Heuer and that of Mr. Green in this area is difficult to re-

concile. The latter had been in Tunnel Nos. 3 and 3A some five or six times as often as Dr. Heuer (nn.196 & 243, *supra*) and thus had had many more opportunities to observe various types of rock failures. We note, moreover, that bedding planes in a machine bored tunnel are indistinct and often difficult to discern (n.181, *supra*).

We also note here Mr. Green's testimony with respect to the reminding of the arch essentially throughout the reach where Order for Changes No. 1 applies. In addition, we note his testimony in which he was unable to recall how much additional concrete had been placed in Tunnel No. 3 (nn.202 & 203, *supra*, and accompanying text).

An important exhibit offered by the appellant on rebuttal was the geology drawings (mappings) of the tunnels made by the project geologist (AX 87). While the parties are apart on the question of what these drawings show with respect to the amount of rock failure attributable to overstraining or stress relief, the Government has conceded that 900 feet of Tunnel No. 3 involved fresh fractures and the drawings themselves show that immediate fallout and fresh fractures occurred in another 450-foot stretch of Tunnel No. 3 not involved in the Government's concession (nn.155-59, *supra*, and accompanying text).

*Defenses Offered by Government
Respecting Conditions Encountered in Tunnel No. 3*

In the decision from which the instant appeal was taken, the con-

tracting officer says that the Government had been unable to verify Mr. Sperry's report of failures through intact rock or the report of other contractor personnel concerning rock failures. Appellant's counsel offers the following comment: "[T]he Findings of Fact is dated December 31, 1974 which is a year and one-half after Mr. Cooper completed his drawings (Exhibit 87) which showed extensive fracturing of the type reported by Appellant" (n.157, *supra*).

The inability of the contracting officer to verify reports by Mr. Sperry and other contractor personnel of rock failures as described by them cannot be reconciled with the record before us. The record shows that at the time boring of Tunnel No. 3 commenced (May 13, 1971), the project geologist reported fall-out in the arch; that within 3 weeks of that date, he was reporting fall-out of from .5 feet to 2.0 feet deep and from 1 foot to 4 feet wide occurring in the arch immediately after passage of the cutterhead of the mole (AX 87(6)); that prior to mid-November of 1971 a Bureau of Mines geologist was saying that roof support in Tunnel No. 3 would have to be effective within minutes after the tunnel roof was exposed (n.24, *supra*); and that in the geology progress report forwarded to the Director, Design and Construction under date of Jan. 26, 1972 (AX 69), the project construction engineer refers to fallout in Tunnel No. 3 occurring immediately after excavation removed the underlying

rock support (n.311, *supra*, and accompanying text). One of these reports (AX 69) was made directly to the contracting officer. All of them were presumably forwarded to him in the normal course of keeping him advised as to the progress on the project.

The Government made comparatively little effort to controvert the appellant's evidence with respect to the conditions encountered in Tunnel No. 3. The extensive testimony given by Dr. Heuer pertaining to the numerous photographs taken of that tunnel was not refuted by any Government witness; nor was Dr. Heuer cross-examined with respect to any of the photographs to which he testified. The Government only offered four photographs in evidence pertaining to Tunnel No. 3 (GX YY; GX FFF; GX GGG; and GX HHH).

The Government's expert witness Dr. Hilf said he had no reason to doubt Dr. Heuer's testimony that shear fractures had occurred since he was not there (*i.e.*, not in Tunnel Nos. 3 or 3A during construction). While the Government purports to place some reliance upon the testimony offered by Mr. Tackett and Mr. Logan, such reliance is considered to be misplaced. As appellant's counsel has noted, Mr. Tackett, gave no testimony as to the conditions encountered in Tunnel Nos. 3 and 3A since he was never in either tunnel during construction. Mr. Logan was in Tunnel No. 3 during construction, but the testimony he gave was of marginal

value to the Government. While Mr. Logan unequivocally stated that the conditions encountered in Tunnel No. 3 were not materially different than had been indicated in the contract, it appears that this appraisal may have been based upon the interpretation the Government had placed upon the Government testing provision of Paragraph 50, an interpretation which the Board has rejected. Even if this were not the case, we would give little weight to Mr. Logan's testimony for the reasons previously discussed (*i.e.*, his indifference to what evidence had been compiled by the project geologic personnel to support a nonfactual "finding" he had made that the conditions encountered did not differ from those indicated in the contract; and his demonstrably faulty recollection as to what conditions had existed in Tunnel No. 3 on the occasion of his second visit to the tunnel on Mar. 23 and 24, 1972).

As has been previously noted, the Government's defense against the differing site conditions claim has been largely devoted to showing (i) that the specifications and drawings indicated that the appellant would encounter the conditions claimed to represent the differing site conditions and (ii) that a category two differing site condition had not been encountered. In addition, the Government made a serious effort to show that many of the contractor's difficulties stemmed from choices that it had made (*e.g.*, use of a prototype mole with a 20-foot 6-inch diameter bore and a fixed cutter-

head), or involved matters within its control (*e.g.*, failure to keep the mole on line and grade; gripper caused failures). Except for the category two differing site conditions claim, we have treated these matters previously, noting that some of them will be considered in detail when we reach the portion of this opinion concerned with quantum.

Findings

Based upon the above discussion and upon the record made in these proceedings, the Board makes the following summary findings with respect to the nature of the rock failures and fallout encountered by the contractor in Tunnel No. 3 in the course of excavation and in connection with the placement of concrete in the arch and in the invert of the tunnel:

1. Failures of rock due to overstressing (shear type failures around the periphery of the tunnel due to overstress) occurred in the arch, in the walls and in the invert of various portions of the tunnel, with such failures sometimes occurring virtually immediately upon excavation (typically in the arch) but at other times involving progressive failures which took place days, weeks, and even months after excavation occurred.

2. Inward movement of the perimeter of the tunnel attributable to overstressing resulted in the lowering of the arch in the area of the tunnel where invert concrete had been removed and replaced pursuant to Order for Changes No. 1 (n.

67, *supra*), and in a significant amount of the invert moving into the excavated portion of the tunnel, necessitating subsequent re-mining of the arch and of the invert to provide the required thickness of the final concrete lining.

3. Rock failures and fallouts due to overstressing occurred in intact rock in shale overlain by water bearing sandstone and also in massive dry materials.

4. The magnitude of the fallout in the vicinity of DH 116 was due to the rock being overstressed (shear type failures) causing fractures and cracks to form in the material adjacent to the tunnel perimeter upon excavation which allowed the water to penetrate deeply into the mass of shale and siltstone with the resultant deterioration, disintegration and massive fallout.

5. One of the distinctive features about a shear fracture is the curved failure surfaces, while another is the very fresh appearance of the fractures (a fresh fracture through virgin intact rock).

6. Support problems caused by overstressing of the rock in the tunnel could be expected where the depth of the cover (expressed in feet) approaches one-half of the unconfined strength of the ground (expressed in psi).

7. Rock failures about the periphery of the tunnel due to overstressing were not of a surficial nature but rather involved deep seated failures as evidenced by cracking, slabbing, loosening, and fallout of

the rock in patterns recognizable as shear type failures.

8. The rock failures and fallout attributable to overstressing (shear type failures) could not have been prevented from occurring by utilizing the remedial measures specified in Paragraph 50 of the Specifications (*e.g.*, applying a surficial protective coating such as nonstructural shotcrete) or by resorting to the support measures authorized elsewhere in the contract including the use of full circular steel ribs.

9. Resort to full circular steel ribs as support for those portions of Tunnel No. 3 in which rock failures and fallout due to overstressing had occurred would have been economically prohibitive for those bidders (one of whom was the contractor) who had submitted bids predicated upon the use of rockbolts and, if used, would have resulted in a poorer quality of rock mass about the tunnel than was achieved by the pretensioned rockbolt system used by the contractor.

10. Some of the rock failures and fallouts that occurred in Tunnel No. 3 were caused by conditions which the contractor should have expected to encounter including (a) rock failures due solely to water, (b) fallout to bedding planes, (c) sinking of boring machine in zones of soft and wet shale, and (d) failures due to action of the grippers.

[4] Having found above that in various portions of Tunnel No. 3 the contractor encountered rock failures and fallout due to over-

stressing (shear type failures) which were not of a surficial nature and having previously found the contract to have indicated that the deterioration and disintegration encountered in the tunnels would be primarily of a surficial nature, the Board now finds and determines that in driving Tunnel No. 3 the contractor encountered conditions materially different from those indicated in the contract.

b. Conditions encountered in Tunnel No. 3A

While the costs pertaining to Tunnel Nos. 3 and 3A have been combined in the claim submitted (AX 10; AF 77; AX 84; and corrected AX 84), the proof submitted by the appellant as to the conditions encountered in the two tunnels has been almost entirely restricted to the conditions which obtained in Tunnel No. 3.

Of appellant's witnesses only Dr. Heuer and Mr. Green were in Tunnel No. 3A during construction. Except for the May 1973 report (AF 77A), all of the reports authored or co-authored by Dr. Heuer (AX 4; AX 5; AX 20; and AF 36) were completed prior to the time excavation in Tunnel No. 3A commenced. All 22 of the photographs included in AF 77A relate to conditions in Tunnel No. 3. None of the numerous photograph introduced by the appellant at the hearing were identified as pertaining to Tunnel No. 3A.

The geology drawings for Tunnel No. 3 included in AX 87 provide some corroboration for appellant's claims with respect to the conditions

encountered in that tunnel. The geology drawings for Tunnel No. 3A (AX 87(7) and AX 87 (8)), however, provide no corroboration for appellant's claim of rock failures and fallout due to overstressing having occurred in that tunnel. While the drawings do refer in the remarks column to 11 cases of fallout (10 from the roof and one from the sidewall), the project geologist does not note any instances of fallout from the roof having occurred immediately upon removal of the underlying support for the rock; nor does he note any instances of freshly fractured rock having been observed (n. 160, *supra*).

The references to Tunnel No. 3A in the May 1973 report are of a perfunctory or conclusory nature. (AF 77A, pp. 26, 32, 38, 44-45, 52, 54-55, 58-59). The three large drawings which accompanied the report (Drawings Nos. R2093, R2094, and R2095) have bar charts above the profile which are labeled "Progressive Failure After Excavation." Dr. Heuer testified that the bar charts are based on notes he made when he visited the tunnels on Feb. 2 or 3, 1973. None of the numerous photographs taken on Feb. 6 or 7, 1973, to illustrate conditions obtained in early February of 1973 pertain to Tunnel No. 3A; nor is there any other evidence in the record to support the categories of rock failures shown on the bar chart for Tunnel No. 3A (Drawing No. R2095).

There are other factors limiting the probative value of Drawing No. R2095. Noted by the Board is the absence of any testimony from

either Dr. Heuer or Mr. Sperry as to what is shown below the profile on Drawing No. R2095. As to what is shown above the profile for "Areas of High Invert Requiring Removal of Tights Before Invert Concrete Placement," we note that the appellant has made no claim for additional costs related to placement of concrete in the invert of Tunnel No. 3A apparently in recognition of the fact that all of that tunnel was moled high (n. 183, *supra*).

An estimated rock fall of from 40 to 50 cubic yards occurred in Tunnel No. 3A on June 4, 1973, within the reinforced section of the tunnel near the outlet portal (n.101, *supra*). No testimony was elicited from appellant's witnesses with respect to such fallout, however, even though Mr. Green was still on the project at the time of the fallout and continued on the project until the tunnels were completed. The fact that the fallout occurred within the reinforced section of the outlet portal militates against attributing the fallout to overstressing (shear type failure) around the periphery of the tunnel, since the cover in that area (AF 1, Drawing No. 809-D-323) is less than 100 feet and Table I of GX U shows the lowest strength of rock in Tunnel No. 3A to be 300 psi. See statement in report forwarded by the project manager's letter dated Dec. 27, 1971, in which it is stated that support problems may be expected when the depth of cover (expressed in feet) approaches one-half the unconfined strength of the ground (expressed in psi) (AF 36,

III-6). See also the testimony of Mr. Mathews in which he states that "geodynamic pressure" (overstressing) is not present at shallow depth and that rock which is loosened because of defects in the rock is independent of the depth of cover (n.273, *supra*).

According to the appellant the overstress rock failures caused delay to and increased the cost of performing the three basic tunnel construction operations (excavation, invert concrete, and arch concrete). The delays to and factors increasing the cost of invert concrete are said to be described at Tr. 347-48, with those relating to arch concrete being described at Tr. 353-65 (AOB 54). The appellant is not making a claim related to invert concrete in Tunnel No. 3A but is making a claim related to placement of concrete in the arch of Tunnel No. 3A. The testimony of Mr. Green at Tr. 353-65 is of no assistance to appellant in this regard, however, since all of the specifics of that testimony including the exhibits covered thereby pertain to the difficulties relating to the placement of concrete in arch of Tunnel No. 3 (*e.g.*, see n.201, *supra*, and accompanying text).

[5] Applying the criteria the appellant has advanced for recognizing rock failures and fallout due to overstressing (shear type failures) about the periphery of a tunnel (typically the immediate fallout in the arch; the curved failure surfaces; the new fractures and a minimum depth of cover), the Board is unable to find that in

driving Tunnel No. 3A the appellant encountered rock failures and fallout attributable to such a cause. Having previously found the contract to have indicated that the deterioration and disintegration to be encountered in driving Tunnel Nos. 3 and 3A would be primarily surficial in nature, susceptible to being remedied by the application of surficial measures and there having been no showing that in driving Tunnel No. 3A the appellant encountered rock failures and fallout due to overstepping (shear type failures) around the periphery of the tunnel—necessitating support of a nonsurficial nature—the Board now finds and determines that the appellant has failed to establish a first category differing site conditions claim with respect to that portion of its claim pertaining to Tunnel No. 3A.

[6] As the appellant has also submitted a second category differing site conditions claim with respect to Tunnel No. 3A, we now turn to consideration of that question. According to the appellant the conditions in Tunnel Nos. 3 and 3A were unknown in bored tunneling work for the following reasons: (i) Dr. Heuer had done an extensive literature survey which had failed to disclose any description or documentation of shear failure modes due to overstepping in intact rock in any kind of tunnel; (ii) the four lowest bidders on the job had all bid prices for excavation and support which could not have covered the cost of installing a support system such as

steel ribs, shotcrete, or the Bernold system; (iii) although Dr. Heuer could have predicted theoretically that overstepping and fractures would occur, he could not have predicted, even theoretically, how fast they would occur; and (iv) if Mr. Mathews had been estimating the job for the contractor in 1970, he would not have expected the development of geodynamic pressure (overstress) (ARB 6, 7).

A showing that the appellant encountered rock failures and fallouts due to overstepping (shear type failures) around the periphery of the tunnel is necessary for the proof of its second category differing site conditions claim. Since the appellant has failed to make such a showing with respect to the rock failures and fallout encountered in Tunnel No. 3A, the Board finds and determines that the appellant has failed to establish a second category differing site conditions claim with respect to the portion of its claim pertaining to that tunnel.

Part III—Quantum

A. Discussion

Still to be determined is the amount of the equitable adjustment to which the appellant is entitled under the "Differing Site Conditions" clause (General Provision No. 4) of the contract by reason of our finding that the conditions it encountered in Tunnel No. 3 differed materially from those indicated in the contract. As the Court of Claims has said, the starting point for the calculation of the

amount of an equitable adjustment is a computation of the contractor's cost of performing the extra work resulting from a changed condition. *Boyajian v. United States*, 191 Ct. Cl. 233, 248 (1970). The Court of Claims has also held that the amount of the equitable adjustment to which the contractor is entitled as a result of a changed condition is "the difference between what it cost it to do the work and what it would have cost it if the unforeseen conditions had not been encountered" and that "[t]he amount of an equitable adjustment for a changed condition is thus not based upon the contractor's original estimate." *Roscoe-Ajax Construction Co. v. United States*, 198 Ct. Cl. 133, 142 (1972).

The first question we have to confront is whether the resort by the appellant to what it has described as "reference reaches" and "claim reaches" for proof of the amount of the equitable adjustment to which it is entitled is reasonable in the circumstances present here.

The claim for in situ rock failures in Tunnel Nos. 3 and 3A was presented on the basis of using "claim reaches" and "reference reaches" to calculate the amount of the equitable adjustment sought (AF 77).³⁹⁴

³⁹⁴ The "claim reach"/"reference reach" approach for determining the amount of a claim was first used in connection with the DH 116 claim (nn.50&51, *supra*, and accompanying text). It is noteworthy that a portion of Tunnel No. 3 identified as the reference reach for the DH 116 claim on Apr. 22, 1972 (AF 50), became part of the claim reach for excavation in May of 1973 (AF 77, "In Situ Rock Stress Cost Evaluation," p. 1).

In justification for so proceeding, appellant's counsel states:

The claim reaches are those sections of Tunnels No. 3 and No. 3A in which differing site conditions or the effects thereof were encountered. The reference reaches are those sections in which the conditions encountered did not differ materially from those indicated in the contract or normally inhering in work of this character.

* * * * *

Because of the fact that these Tunnels were miled with the same equipment and crews throughout their entire length (Tr. 305, 308-309), it is possible to determine what it would have cost in the claim reaches if the unforeseen conditions had not been encountered. What it cost to do each foot of work in the reference and claim reaches is known. In the claim reach in Tunnel No. 3, had differing site conditions not been encountered, the cost per foot would have been the same as it actually was in the reference reach.

(AOB 54-55).

Exhibit 84 contains a summary of the costs incurred by Appellant in the reference and claim reaches which are identified by stations and dates on the first three pages of "Navajo 3 and 3A Progress Tabulation" which is in the front of Exhibit 10. From the actual cost of each claim reach is subtracted what it would have cost if the unforeseen conditions had not been encountered, i.e., the per foot reference reach cost multiplied by the number of feet in the claim reach. The difference, plus profit, is the equitable adjustment to which Appellant is entitled.

(AOB 56).

We submit that the actual cost per foot in the reference reaches taken from Appellant's books of account are in evidence and that by simply applying those costs to the footages in the claim reaches, the amount of the equitable adjustment to

which Appellant is entitled is readily determined. (ARB 24-25).

The above summary presupposes that there is evidence in the record showing who selected the reference and the claim reaches used in the computations, the bases for selecting them, and the linear feet of each type of reach involved in the selection for the three basic operations into which driving the tunnels has been divided, *i.e.*, tunnel excavation, place invert concrete and place arch concrete. Addressing this aspect of the claim, appellant's counsel states: "Mr. Green did not determine the reference and claim reaches (Tr. 272); Mr. Sperry did (Tr. 1311, 1337)" (ARB 24).

Upon examination of the cited transcript references, however, we find that while Mr. Sperry testified that he selected the reference reach for excavation (n.194, *supra*, and accompanying text), he did not testify that he had selected the claim reach for excavation. In regard to Tunnel No. 3A, we note that excavation in the claim reach of that tunnel did not begin until Sept. 1, 1972 (AX 10, "Navajo 3 and 3A Progress Tabulation"), and that Mr. Sperry left the project in late August of 1972.

Mr. Sperry also testified with respect to what is shown on a schedule captioned "Navajo Tunnels No. 3 & 3A Production Comparisons" dated Apr. 12, 1973 (AX 91). The schedule was described by Mr. Sperry as a sort of summary of work that he had done while at A. A. Mathews, Inc., in 1973, in con-

junction with report No. 1856 (the May 1973 report (AF 77)). The comparisons made in AX 91 only pertain to excavation, however, and the only reference and claim reaches given therein are for that operation. Here again, Mr. Sperry's testimony only refers to the selection by him of the reference reach for excavation (Tr. 1311-15).

There is nothing in the record to indicate that Mr. Sperry did any work related to the establishment of reference reaches or claim reaches after the submission to the Bureau of report No. 1856 (AF 77) in May of 1973. Some 6 months after the submission of the May 1973 report, contractor personnel were still deliberating upon the basis to be used in establishing reference and claim reaches for all three of the basic operations involved in driving the tunnels (n.135, *supra*). In a memorandum written from one company official to another in the San Mateo office under date of Dec. 26, 1973, subject: "Navajo Irrigation Project Claims," the author states that "[a] reference reach will be chosen for each of the contract bid items of tunnel excavation, arch concrete tunnel lining, and invert concrete tunnel lining" and that "[t]he entire tunnel length, except for a start-up period, will represent the claim reaches" (GX L, pp. 1, 2).

Neither Mr. Sperry nor any other of appellant's witnesses testified to having selected the reference reaches and the claim reaches upon which the amounts claimed for invert concrete and arch concrete in Tunnel Nos. 3 and 3A are based.

While the linear feet involved in the reference and claim reaches for invert concrete and arch concrete are shown in AX 10 ("Navajo 3 and 3A Progress Tabulation"), no witness for the appellant testified that he had determined that specific reaches of the tunnels were reference reaches and other specific reaches were claim reaches for the two operations involved.

A "Navajo 3 & 3A Progress Tabulation," did accompany the May 1973 claim submission (AF 77). Commenting upon what is shown therein with respect to arch concrete, the "In Situ Rock Stress Cost Evaluation" (AF 77) states at page 4: "Lines 12 through 19 of the Progress Tabulation show actual and projected details of this operation. These figures will be revised upon completion of arch concreting."

Mr. Green testified that the "Navajo 3 and 3A Progress Tabulation" included in the front of AX 10 was part of the claim submitted to the Bureau in February of 1974. As the progress tabulation was not included as an enclosure to the claim letter of Feb. 6, 1974 (AF 112), the document was presumably furnished to the Government in the negotiation conference of Feb. 7, 1974 (AF 114). Mr. Green noted that the tabulation shows the rate of advance in the reference reaches for each of the three basic operations involved in constructing the tunnels. Upon cross-examination he stated that various personnel had had input in determining the stretches of the tunnels considered

"reference reaches" and "claim reaches" but that the determination of these reaches did not involve a decision that he had personally made (nn.206-11, *supra*), and accompanying text).

The appellant having failed to offer any evidence to show who selected the claim reach involved in the computation of the amount claimed for excavation in the claim submitted and having failed to offer any evidence to show who had selected either the reference or the claim reaches involved in the computation of the amounts claimed for "Place Invert Concrete" and "Place Arch Concrete" (AX 10; corrected AX 84), the Board finds and determines that no adequate basis exists for accepting the reference reach/claim reach approach in determining the equitable adjustment to which the appellant is entitled by reason of the differing site conditions found to have been encountered in Tunnel No. 3. Before undertaking to determine what other basis for an equitable adjustment may be proper in the circumstances of this case, it would appear to be advisable to separately consider the claims for the three basic operations involved in constructing the tunnels, namely, "Tunnel Excavation," "Place Invert Concrete," and "Place Arch Concrete," as well as the quantum defenses the Government has raised with respect to the claims asserted.

1. Tunnel Excavation

This is by far the most important claim from a dollar standpoint, as

can be seen comparing the \$1,297,305 of direct costs claimed for this item, with the direct costs claimed for "Place Invert Concrete" and "Place Arch Concrete" of \$160,715 and \$661,185 respectively (corrected AX 84; n.1, *supra*). Most of the testimony at the hearing related to the claim for excavation. This is not surprising since Dr. Heuer and Messrs. Sperry, Mathews, and Green all testified as percipient witnesses with respect to the claim for excavation, while only Dr. Heuer and Mr. Green gave testimony concerning the "Place Invert Concrete" and the "Place Arch Concrete" claims. Many of appellant's important exhibits (AX 4; AX 5; and AX 20) cover time periods when only tunnel excavation had been undertaken. Most of the quantum defenses the Government has raised only relate directly to the claim for tunnel excavation.

Where, as here, the contractor has failed to segregate costs, the problem is to determine the extent to which the additional costs claimed to have resulted from the differing site conditions can be properly attributed to that cause and not to other causes. Preliminary to finding that the contractor had encountered a differing site condition in Tunnel No. 3, the Board found that the rock failures and fallout the contractor experienced were due to overstressing (shear type failures) which failures manifested themselves in the arch, the sidewalls, and the invert of the tunnel. Clearly the costs related to overcoming the differing

site conditions are recoverable as part of the equitable adjustment. The Government contends, however, that a substantial portion of the claimed costs are not attributable to the differing site conditions assuming there is one. We now turn to consideration of the arguments advanced by the Government with respect to quantum.

a. *Gripper Caused Failures*

Several months after the claim was submitted and again at the hearing, the Government raised a question as to the extent to which rock failures and fallout in the sidewalls were due to the pressure exerted by the grippers of the mole. At the conference on Dec. 6, 1971, the Government took the position that the action of the grippers was largely responsible for the fallout in the sidewalls of Tunnel No. 3 (text accompanying n.30, *supra*). At the hearing Mr. Logan attributed much of the fractured rock shown in the photograph taken on Jan. 11, 1972, near Station 831+25 (GX GGG) to the pressure exerted on the sidewalls by the gripper of the mole. He also testified that a photograph taken at Station 856+03 on Sept. 2, 1971 (GX HHH), shows some of the failures of the rock that is occurring beneath the gripper pads. Mr. Logan was of the opinion that gripper pressure had contributed to the rock failures he had observed at Station 782+00 in March of 1972 (nn.339-41, *supra*, and accompanying text). According to the project geologist, the sidewalls fractured by the grippers at

Stations 855+50 to 856+80 were permitted to ravel before shotcrete was applied (AX 87(6)). Rock fractures in the sidewall from Stations 826+00 to 829+00 were believed by Mr. Levine to have been triggered by the gripper pressure of the mole on the shale (text accompanying n.311, *supra*).

Appellant's witnesses also testified to rock failure which they attributed to the grippers. Mr. Sperry saw evidence of gripper caused failures of rock in different places one of which was at Station 847+00 (Tr. 134-36). Mr. Green also reported seeing some rock failures in the ribs of the tunnel that he considered to have been caused by the grippers (n.197 *supra*). Spalling at springline shown in a photograph (AX 21) was attributed by Dr. Heuer to the action of the grippers (Tr. 403).

The gripper caused failures to which we have referred occurred in widely separated areas of Tunnel No. 3. The Board finds that such failures were not attributable to the differing site conditions, but were rather a consequence of the contractor having chosen to use a hard rock prototype mole to excavate the relatively weak rock involved in Tunnel No. 3.

b. *Inadequate Guidance System*

The Government has made a concerted effort to show that the guidance system used by the contractor was inadequate for keeping the boring machine (mole) on line and grade. It quotes from GX M to show that using the guidance sys-

tem employed by the contractor it would be possible for the boring machine to rotate about the laser beam (GPB 65). Upon cross-examination Mr. Sperry acknowledged that it would be possible for the mole to be driven with the target system used so that the mole would actually rotate around the laser beam. He was unable to say from his experience, however, as to whether this had ever happened (n.184, *supra*).

The testimony to which we have referred and GX M establishes that utilizing the guidance system employed by the contractor the mole could rotate about the laser beam. This was admitted to be the case by Mr. Sperry. The fact that something is possible does not mean, of course, that it has happened or that it ordinarily does happen. In this case no witness testified to the mole rotating around the laser beam. Absent such testimony or other evidence of record, there is no basis upon which the Board may conclude that it ever did.

[7] Perhaps realizing the somewhat nebulous nature of the evidence offered in this area, the Government has called the Board's attention to GX AAA-1 through AAA-24 asserting that they contain voluminous references to the problem the contractor was having in keeping the mole on line and grade (GPB 66). With respect to this exhibit, the Board notes that it consists of 24 volumes with literally thousands of handwritten pages of reports by Government inspectors

concerning what transpired each work day, many of which involved working three shifts.

If the purpose of calling attention to so voluminous an exhibit is to suggest to the Board that it should review the documents involved with a view to finding what support may exist for the Government's position in this area, there appears to be a considerable amount of confusion as to the responsibilities of counsel and those of the Board with respect to voluminous documents offered and received in evidence. In the event that counsel considers that information contained in a voluminous exhibit either proves or may be of assistance in proving a particular point, it is incumbent upon counsel to specifically cite the portions of the voluminous exhibit relied upon by page number, by date, or by other appropriate reference. This presupposes, of course, that a summary of the particular portions of the voluminous exhibit relied upon has not been offered and received in evidence at the hearing as a separate exhibit. Absent specific citations to a voluminous exhibit or to an appropriate summary thereof in evidence, the Board will not undertake to determine the content of a voluminous exhibit in particular areas before reaching its decision. It may, of course, refer to the voluminous exhibit to verify information contained in other exhibits in evidence (*e.g.*, confirm that an event occurred at a particular time or in a particular place).

[8] Lastly, the Government seeks to bolster its position by referring

to and quoting from GX BBBB, an exhibit which was offered by the Government but which was not received in evidence. With respect to this exhibit, Government counsel states:

[T]he Government made an offer of proof on the exhibit and maintains that the exhibit should have been admitted into evidence on the basis that Mr. Mercer was the field engineer on the job and that the diary is identified as his diary and is presumably a record kept in the ordinary course of business. The document, moreover, was obtained by the Government during discovery proceedings from the contractor's own files.

(GPB 66).

GX BBBB was not received in evidence because the witness by whom the Government sought to introduce the exhibit failed to identify it (Tr. 1353-56). Concerning the offer of proof, the hearing member stated: "The Board will not consider that exhibit in reaching its decision, but it will be part of the record incident to the offer of proof" (Tr. 1356).

The Board finds that the hearing member properly refused to admit GX BBBB in evidence on the ground that it had not been identified by the witness through whose testimony its admission was being sought. A document is not identified within the meaning of the rules of evidence simply because counsel for the Government identifies the proffered document as having been obtained in discovery proceedings from the contractor's own files.

The substantive arguments made by Government counsel in the offer of proof and in the Government's

posthearing brief have not been addressed by the Board in this opinion since no consideration has been given to the content of GX BBBB in reaching our decision. Incident to the offer of proof, GX BBBB will be retained as a part of the record in this case for consideration upon review of our decision if that materializes.

c. Rock Failure to Bedding Planes—Failures Due Solely to Water

As the Government has noted in its brief, witnesses have testified that they observed fallout associated with fresh fracturing attributed to overstressing and that they had also observed fallouts at bedding planes which were attributed to other causes (GPB 86). The contractor's consultants, Dr. Don U. Deere, Dr. Andrew H. Merritt, and Dr. Ron Heuer were all agreed that some slabbing to pre-existing bedding planes could have been anticipated (n.162, *supra*). The project manager anticipated fallout at the contact between two different types of materials and some of the arch failures, observed by Mr. Green involved failures to distinct bedding planes (n.168, *supra*; Tr. 329-30). The Board finds that in excavating Tunnel No. 3 the contractor experienced some rock failures to bedding planes; that such failures were of a surficial nature, that they had been anticipated; and that they had been provided for in the bid estimate.

The information furnished by the Government clearly indicated that some water would be encountered in Tunnel Nos. 3 and 3A (n.117, *supra*; AF 77, p. 26). The bid estimate did include some time for rock support, some delay time including the fallout anticipated from water (text accompanying n.167, *supra*). Some of the disintegration and deterioration encountered in Tunnel No. 3 was due to water (Tr. 503). Mr. Mathews considered that the water conditions he observed in Tunnel No. 3 were similar to those he had seen earlier in Azotea Tunnel where he had observed very little water (n.272, *supra*, and accompanying text). Rock failures and fallout due to water are not included among the four ultimate facts on which the contractor's in situ stress claim is based (text accompanying n.162, *supra*). The Board finds that the rock failures and fallout encountered in Tunnel No. 3 due solely to the presence of water were not caused by the differing site conditions but rather represented conditions which should have been and were anticipated by the contractor as is evidenced by provision therefor in the bid estimate.

d. Tunnel Advance Slowed by Soft Invert—Mole Downtime

Soft invert was encountered in Tunnel No. 3 on Apr. 21, 1972, with the mole sinking about 6 inches below grade. Manipulation of the mole cutterhead for repairs on April 22 caused it to settle still further and

the mole was 24 inches low when advance was resumed on April 24. The mole was steered upward and attained grade by the end of the day shift on April 25. It began to settle again on the graveyard shift on Apr. 26, however, and continued to sink until it reached 34 inches below grade on Apr. 29. By May 4, 1972, the thickness of siltstone/shale below the invert had begun to decrease and the mole was steered back up to grade. During this 2-week period, the tunnel advanced only 198 feet from Station 771+18 to Station 769+20 (AX 87(2)). The slow advance in this stretch of Tunnel No. 3 was due to the weak siltstone/shale material in the tunnel invert not providing adequate bearing capacity to support the mole and allow for corrective steering measures to get the mole back up to grade (AF 77A, pp. 37-8).

In a report to one of the unsuccessful bidders on Tunnel Nos. 3 and 3A, a portion of which is quoted in the letter to the contractor dated Oct. 2, 1973 (GX Q), Dr. Deere refers to a number of problems a contractor using a hardrock mole to excavate the tunnels could expect to encounter including difficulties in thrusting the machine if the bottom is soft or the sidewalls are composed of slabby shale and/or very weakly cemented sandstone (GX Q, pp. 6-7).

The Board finds that the delays to tunnel advance caused by the contractor encountering soft invert in a 198-foot stretch of Tunnel No. 3 were not attributable to the differing site conditions; that such delays

were rather due to the contractor having chosen to use a hardrock prototype mole to excavate the relatively weak rock of which most of Tunnel No. 3 was composed; and that the contractor rather than the Government must bear the consequence of this exercise of its business judgment.

With respect to the causes of mole downtime, the Government contrasts what was said about the subject in the Sperry/Heuer report (AX 4) at p. 543 ("Most of the mole downtime could have been expected from a prototype piece of equipment operating in such unexpectedly adverse conditions") with what was said in an earlier draft of that report (GX YYY) ("Most of the mole downtime could be expected of a prototype piece of equipment"). Thereafter, Government counsel states:

In comparing these two exhibits it becomes perfectly obvious that the authors, who were both witnesses at the hearing, revised their supposedly disinterested report to include a phrase which attributes mole downtime to "unexpectedly adverse conditions." It is, of course, no surprise that this added language just so happens to gratuitously lend support to a theory of a differing site condition occurring in the tunnel.

(GPB 62-63).

We find that most of the mole downtime was the result of the contractor using a prototype piece of equipment. We further find, however, that various parts of the mole and its ancillary equipment were damaged by falling rock caused by overstressing (shear-type failures) and that significant portion of the

mole downtime is attributable to such falling rock (*i.e.*, was caused by the differing site conditions).

e. *Installation of Shield on Mole—Use of Shotcrete as Protective Coating*

At a meeting with representatives of the contractor on Dec. 6, 1972, the project construction engineer pointed out instances of the contractor's lack of preparation for handling some of the problems encountered. Among the items mentioned were the contractor's delay (i) in installing a shield for the mole and (ii) in proceeding with shotcreting because shotcreting equipment was not available (n.53, *supra*).

In a letter written under date of Dec. 7, 1970, to the attention of the project construction engineer, Mr. Sperry submitted for approval a description of the contractor's anticipated excavation and rock support methods. One of the rock support methods described involved the use of a shield about 7 feet long to support the excavated back between the cutterhead and the support installation area (n.6, *supra*). Over 7 months later, Mr. Mathews was categorically stating that "[a] shield or some other device which will support the crown between the dust shield and the rock bolt installation area must be designed and installed." Some 9 months after Mr. Sperry's December letter, Dr. Heuer was saying that "the use of the partial shield will permit steady, if retarded, progress

through areas having weak rock in the tunnel arch" (n.19, *supra*). A shield was not installed, however, until Oct. 5, 1971 (n.53, *supra*).

Testifying at the hearing Mr. Sperry stated that when the contractor started moling a shield was not considered necessary since the rock had enough stand-up time and the rockbolt grips were up close to the dust seal and that they could be tilted forward to support the rock within about 4 to 6 feet behind the dust seal (Tr. 167). Addressing the question of how the rock failures and fallouts slowed down progress, Mr. Sperry stated that just as soon as the arch was excavated the failures started to occur and that what fell on the mole buckets did not bother much but that the rock that fell behind the dust seal of the mole came down and piled up on the part of the mole where the contractor later put a shield (text accompanying n.172, *supra*).

Not addressed by Mr. Sperry in his testimony was the question of why a shield for the Dresser mole was considered necessary in December of 1970, but was not considered necessary when the contractor started moling in May of 1971; nor has any explanation been offered as to why after the major fallout in mid-July of 1971, it took the contractor 5 weeks to decide upon the shield to be ordered (GX H (8/19/71)). It is noted that when in early December of 1970 the Bureau was advised of the plan to use a 7-foot shield as part of the rock support program, the contractor knew that

it would be using a Dresser mole for excavation of the tunnels (n.3, *supra*).

The Board finds that the Bureau was entitled to rely upon the contractor's representation that the Dresser mole to be used in excavating the tunnels would be equipped with a 7-foot shield to support the excavated rock between the cutter head and the support installation area; that the contractor delayed ordering the shield in question for over 8 months after it had proposed its use to the Bureau in December of 1970; and that from the time moling began on May 13, 1971, until the shield was installed on Oct. 5, 1971, excavation progress was delayed and costs were increased by the absence of the shield.

The contractor's delay in proceeding with a shotcreting program follows a somewhat similar, if less egregious, pattern of delay. The May 1973 report (AF 77A), points out that it could reasonably be concluded from the contract documents that the deterioration and disintegration to be expected would be mainly of a surficial nature which could be prevented by such means as applying a surficial protective coating such as non-structural shotcrete (n.81, *supra*, and accompanying text). In a letter to the contractor dated July 24, 1971, Mr. Mathews stated that shotcrete was the logical medium to prevent shale from raveling between rockbolts since it would adhere to wet surfaces. In a report dated Sept. 17, 1971, Dr. Heuer noted that while a latex compound might be sufficient

in dry areas, shotcrete should be applied in wet areas (n.17, *supra*, and accompanying text).

The use of shotcrete to prevent surficial deterioration was again stressed by Dr. Heuer in the report transmitted with the contractor's letter of Dec. 27, 1971 (n.45, *supra*, and accompanying text). The Government's witness Mr. Logan considered that a protective coating of shotcrete would have protected against air slaking since it would protect the surficial material on the tunnel by maintaining a uniform moisture content (n.343, *supra*).

The May 1973 report refers to the initial plans for the use of shotcrete as a protective coating in areas of most severe surface slaking (AF 77A, p. 29). Mr. Sperry testified that he considered shotcrete for protective coatings when he prepared the bid estimate and that some money was included in the bid estimate for that item. The explanation offered by Mr. Sperry for no shotcrete plant being on the job when moling was started in mid-May of 1971, was that the contractor was experimenting with latex coatings, a new type of coating and that it was not felt that shotcrete would be needed. In the event that shotcrete were needed, however, Mr. Sperry considered that it could be obtained in time without delaying the progress of the work (Tr. 167-69).

Review of the record discloses that bids were opened on Sept. 22, 1970; that the instant contract was awarded on Oct. 23, 1970; that moling in Tunnel No. 3 began on May

13, 1971; that the job was shutdown from July 14, 1971, to Aug. 20, 1971; that it was not until the first day of the shutdown that the decision was made to go to shotcrete (GX H (7/14/71)); and that shotcreting did not begin until the following month (GX H).

In his testimony, Mr. Sperry said that he had given up on the use of protective coatings as they had not worked at DH 116 (Tr. 114). Review of the portion of Mr. Sperry's diary in evidence discloses, however, that shotcrete was still being used or planned for use in November of 1971 (GX H (11/10/71; 11/29/71)). The statement by Mr. Sperry that he had given up on the use of shotcrete as a protective coating because it had not worked at DH 116 appears to manifest confusion on Mr. Sperry's part as to either the nature of the rock failures and fallouts which occurred in the vicinity of DH 116 or the limited circumstances when protective coatings of shotcrete may be usefully applied.

If, as Dr. Heuer testified and as the Board has found, the deterioration and disintegration which occurred in the vicinity of DH 116 was not of a surficial nature, then the fact that applications of protective coatings of shotcrete did not prevent the deterioration and disintegration which occurred there would appear to have no bearing on the question of whether protective coatings of shotcrete should be applied to remedy surficial deterioration and disintegration occurring elsewhere in the tunnels. It is clear

that not only the appellant's expert witness Dr. Heuer, but also Mr. Mathews and Mr. Logan, considered that the use of a protective coating of shotcrete would be helpful in preventing or arresting surficial deterioration or disintegration. In such circumstances, the use of protective coatings of shotcrete was considered to be imperative if the surfaces to which they were to be applied were wet. None of these witnesses indicated in their testimony or elsewhere in the record that a protective coating or shotcrete would prevent rock failures and fallout due to overstressing as we have found occurred in the vicinity of DH 116.

The Board finds that the failure of the contractor to procure the equipment required for the application of protective coatings of shotcrete within a short time after the award of contract (i) delayed the contractor in preventing or reducing surficial deterioration or disintegration where encountered from the start of moling in May of 1971, until the equipment was obtained in August of 1971, and (ii) increased the costs of tunnel excavation.

2. *Place Invert Concrete*

In the May 1973 claim submission ³⁹⁵ the contractor asserted that

³⁹⁵ AF 77, letter transmitting claim dated May 18, 1973. Mr. Sperry left the job at the end of Aug. of 1972. Invert Concrete Start Up work began on Oct. 30, 1972, with Arch Concrete Start Up work beginning in Tunnel No. 3 on Feb. 13, 1973, and in Tunnel No. 3A on June 16, 1973 (AX 10, "Navajo 3 and 3A Progress Tabulation").

the concrete invert heave between Stations 812+50 and 844+50 was an integral part of the differing site conditions claim. The claim included an estimated cost to repair invert heave in the amount of \$526,700 and an estimated additional cost to place invert concrete of \$115,220. Subsequently, by Amendment No. 1 to Part 1 of Order For Changes No. 1, dated Apr. 1, 1974, the amount due under the contract was increased by the lump sum of \$565,838 to cover the increased costs incurred to remove and replace the concrete invert between Stations 812+42 and 824+00 and Stations 833+00 and 844+46 of Tunnel No. 3 (n.67, *supra*). The amount presently claimed for placing invert concrete is in addition to what the contractor has previously been paid for removing and replacing the concrete invert in Tunnel No. 3 under the terms of Order For Changes No. 1.

Major delays during the placing of the invert concrete were said to have been caused by the rock in the invert of Tunnel No. 3 rising and encroaching inside the "A" line, necessitating that it be removed by spading, ripping, and blasting. (AF 77. "In Situ Rock Stress Cost Evaluation," p. 2). The inward movement of the lower walls and invert following excavation required remining in order to achieve the specified thickness of concrete tunnel lining (AF 77A, p. 3).

The Bureau surveyed Tunnel No. 3 at various times during excava-

tion in order to check on the alignment to which the tunnel was being excavated. Prior to constructing the tunnel concrete lining, the contractor had hired the firm of Lawrence A. Brewer and Associates, Inc., to independently check the tunnel profile. In report No. 1856 (AF 77), Dr. Heuer states that the inward movement of the lower side-walls and invert cannot be explained as a reaction to water but were caused by rock failures and subsequent movements due to over-stressing. He also states that these large scale failures of overstressed rock are not due to simple surficial deterioration, disintegration and loosening in the presence of air or water since many of them occurred in portions of the tunnel in which water was not present (AF 77A, pp. 42, 57, 61-62).

The portion of Tunnel No. 3 designated as a claim reach for invert concrete comprises the 8,593 feet of Tunnel No. 3 from Station 769+35 to Station 855+28 (AF 77, "In Situ Rock Stress Cost Evaluation," p. 2). As has been previously noted, however, the contractor was paid under Order For Changes No. 1 the sum of \$565,838 for removing and replacing the concrete invert between Stations 812+42 and 824+00 and Stations 833+00 and 844+46, all of which are within the designated claim reach.

In Report No. 1856, Dr. Heuer states that the results of the surveys made by the BOR and by Brewer are shown on Drawing Nos. R2093 and R2094, and that both surveys indicated that the invert of Tunnel

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No. 3 was high and within the "A" line throughout most of the 10,800-foot tunnel length from Station 747+00 to Station 855+00 (AF 77A, p. 42). The fact that the invert was high and within the "A" line in various stretches of the tunnel does not necessarily mean that all of the high invert was due to inward movement of rock because of overstress. This is acknowledged by the contractor in the May 1973 claim submission from which the following is quoted:

[T]he startup of invert concreting was characterized by several equipment design problems from the inlet portal to Sta. 752 and by removal of invert tights caused by excavating too high from Sta 752 to Sta 768. There was no appreciable stress induced invert encroachment in this reach.

(AF 77, "In Situ Rock Stress Cost Evaluation," p. 2).

At the hearing, Dr. Heuer testified as to a graph on Drawing Nos. R2093 and R2094 labelled "Invert Elevations Relative to Line A." In connection therewith, he noted that a horizontal line is designated as the "A" line, that a solid line is labelled "Brewer Survey" and a series of small circles connected by dashed lines is labelled "Owner Survey." Concerning this last item, Dr. Heuer stated:

[T]his is the survey of the invert elevation performed to my understanding by the Bureau of Reclamation Survey people. Copies of that data were given to me by the contractor. Just above the line, above this graph is shown at what time the owner made the survey of different reaches of the tunnel.

(Tr. 469).

The graph shows that the Bureau made some nine different surveys commencing in October of 1971 and concluding in August of 1972, while the Brewer survey occurred in September of 1972. In some instances results of the two surveys are shown to be identical or to correspond quite closely. In the many instances where the two surveys differ, the Brewer survey shows the invert to be higher and in a substantial number of cases materially higher than the BOR survey. The drawings also show the number of inches the invert was high above the caption "Areas of High Invert Requiring Removal of Tights Before Invert Concrete Placement."

While the graph unquestionably shows the Brewer survey as indicating that the invert was high and within the "A" line throughout most of the 10,800-foot tunnel length from Station 747+00 to Station 855+00, the Board is unable to conclude that the graphs also indicate this to be true with respect to the BOR surveys. Based upon our review of the graph in question, the Board finds the BOR surveys to have indicated high invert for approximately 5,000 feet of Tunnel No. 3 consisting of the reaches between Stations 847+00 and 833+00; between Stations 822+00 and 807+00; between Stations 789+00 and 784+00; and between Stations 768+00 and 752+00. Some 1,600 feet of the high invert so shown (Stations 768+00 to 752+00), however, represents in-

vert the contractor has admitted was excavated high, while another 2,104 feet of the high invert reflected in the BOR surveys was paid for under Order For Changes No. 1. There still remains 1,296 feet of high invert indicated by the BOR surveys as shown on the graphs in Drawing Nos. R2093 and R2094 (AF 77A) for which no payment has been made and as to which the contractor has made no admission of fault.

The Government did not cross-examine Dr. Heuer as to the testimony he gave in this area. No Government witness undertook to controvert or even to address what is shown by the graphs on Drawing Nos. R2093 and R2094 with respect to what the BOR surveys had found to be high invert. The BOR surveys portrayed on the graphs were made by Bureau personnel over the period indicated. Report No. 1856 and the accompanying drawings with the graphs showing high invert (AF 77A) were in the possession of the Government some 3 years prior to the hearing. The accuracy of what was shown on those graphs respecting the BOR surveys in question could have been and presumably were checked against the surveys in the possession of the Government by personnel qualified to do so. Absent any testimony controverting what is portrayed on the drawings as the result of the various BOR sur-

veys³⁹⁶ or other countervailing evidence in the record, the Board finds and determines that there is 1,296 feet of high invert shown on the graphs on these drawings which resulted from inward movement of the rock due to oversteering (*i.e.*, were caused by the differing site condition) in the identified reaches of Tunnel No. 3 for which the contractor has not been previously compensated.

3. *Place Arch Concrete*

In the May 1973 claim submission the contractor states: "Delays encountered during arch concreting of Tunnel 3 were caused by removal of stress induced encroachment of the tunnel ribs and arch, by placing of additional concrete in fallout voids caused by the high in situ rock stress, and by replacing heaved invert concrete" (AF 77, "In Situ Rock Stress Cost Evaluation," pp. 3-4). The same view is expressed by Dr. Heuer in report No. 1856 in which he states:

Additional difficulties resulted from maintenance of the tunnel excavation in the problem zones, and from the need to remine "tights" prior to placement of both invert and arch concrete in areas where the rock surrounding the tunnel moved inward and encroached upon the "A" line at some time after excavation.

³⁹⁶ No comparable weight has been given to what is shown on the drawings with respect to the Brewer survey or the Spider survey since in regard to such surveys (i) the drawings are considered to be simply summaries of documents not in evidence; (ii) the testimony of Dr. Heuer with respect to them was of a very general nature; and (iii) there was no Government involvement.

(AF 77A, p. 60).

In support of the "Place Arch Concrete" claim, the appellant relies principally upon the testimony of Mr. Green. According to Mr. Green the failures observed by him in Tunnel No. 3 that delayed arch concreting consisted of the following: (1) The additional concrete that had to be used behind the forms due to overbreak outside the bored diameter of the tunnel; (2) fallout that occurred ahead of concrete placement which was quite severe and which required cleaning before the forms could be set; (3) fallout that continued after the forms were set which had to be cleaned out before the concrete could be pumped behind the arch forms; and (4) damage to utility lines ahead of the arch concrete placement which had been caused by fallout and which had to be repaired before the contractor could proceed with the arch concrete placement (Tr. 352-53).

Mr. Green also testified with respect to a number of photographs offered in support of the arch concrete claim. According to Mr. Green one of the photographs (AX 16A) showed a typical placement of the arch forms. Two of the photographs (AX 16B and 16H) show damage to utility lines ahead of the arch concrete placement. Four photographs (AX 16D, E, F, and G) show tight spots present in Tunnel No. 3 as evidenced by the red letters on the ribs showing the amount of ad-

ditional excavation in inches that had to be made prior to arch concrete placement in order to get the required thickness of concrete behind the arch forms. One of the photographs (AX 16F) was identified by Mr. Green as having been taken on Mar. 17, 1973, at Station 781+75. Based upon the course normally followed in assembling the contractor's job progress photo album, Mr. Green considered that all of the photographs of AX 16 except AX 16A (showing the arch forms) were taken on the same date and in the same general area. Also identified by Mr. Green was a picture of a tight removal car (AX 17) and a picture of a high car used by the engineers to check and mark tight spots (AX 18) (Tr. 354-63). It was Mr. Green's testimony that the arch of Tunnel No. 3 was essentially remained throughout the area where Order for Changes No. 1 applied (n.63, *supra*). Describing what was entailed in such work, Mr. Green stated:

[I]t was quite dangerous to remove these rock bolts, and to relieve the bearing under the bearing plate, we removed the rock bolts, remove the tight spots, and then install another rock bolt, was quite time consuming, and quite dangerous for a miner under an area he was relieving the support he had there.

(Tr. 364-65). Mr. Green was unable to recall how much additional concrete had to be placed within the forms because of the rock failures and disintegration that he had observed in the tunnel (n.203, *supra*).

The large drawings which accompanied the May 1973 claim submission (AF 77A) lend no support for the "Place Arch Concrete" claim since the drawings are based upon Dr. Heuer's observations in the tunnels on Feb. 2 or 3, 1973 (n.249, *supra*). At that time and for more than 5 weeks thereafter, the contractor was still involved with the Arch Concrete Start Up Phase of the work (AX 10, "Navajo 3 and 3A Progress Tabulation," p.2). The geologic drawings made by the Bureau's project geologist do contain information which can be used, however, as at least a basis for an estimate. At the outset we note that the 900 feet of Tunnel No. 3 that Government counsel acknowledges involved "Fallout Associated With Freshly Fractured Rock" pertained to the roof of the tunnel (n.155) and that another 450 feet of Tunnel No. 3 not involved in the Government's concession also related to fallout in the roof (n.158, *supra*). Other fallout in the roof not reflected in either of these calculations are shown in geologic drawings for specific stretches of Tunnel No. 3.

In the Government's posthearing brief counsel raises a question as to how the claim reach for concrete can extend into the reference reach for excavation and vice versa (GPB 94). Since we have not accepted the claim reach/reference reach approach as a proper basis for an equitable adjustment, no useful purpose would be served by addressing this question. It is not correct to say, however, as the Government does at the same place, that

there has been no testimony concerning what the differing site condition consisted of as it related to concrete other than difficulties encountered in chipping tightts in both the invert and the arch. As we have noted Mr. Green testified not only with respect to tightts in Tunnel No. 3 but also in regard to placing additional concrete in the forms because of rock failures and disintegration that he had observed, although he was unable to say how much concrete had been so placed. He also testified as to damage to utility lines ahead of the arch concrete placement which had been caused by the fallout.

As has been noted above, it also appears that the Government has overlooked the fact that the appellant's claim for arch concrete clearly includes a claim for "placing of additional concrete in fallout voids caused by the high in situ rock stress." The geologic drawings made by the Bureau's project geologist provides some evidence of the extent of fallout for which additional concrete was unquestionably required to fill the voids resulting from the fallout.

Based upon Mr. Green's uncontradicted testimony the Board finds that the arch of Tunnel No. 3 was essentially remined throughout the area where Order For Changes No. 1 applied (n.63, *supra*), and that the stretch of the Tunnel No. 3 involved in such remining totaled 2,304 feet. Also for consideration is the 900 feet of fallout the Government has acknowledged was associated with fresh fractures (n.155,

supra), and an additional 450 feet of fallout related to fresh fractures shown on the geologic drawings made by the project geologist (n. 158, *supra*). Based on these figures, the Board finds and determines that 3,654 feet of Tunnel No. 3 involved rock fallout attributable to over-stressing (shear type rock failures), necessitating the incurrence of substantial additional costs in preparing the tunnel for (or in proceeding with) the placement of the arch concrete.

Accounting Records

One of the problems confronting the appellant at the time of the hearing was the fact that Mr. Mike Eldridge (the accountant in charge of project accounting for Tunnel Nos. 3 and 3A during contract performance) was out of the country and consequently not available to testify (n.205, *supra*, and accompanying text). In an attempt to overcome this difficulty, testimony was elicited from Mr. Thomas W. Green (an engineer who had collaborated with Mr. Eldridge on some aspects of the accounting data as well as preparing the backup for the amounts claimed in limited areas) and from Mr. Thomas Case Stone, the accountant in charge of project accounting at the time of the hearing who had reviewed the work papers prepared by Messrs. Eldridge and Green and made various calculations based thereon such as undertaking to determine the costs incurred in the reference reaches

for the three basic operations (n. 217, *supra*, and accompanying text).

This make-shift arrangement proved to be unsatisfactory in a number of ways. For example, the testimony given by Mr. Green was interpreted by Mr. Stone to mean that nothing had been included in the claim as operating expenses for equipment used on the second and third shifts (n.210, *supra*). When he took the stand initially Mr. Stone testified that to come up with the claim reach equipment cost they had had to add the company's second and third shift operating expenses for that item (Tr. 796). This and other changes made by Mr. Stone in AX 10 were reflected in AX 77, an exhibit described by him as a digest of the work papers included in AX 10. Later, however, Mr. Stone testified that the conclusions he had drawn from Mr. Green's testimony were in error and the amounts claimed for equipment operating expenses in the work papers as prepared by Mr. Eldridge had included allowances for the second and third shifts. At the same time he noted that the amount claimed for equipment ownership had been understated by the amount of the third shift and that giving effect to these changes would necessitate revising AX 77 (Tr. 970-73). The necessary changes subsequently made in AX 10 are shown separately in AX 85. A digest of the working papers included in AX 10 as revised is included in the record as AX 84 (Tr 1068-73). Exhibit AX 84 was sub-

sequently revised further as evidenced by a corrected AX 84 (n.l. *supra*).

At the time of the hearing Mr. Stone had been employed by the contractor for less than 17 months. He had had no connection with the project during contract performance. Upon cross-examination Mr. Stone was unable to say whether the equipment costs for the claim had been computed in accordance with the provisions of Paragraph 17 of the contract pertaining to idle time or whether the equipment referred to on page G 3.2 of AX 85 was operating (Tr. 1084-85); nor could Mr. Stone say whether the costs of correcting tightness in the tunnel had been segregated on the basis of whether it involved corrective work for which the contractor was responsible (Tr. 1090-94).

The Government asserts that the figures shown in AX 10 were made up after the fact and bear no relation to a differing site condition. Cited in support of these statements is Mr. Stone's testimony that he had not even attempted to tie the costs data in AX 10 to the contractor's ledgers (GPB 91). According to appellant's counsel, however, the appellant did keep detailed cost ledgers from which the actual costs in the claim reaches and in the reference reaches were extracted and placed in AX 10 and AX 11 (ARB 24). Mr. Green's testimony at Tr. 211-12, 215, and 218 is cited as supporting evidence.

The evidence of record indicates that most of the costs included in the claim were extracted from appel-

lant's books. This was not true, of course, with respect to the amount claimed for equipment operating expenses or equipment ownership costs. In accordance with the provisions of Paragraph 17 of the contract, such costs were computed on the basis of applying AGC rates (Tr. 821-23, 1084-85).

The question of whether and, if so, to what extent the costs incurred by the appellant can be attributed to the differing site conditions is one of the principal questions in this case. While the costs claimed by the appellant have been frequently revised, there is no evidence in this record indicating that the costs shown in AX 10 were made up after the fact. There is nothing in the testimony of Mr. Gaylor Hay (the Government's principal witness with respect to quantum) to indicate that the costs claimed by the contractor were not supported by the cost records made available to him. Listed in Mr. Hay's travel report (GX VVV) as among the principal facts emerging from a study of the contractor's records was the fact that the contractor's costs of performing the original contract work would exceed the estimated costs by more than \$3,600,000 (nn. 367 and 369, *supra*, and accompanying text).

Mr. Stone's testimony that he had made no attempt to tie the claimed costs to the contractor's records is consistent with his testimony in other areas. As Mr. Stone viewed his assignment, it was to determine costs for the reference reaches on the same basis as had been employed by Messrs. Eldridge and Green in

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determining the costs in the claim reaches (n.215, *supra*). In preparing the costs for a reference reach Mr. Stone or one of his assistants simply took the ledger balance for a particular item as recorded in the work papers (AX 10) and prorated the amount to the period covered by performance in that reference reach (Tr. 792-94).

In the letter to the BOR dated Feb. 27, 1974, the contractor asserted that it had contemplated completing the work within 700 calendar days (n.143, *supra*). The amount claimed for Roman Numeral VIII of \$826,361 is based upon completing the contract by Oct. 9, 1972 (AX 10, Work Paper O; text accompanying n.223, *supra*). This date fails to give any recognition to the contractor's responsibility for its protracted delay in providing a shield over the mole or obtaining the necessary equipment for applying protective coatings of shotcrete or coping with the problems caused by soft invert discussed above; nor does it take into account the numerous instances where the contractor was delayed because of routine maintenance, needed repairs, strikes, or other labor problems (AX 87).

Additional Factors for Consideration

Contrasting the appellant's position with what is characterized as the Government's ambivalence, counsel states: "Appellant has consistently maintained both the existence of the rapid, shear fractures through intact rock and the position

that these were changed conditions (E.g., Appeal File Exhibits 19 and 77; Exhibits 5 and 20)" (ARB 22).

This assessment by appellant's counsel attributes a basic consistency to appellant's actions which the record shows can only properly be attributed to Dr. Heuer. As to the exhibits cited, we note that the initial claim letter of July 29, 1971 (AF 19), says nothing at all about "the existence of the rapid, shear fractures through intact rock." The Board has previously noted that Dr. Heuer's analysis of the nature of the difficulties encountered in Tunnel No. 3 is basically the same in his handwritten report of July 17, 1971 (AX 20), his report of May 1973 (AF 77A) and his testimony at the hearing. We note, however, that insofar as the record discloses, the Government does not appear to have been apprised of either the handwritten report of July 17, 1971 (AX 20), or of Dr. Heuer's report of Sept. 17, 1971 (AX 5), until they were introduced as appellant's exhibits at the hearing.

Within appellant's organization there appears to have been a pronounced reluctance to accept. Dr. Heuer's analysis as a sound basis for the claims asserted. Although the claim for rock failures in Tunnel Nos. 3 and 3A attributed to the relief of in-situ stresses was presented by the contractor's letter of Jan. 31, 1973 (n.64, *supra*, and accompanying text), the contractor continued to articulate an entirely different basis for the DH 116 claim

long after the filing of the claim for in-situ rock stress failures (nn.55-61, *supra*, and accompanying text). In fact, it was not until at the May 1976 hearing that the DH 116 claim was finally abandoned (n.223, *supra*).

The home office of the appellant at San Mateo, California, appears to have evidenced even less regard for the determinations purportedly made by Mr. Sperry respecting reference reaches and claim reaches. Months after the May 1973 claim submission (AF 77) showing claim reaches and reference reaches, the corporate officials concerned at San Mateo were using the future tense in referring to the establishment of reference reaches for the three basic operations involved in tunneling (nn.132-37, *supra*, and accompanying text).

Many of the problems encountered in Tunnel No. 3 can be traced to the procrastination of Mr. Sperry with respect to the installation of a partial shield over the mole and the delay in ordering the equipment required for applying protective coatings of shotcrete to the exposed surfaces of rock to prevent surficial deterioration, particularly from water. In this connection we note that the Navajo Indian Irrigation Project for Tunnel Nos. 3 and 3A was the first project on which Mr. Sperry was the project manager and that prior to September of 1970, he had had experience in only one bored tunnel (AX 88).

As has been previously noted, in a letter dated Dec. 7, 1970, Mr.

Sperry had proposed the use of a shield about 7 feet long over the mole which was not installed, however, until Oct. 5, 1971. Also noted was the fact that although the bid submitted in September of 1970 included some money for a protective coating of shotcrete, it was not until the major fallout in mid-July of 1971, that the shotcrete equipment was even ordered. It is clear that the protracted delays by Mr. Sperry in proceeding with the execution of the contractor's own plans materially increased the cost of contract performance and that the increases in costs so caused can not be attributed to the differing site conditions encountered.

One of the principal points made by the Government with respect to quantum is the lack of reference to stationing which has characterized appellant's claim presentation (GPB 81-88). While the case as stated by the Government is somewhat overdrawn (Dr. Heuer and Messrs. Sperry and Green all related their testimony—at least to some extent—to stationing), it is nonetheless true that the appellant's presentation leaves much to be desired from the standpoint of showing the precise stretches of the tunnels forming the basis of the claims which were affected by the differing site conditions. For example, the portion of Mr. Sperry's diary in evidence (GX H) is not of material assistance to the appellant in this regard.

It is true, however, that numerous photographs showing rock failures

of the type upon which the differing site conditions claims are predicated—identified by station—are (i) included in the record (*e.g.*, AX 4, AX 5, and AF 77A) or (ii) were introduced at the hearing (nn. 245&46, *supra*, and accompanying text). In addition, the want of stationing in the reports or in the testimony is supplied in part by the geologic drawings made by the project geologist during the course of contract performance (nn. 155, 158&59, *supra*, and accompanying text). Also for consideration in this regard is the failure of the Government witnesses (notably the project construction engineer) to controvert what is shown on the BOR surveys as depicted on Drawing Nos. R2093 and R2094 (AF 77A).

Another factor we have taken into account in undertaking to assess the disparate positions of the parties has been the apparent reluctance of Bureau personnel above the project level to fully investigate the contractor's claim of differing site conditions with a view to determining the facts present in the case upon which an informed judgment respecting the merits of the claims could be made. Inexplicable to the Board is why Mr. Logan would have shown no interest in ascertaining whether the project geologic personnel had confirmed as correct some of his findings and particularly his findings No. 6 (“(6) geologic conditions encountered in the tunnel to date do not differ from that portrayed by the specifications

document”), when, according to his testimony, that is what he had commissioned the project geologic personnel to do (nn.334-38, *supra*, and accompanying text).

Even less responsible is the fact that in a decision rendered on Dec. 31, 1974, the contracting officer should say that the Government had been unable to verify reports by contractor personnel of failure through intact rock (AF 10, p. 12), since it is presumed that at the time the decision was being prepared the contracting officer had access to the geologic drawings (AX 87) which clearly show the contractor to have encountered fallout associated with freshly fractured rock (nn.155&158, *supra*, and accompanying text), as has been conceded by the Government with respect to at least 900 feet of Tunnel No. 3 (GPB 85-86). Long before the project geologist had completed the drawings, however, a Bureau of Mines geologist had expressed the opinion in writing that roof support in Tunnel No. 3 would have to be effective within minutes after the tunnel roof was exposed behind the cutter head (n. 24, *supra*, and accompanying text). Almost 3 years before the contracting officer had been advised by the project construction engineer of fallout in Tunnel No. 3 occurring “immediately after excavation removed the underlying rock support” (text accompanying n.311, *supra*).

For the contracting officer to say in the face of such evidence that the Government had been unable to

verify reports by contractor personnel of "failures through intact rock" is highly indicative of a mind set against addressing seriously the question of whether the conditions encountered in Tunnel Nos. 3 and 3A differed "materially from those indicated in this contract" or whether they constituted "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract" (General Provision No. 4).

The Government asserts that the contractor bid in anticipation of making a tremendous profit on rockbolts (GPB 80). In support of this statement the Government refers to a graph appearing on the contractor's bid estimate (GX I). Assuming, *arguendo*, that the graph can properly be interpreted in the manner suggested by the Government, we note that the contractor's expectations would have to be realized in circumstances where in Bidding Schedule Nos. 2 and 2A of the Invitation For Bids the Bureau had prescribed both the quantity of rockbolts to be used and the price to be paid therefor (AF 1; Tr. 183-84). Irrespective of the contractor's expectations, however, it appears to be clear that the differing site conditions claim has been presented as a cost claim and that in such circumstances only the costs actually paid for rock bolts would be included in the base upon which the 10 percent profit sought is predicated (ARB 20-21).

In the posthearing brief Government counsel says: "[W]e think Mr. Stone's testimony speaks for itself as totally inadequate to explain the figures in Exhibit A-10 and how they were arrived at. We do know, however, they were made up after the fact and bear no relation to a differing site condition" (GPB 91).

From this somewhat enigmatic statement, it is not clear whether it is intended to imply that the costs actually incurred in performing the contract were allocated to claim reaches and reference reaches in an arbitrary fashion after the fact or if a question is being raised as to whether the figures on which the claim is based are themselves inflated. If the former meaning is the correct interpretation of the quoted statement, then the Board's findings that the claim reach/reference reach approach is not a proper basis for determining the amount of the equitable adjustment makes the question presented moot. If it is intended to present the latter question for our consideration, however, we can only say that the evidence of record including the testimony given by the Government's witness, Gaylor Hay, tends to support the appellant's position that the excess costs incurred in performing the contract were somewhat greater than the amount of the claim asserted.

[9] The Board takes this occasion to note, however, that it seriously questions the wisdom of the Government not arranging for the audit of multi-million dollar claims

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apparently advanced in good faith by reputable contractors (n.3, *supra*), rather than proceeding on the supposition (as appears to be the case here) that it will be successful in resisting the claim on the merits. Securing audits will not only facilitate the examination of witnesses with respect to quantum but are likely to prove useful in establishing a basis for agreeing upon stipulations narrowing the issues in quantum areas or affording a basis for arriving at a settlement prior to the hearing, while it is in progress or after it has been concluded. Assuming a Government auditor familiar with the costs principles applicable to Government contracts had audited the costs in this case, it is likely the report would disclose how much was included for (i) business entertainment expenses and (ii) company-type advertising (n. 225, *supra*) and with respect to equipment costs whether costs involving idle time had been prepared in accordance with Paragraph 17 of the contract and whether particular equipment was operating (text accompanying n.232, *supra*).

B. Decision

The reference reach/claim reach approach having been found to be unacceptable as a measure for determining the amount of the equitable adjustment due the contractor in this case, we turn to consideration of other possible bases for arriving at an equitable adjustment. According to appellant's counsel, AX 84 contains a summary of the costs in-

curred by the appellant in the reference and claim reaches (AOB 56). The claim may therefore be treated as having been presented on a modified total cost basis.

Respecting claims presented on a total cost basis, the Court of Claims has stated: "This method of proving damage is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost." *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 511 (1955). Amplifying upon this appraisal in a later case, the Court of Claims stated: "The acceptability of the method hinges on proof that (1) the nature of the particular losses make it impossible or highly impracticable to determine them with a reasonable degree of accuracy; (2) the plaintiff's bid or estimate was realistic; (3) its actual costs were reasonable; and (4) it was not responsible for the added expenses." *WRB Corp. v. United States*, 183 Ct. Cl. 409, 426 (1968).

[10] We need not consider whether the first three conditions stated in *WRB* have been satisfied since it is clear that the last condition has not been met. Based upon the evidence of record discussed in Part III A of this opinion, the Board finds that the manner in which the appellant proceeded both before and after encountering the differing site conditions accounts for a very substantial part of the added costs for

which claim has been made. The total cost method is therefore not acceptable as a basis for the equitable adjustment in this case.

On a number of occasions the Board has been confronted with a question of determining the amount of an equitable adjustment where, as here, the total cost method has been found to be unacceptable, the contractor has failed to segregate costs and the Government has been found to be liable for at least some part of the costs incurred.

In all of such cases the Board has determined the amount of the equitable adjustments by resorting to what has been described as the jury verdict approach. Cases in this category over a 15-year span include the following: *Lincoln Construction Co.*, IBCA-438-5-64 (Nov. 26, 1965), 72 I.D. 492, 502-04, 65-2 BCA par. 5,234 at 24,587-88, *aff'd on reconsideration*, 73 I.D. 49, 66-1 BCA par. 5,343; *Power City Construction & Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 200-06, 68-2 BCA par. 7,126 at 33,022-26; *Ray D. Bolander Co., Inc.*, IBCA-331 (Mar. 30, 1970), 77 I.D. 31, 39-40, 70-1 BCA par. 8,200 at 38,133-34; *JB&C Co.*, IBCA-1020-2-74 and IBCA-1033-4-74 (Sept. 28, 1977), 84 I.D. 495, 582, 77-2 BCA par. 12,782 at 62,154-55; and *A&J Construction Co., Inc.*, IBCA-1142-2-77 (Dec. 28, 1978), 85 I.D. 468, 480-92, 79-1 BCA par. 13,621 at 66,788-94.

Appellant's claim for an equitable adjustment for the differing site conditions said to have been encountered in Tunnel Nos. 3 and

3A has been submitted in the amount of \$3,849,560 (n.1, *supra*). We have found, however, that no differing site conditions were encountered in Tunnel No. 3A. Consequently, before undertaking to determine the equitable adjustment to which the appellant is entitled by reason of the differing site condition encountered in Tunnel No. 3, we must first determine the amount by which the consolidated claim (corrected AX 84) should be reduced by reason of our denial of the claim asserted for excavation and for placing arch concrete in Tunnel No. 3A. We have previously noted that simply adding the figures in corrected AX 84 would result in a claim of \$4,004,341 rather than the amount of the claim as asserted of \$3,849,560 (n.1, *supra*). An examination of the exhibit discloses that the amount claimed for "profit" on the base items (corrected AX 84, Roman numerals IV through X) is understated by \$2,206 (10 percent of \$3,373,652 is \$337,365 and not \$335,159), while the amount claimed for "Bond Premium on Increased Contract Amount" is overstated by \$132,626 (\$3,711,017 x .004 is \$14,844 as contrasted with the \$147,470 shown on corrected AX 84), resulting in a net understatement in the claim according to these computations of \$24,361 (\$4,004,341 less \$130,420 (\$132,626 - \$2,206) is \$3,873,921 as compared to the claim asserted of \$3,849,560).

According to our calculations the claim properly computed—

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after apportioning costs between the three basic operations ("Tunnel Excavation," "Place Invert Concrete," and "Place Arch Con-

crete,") and allocating the direct and indirect expenses, as well as profit between the two tunnels—as follows:

Claim for	Consolidated Claim	Tunnel No. 3	Tunnel No. 3A
Tunnel Excavation.....	\$2, 371, 840	\$2, 064, 488	\$307, 352
Place Invert Concrete.....	294, 095	294, 095	
Place Arch Concrete.....	1, 208, 958	918, 448	290, 510
	\$3, 874, 893	\$3, 277, 031	\$597, 862

From the consolidated claim of \$3,874,893, there must be deducted the amount of \$597,862 allocated to the disallowed claims pertaining to Tunnel No. 3A ("Tunnel Excavation"—\$307,352; "Place Arch Concrete"—\$290,510) leaving a balance claimed for Tunnel No. 3 of \$3,277,031 comprised of the amounts allocated to "Tunnel Excavation" (\$2,064,488), "Place Invert Concrete" (\$294,095), and "Place Arch Concrete" (\$918,448).

In determining the amount of the equitable adjustment for the differing site conditions encountered in Tunnel No. 3, the Board has considered the detailed findings it has made with respect to rock failures due to overstressing (shear type failures). Earlier in the opinion we have noted the generally unsatisfactory nature of the evidence respecting the frequency and scope of the rock failures attributed to the differing site conditions, particularly with respect to the "Place Invert Concrete" and "Place Arch Concrete" claims. As we have previously noted, the portion of Mr. Sperry's diary in evidence is not of material

assistance to the appellant in this regard.

Apparently in an effort to overcome the weakness stemming from the absence of sufficient stationing references showing the extent of the differing site conditions encountered, the appellant conceived of the novel approach of presenting the claim on the basis of designating some stretches of the tunnels as claim reaches and other stretches of the tunnels as reference reaches. To have any validity, it would have been necessary for the appellant to show that in long stretches of the tunnels, the materials encountered were largely homogeneous and isotropic in nature. This it has failed to do. For this doctrinaire approach to proof of differing site conditions to succeed, it would also have been necessary for the appellant to show that the person selecting the claim reaches and reference reaches was highly qualified in the field of rock mechanics and had had extensive experience in tunneling work and particularly in bored tunnels. While we have grounded our decision in this area on the fact that neither Mr.

Sperry nor anyone else testified to having selected the claim reach for "Tunnel Excavation" and no one testified to having selected either the claim or the reference reaches for the "Place Invert Concrete" and "Place Arch Concrete" claims, we take this occasion to note that there is nothing in the record to show that during the period in question Mr. Sperry had either the expertise or the experience to have qualified him to select reference reaches and claim reaches as a basis for establishing the equitable adjustment to which the contractor was entitled by reason of having encountered differing site conditions.

Nevertheless, the appellant did offer in evidence numerous photographs showing that it had encountered rock conditions in Tunnel No. 3 of the type on which its differing site conditions claim is based. With respect to such photographs and in other areas, Dr. Heuer gave extensive and detailed testimony in support of the differing site conditions claim. In regard to Dr. Heuer's testimony concerning the conditions actually encountered in Tunnel No. 3, the Government offered no countervailing evidence. The appellant was also materially assisted in the proof of its case, particularly in the area of quantum, by the geologic mappings made by the Bureau's project geologist (AX 87), and to some extent by the failure of the Government to controvert what the large contractor drawings pertaining to Tunnel No. 3 showed with respect to the various surveys the Bureau had made of the invert.

In addition, we have noted the inexplicable failure of Mr. Logan to proceed with a serious investigation of the differing site conditions claim and the apparent mind set of the contracting officer against addressing seriously the question of whether the contractor had encountered differing site conditions in the course of constructing the tunnels even to the extent of denying facts in his possession or with which he is charged with knowledge. While there are a number of difficult questions in this case, the material facts bearing upon the conditions encountered in Tunnel No. 3 are for the most part undisputed, as is evidenced by the Government's failure to controvert the factual evidence offered by the appellant in this area at the hearing.

The Board has previously noted, however, the contractor's failure to segregate cost and the problem presented in attempting to determine the extent to which the additional costs claimed to have resulted from the differing site conditions can properly be attributed to that cause and not to other causes. Here the problem is compounded by the marked tendency the contractor has shown to attribute to the differing site conditions all delays to contract performance irrespective of their origin and its failure to adhere to measures in the course of performing the contract either recognized as necessary or desirable in its bid estimate or when submitting its rock support program to the Bureau for approval.

January 15, 1981

In Part III A of this opinion, we have discussed at length various ways in which performance of the contract was seriously delayed and costs greatly increased by causes which cannot be attributed to the differing site conditions the contractor encountered in Tunnel No. 3. In summary, these causes of delay or increased costs include the following: (i) delays for which, insofar as increased costs are concerned, the contractor is responsible without regard to fault (*e.g.*, strikes and other forms of labor unrest (wildcat strikes)); maintenance and repair of equipment, as was the case with respect to most of the mole downtime; (ii) difficulties which should have been accepted as a normal cost of doing business where, as here, the contractor chose a prototype hard rock mole to bore tunnels in relatively weak ground (*e.g.*, rock failure attributable to the pressure from the grippers; delays incident to encountering soft invert); (iii) rock failures that should have been and were anticipated (*e.g.*, failures to bedding planes; failures due solely to action of water); (iv) impediments to contract performance resulting from protracted delays by the contractor in implementing its own plans (*e.g.*, failure to provide partial protective shield over mole for 10 months after the Bureau was notified that such action was contemplated; failure to secure equipment required for applying protective coatings of shotcrete to surfaces of Tunnel No. 3 until after major fallouts in the tunnel had occurred in mid-July of 1971, even though

the bid submitted in September of 1970 included an allowance for such protective coatings; and (v) difficulties which should have been anticipated in coping with rock failures in local areas of the tunnels where the existing patterns for the use of rockbolts would probably prove to be ineffective without regard to the problems related to the differing site conditions which could not have been anticipated.

On the basis of the record before us, it is not possible to determine with mathematical precision the extent to which the differing site conditions encountered in Tunnel No. 3 delayed contract performance or increased the costs thereof; nor can any such determination be made with respect to the various factors enumerated above which we find, however, did contribute very substantially to the delayed performance and increased costs involved in performing the contract. Based upon our review of the entire record, as well as our findings made with respect thereto and the inferences drawn therefrom, and weighing the evidence present in the case as best we can, the Board finds and determines that the equitable adjustment to which the contractor is entitled by reason of encountering differing site conditions in Tunnel No. 3 is in the amount of \$1,500,000.

Summary

1. The Board finds the appellant to have encountered differing site conditions in Tunnel No. 3 and further finds that by reason thereof the appellant is entitled to an equitable

adjustment of the contract price in the amount of \$1,500,000.

2. The Board finds that no differing site conditions were encountered in Tunnel No. 3A and consequently denies the claim asserted by the appellant in connection therewith calculated to be in the amount of \$597,862 ("Tunnel Excavation"—\$307,352; "Place Arch Concrete"—\$290,510).

3. The appeal is otherwise denied.

WILLIAM F. MCGRAW

Chief Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD

Administrative Judge

RUSSELL C. LYNCH

Administrative Judge

APPENDIX

Contract No. 14-06-D-7054

Specifications No. DC-6849

IBCA-1068-4-75

GENERAL PROVISIONS

(Construction Contract)

4. DIFFERING SITE CONDITIONS

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do

materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

TUNNEL CONSTRUCTION

50. CONSTRUCTION OF TUNNELS, GENERAL

Construction of tunnels as used in these specifications include the excavation by tunneling methods, supporting the tunnels, placing of concrete lining, and other related work for the tunnel sections between Stations 721+81.33 and 874+29.90 and between Stations 985+32.33 and 1018+44.67, including the closed transitions and reinforced portal sections at the inlet and outlet ends of the tunnels.

Construction of tunnels does not include open-cut excavation, backfill, or compacting backfill within the above stations.

The location of the tunnel portals may be moved, at the direction of the contracting officer, to accommodate the conditions encountered during excavation operations. If the tunnel portals are moved all stations or elevations of portal structures and limits of tunnel construction will be changed accordingly.

The tunnels shall be supported where conditions encountered are such as to require support. Approved types of support are shown on the drawings.

Where conditions in the tunnels are suitable for rockbolt supports the contracting officer will approve the use thereof. Rockbolts shall be furnished and installed in accordance with the provisions of Paragraph 58 and payment therefor will be made at fixed unit prices as prescribed therein. No payment will be made for rockbolts used in conjunction with supported sections described below in this paragraph.

Where the ground conditions in the tunnels are such that the use of supports is required, the contractor may at his option use either shotcrete support or structural-steel supports or an approved combination thereof, or steel reinforcement sheets and shotcrete support. Regardless of whether shotcrete support or structural-steel supports or an approved combination thereof, or steel reinforcement sheets and shotcrete support is used, payment will be made for supporting the tunnels on the linear-foot basis for the actual lengths of the tunnels supported as approved by the contracting officer. Reaches of the tunnels with approved structural-steel supports placed at 6-foot centers or less will be considered for payment purposes as supported reaches of the tunnels. Payment for furnishing and installing tunnel support system will be made at the unit prices per linear foot bid therefor in the schedules which prices shall include the costs of furnishing all materials and placing shotcrete for tunnel support, the costs of furnishing all materials and placing structural-steel supports, or the costs of a combination shotcrete and structural-steel supports, or the cost of placing steel reinforcement sheets and shotcrete support.

Where shotcrete or steel reinforcement sheets are used for tunnel support, measurement, for payment, of furnishing and installing tunnel support system will be made for the actual length of tunnel supported with shotcrete or steel reinforcement sheets. Where structural-steel supports are used, measurement, for pay-

ment, of furnishing and installing tunnel support system in each reach of supported tunnel will be the distance between end supports plus 4 feet.

Shotcrete support shall be in accordance with Paragraph 55. Structural-steel tunnel supports shall be in accordance with Paragraph 56. Steel reinforcement sheets shall be in accordance with Paragraph 56A.

Nothing contained in these specifications shall prevent the contractor, at his own expense, from erecting such amounts of temporary supports as he may consider necessary, or from using more rock support bolts, more or heavier structural-steel supports, or greater thicknesses of shotcrete for support than the minimum required structural-steel sections of minimum thickness of shotcrete support. Nothing in these specifications shall be construed to relieve the contractor from sole responsibility for the safety of the tunnels or from liability for injuries to or deaths of persons or damage to property.

Under Schedule Nos. 1 and 1A the tunnels are to be excavated by drilling and blasting methods and constructed to the requirements of the horseshoe sections as shown on Drawing Nos. 12 (809-D-194) and 13 (809-D-227).

Under Schedule Nos. 2 and 2A the tunnels are to be constructed to the requirements of the machine-bored tunnel sections as shown on Drawing No. 11 (809-D-330).

Waterstops at each end of the tunnels shall be furnished and placed in accordance with Subparagraph 97b. and payment therefor will be made under either Schedule Nos. 1 or 2 and either Schedule Nos. 1A or 2A.

The piezometer installation in Tunnel No. 3 shall be installed in accordance with the drawings and Paragraph 65 and payment therefor will be made under Schedule No. 3 as therein provided.

Government testing indicates that many of the sandstones, shales and siltstones to be excavated will deteriorate

or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three. The contractor shall be responsible for providing a clean, undisturbed surface for placement of the lining. He may accomplish this by applying protective coatings under Paragraph 54, installing subinvert tunnel protection in accordance with Paragraph 60, by dewatering in accordance with Paragraph 51, or by removing any deteriorated or disintegrated material back to clean, undisturbed surfaces in accordance with Paragraph 59. If protective coatings or subinvert concrete is not installed, removal of substantial amounts of deteriorated or disintegrated materials is expected.

No direct payment will be made for protective coatings placed in the tunnels, and the costs thereof shall be included in the unit prices bid in the schedules for other items of work. If the contractor elects not to apply protective coatings or subinvert concrete on these surfaces the following provisions shall apply:

a. Immediately before placing concrete in the tunnel lining all loose disintegrated rock shall be removed to clean, undisturbed surfaces at no additional cost to the Government.

b. No payment will be made for any volumes of tunnel excavation or concrete lining greater than those shown in the tabulations on Drawings No. 12 (809-D-194) and No. 11 (809-D-330) regardless of whether or not the removal of loose and disintegrated material is outside the "B" lines.

Where protective coating of the excavated surfaces is to be applied the contractor may use the material specified for "shotcrete for tunnel supports" in lieu of the material specified for "shotcrete for protective coatings": Provided, That no direct payment will be made therefor and the costs thereof shall be included in the unit prices bid in the schedule for other items of work as prescribed in Subparagraph 54e.

SELECTION OF THE PROPER LEGAL INSTRUMENT (CONTRACT, GRANT OR COOPERATIVE AGREEMENT) UNDER FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 (P.L. 95-224) TO BE USED IN FUNDING CONSTRUCTION OF RECREATION FACILITIES AUTHORIZED UNDER THE FEDERAL WATER PROJECT RECREATION ACT OF 1965 (P.L. 89-72)

M-36931

January 19, 1981

Federal Grant and Cooperative Agreement Act of 1977: Use of a Contract

Under sec. 4 of the Federal Grant and Cooperative Agreement Act, 41 U.S.C. 501 (1976), a contract would not be used to transfer funds from a bureau to a state for the purpose of constructing recreational facilities on Government owned land when the transaction is accompanied by a long term lease of the land to the State because the principal purpose of the relationship is for the benefit of the state and not "for the direct benefit or use of the Federal Government."

Federal Grant and Cooperative Agreement Act of 1977: Selection of instrument

Secs. 5 and 6 of the Federal Grant and Cooperative Agreement Act require an agency to use a grant or cooperative agreement and not a contract whenever, as in the instant matter, the principal purpose of the relationship between the agency and the state is the transfer of money, property or services or anything of value to a state or local government or other recipient to accomplish a public purpose of support or stimulation authorized by a Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for direct benefit or use of the Federal Government.

or disintegrate rapidly when exposed to air or water or when stress relieved or a combination of the three. The contractor shall be responsible for providing a clean, undisturbed surface for placement of the lining. He may accomplish this by applying protective coatings under Paragraph 54, installing subinvert tunnel protection in accordance with Paragraph 60, by dewatering in accordance with Paragraph 51, or by removing any deteriorated or disintegrated material back to clean, undisturbed surfaces in accordance with Paragraph 59. If protective coatings or subinvert concrete is not installed, removal of substantial amounts of deteriorated or disintegrated materials is expected.

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(CONTRACT, GRANT OR COOPERATIVE AGREEMENT) UNDER FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 (P.L. 95-224) TO BE USED IN FUNDING CONSTRUCTION OF RECREATION FACILITIES AUTHORIZED UNDER THE FEDERAL WATER PROJECT RECREATION ACT OF 1965

(P.L. 89-72)

January 19, 1981

Federal Grant and Cooperative Agreement Act of 1977: Distinction between Cooperative Agreements and Grants

If substantial involvement is anticipated between the agency and the state a cooperative agreement is to be used to accomplish the public purpose of support. If no substantial involvement is anticipated a grant agreement should be executed to accomplish the public purpose of support or stimulation authorized by Federal statute. Because no substantial involvement is anticipated in the instant matter, a grant agreement would be the proper vehicle for accomplishing the public purpose of support.

To: Assistant Secretary, Land and Water Resources

FROM: Solicitor

SUBJECT: Selection of the Proper Legal Instrument (Contract, Grant or Cooperative Agreement) under Federal Grant and Cooperative Agreement Act of 1977 (P.L. 95-224) to be used in Funding Construction of Recreation Facilities authorized under the Federal Water Project Recreation Act of 1965 (P.L. 89-72)

SUMMARY

The Regional Solicitor, Rocky Mountain Region, has requested us to issue an opinion to clarify some of the questions that have been raised regarding the application of the Federal Grant and Cooperative Agreement Act of 1977¹ (herein-

after, "the Act") to funding construction under the Federal Water Project Recreation Act of July 9, 1965² (hereinafter P.L. 89-72). The Act states that it is "An Act to distinguish Federal grant and cooperative agreement relationships from Federal procurement relationships, and for other purposes." The Senate Report³ which is a part of the legislative history of the Act states that "the Federal Grant and Cooperative Agreement Act of 1976 is an initial step to eliminate ineffectiveness and waste resulting from confusion over the definition and understanding of legal instruments used to carry out transactions and reflect basic relationships between the Federal Government and non-Federal entities."

The purpose of this opinion is to provide guidance to the Water and Power Resources Service in assisting it to make the proper selection of the legal instrument to be used in funding construction under P.L. 89-72. It is also our desire to discuss and interpret the Federal Grant and Cooperative Agreement Act of 1977 in a general manner so that the other bureaus and offices will have some guidance in making the proper policy determinations for selection of

² P.L. 89-72, 79 Stat. 213, 16 U.S.C. 4601-12, *et seq.*

³ Senate Report No. 95-449, p. 2, Sept. 22, 1977, 95th Cong., 1st Sess.

¹ P.L. 95-224, Feb. 3, 1978, 92 Stat. 3, 41 U.S.C. 501 *et seq.*

the appropriate legal instrument to carry out their programs.

To summarize what follows, it is my opinion that funding to the States for construction of recreational facilities at water projects is essentially an assistance type transaction with no substantial involvement between the executive agency acting for the Government and the States. Consequently, the use of a grant agreement would be appropriate in the instant matter.

II. Background

A. Federal Water Project Recreation Act of July 9, 1965: Generally—

P.L. 89-72 is the current authority under which the Water and Power Resource Service arranges for development and administration of outdoor recreation and fish and wildlife enhancement facilities. In order to encourage non-federal public bodies to administer, operate, maintain and replace such facilities, the Federal agency having administrative jurisdiction may bear 50% of the separable cost of a project allocated to recreation facilities and 75% of the separable cost of a project allocated to fish and wildlife enhancement facilities. Such facilities and appropriate project lands then may be leased to the non-federal public body which agrees to administer them.

B. Federal Grant and Cooperative Agreement Act of 1977: Generally—

Sec. 4 of the Act requires each federal agency to use a procurement

contract as the legal instrument for the relationship between the agency and a State whenever the *principal purpose* of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the *direct benefit or use of the Federal Government*.

Secs. 5 and 6 of the Act require the agency to use a grant or cooperative agreement whenever the *principal purpose* of the relationship between the agency and a State is the transfer of money, property, or services or anything of value to the State to *accomplish a public purpose of support or stimulation authorized by a federal statute*, rather than acquisition by purchase, lease or barter, of property or services for direct benefit or use of the Federal Government.

The Act distinguishes between cooperative agreements and grants by requiring a determination of whether or not substantial involvement is anticipated between the executive agency and the State. If substantial involvement is anticipated, a cooperative agreement is to be used to accomplish the public purpose of support. If no substantial involvement is anticipated, then a grant agreement should be executed to accomplish the public purpose of support or stimulation authorized by the federal statute.⁴

The Act itself does *not* authorize any federal agency to execute or participate in any procurement,

⁴ For illustration of substantial involvement, see OMB interpretation of the Act contained at 43 FR 36863.

(CONTRACT, GRANT OR COOPERATIVE AGREEMENT) UNDER FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977 (P.L. 95-224) TO BE USED IN FUNDING CONSTRUCTION OF RECREATION FACILITIES AUTHORIZED UNDER THE FEDERAL WATER PROJECT RECREATION ACT OF 1965

(P.L. 89-72)

January 19, 1981

grant or cooperate agreement. That authority must be found in some other source. But sec. 7(a) of the Act does provide that ". . . each executive agency authorized by law to enter into contracts, grant or cooperative agreements, or similar arrangements is authorized and directed to enter into and use types of contracts, grant agreements, or cooperative agreements as required by this Act."

The determinations to enter into a procurement contract, cooperative agreement or grant are policy determinations to be made by the executive agency involved. Federal agencies have the flexibility to determine whether a particular transaction or class of transactions is procurement or assistance and, if assistance, whether it is of the nature suitable for a grant or a cooperative agreement. The agency's primary mission should influence its determination of whether the transaction is procurement or assistance, and the extent of its involvement. The classification of the transaction will become a public statement for public and Congressional review of how the agency views its missions, its responsibilities, and its relationship with the non-federal public body.

III. Interpretation of the Federal Grant and Cooperative Agreement Act of 1977 and Its Applica-

tion to the Federal Water Project Recreation Act of July 9, 1965.

The Water and Power Resources Service and individual States, or subordinate public bodies of States, from time to time contemplate construction of recreational and fish and wildlife enhancement facilities at federal water projects. The non-federal entities will provide a portion of the separable project costs (a minimum of 50% of recreational facilities and a minimum of 25% of fish and wildlife enhancement facilities), and all of the costs of operation, maintenance and replacement of those facilities after they are constructed. Those facilities and the project land on which they are constructed may be leased by the federal agency to a non-federal public body for the period during which they are administered by it.

With that type of arrangement, the principal purpose of the instrument is not the acquisition by purchase, lease, or barter of property or services for the *direct benefit or use of the Federal Government*. Consequently, a procurement contract would not be appropriate. The principal purpose of such a transaction is the allocation of value to the non-federal entity to accomplish a *public purpose of support* authorized by federal statute, rather than acquisition by purchase, lease or barter of property or services for the

direct benefit or use of the Federal Government. Because there is to be no substantial involvement of the federal agency in the administration of those facilities, a grant rather than a cooperative agreement would be the appropriate vehicle for accomplishing the public purpose of support.

The Office of Management and Budget has stated that:

Consistent with the purposes of Pub. L. 95-224, agencies are encouraged to maximize competition among all types of recipients in the award of grants or cooperative agreements, in consonance with program purposes.⁵

This policy would not affect those programs wherein Congress has authorized the agencies to enter into cooperative agreements or grants with states. Thus, competition would not be required in the instant matter.

Any additional inquires relative to this decision or related problems should be addressed to the Associate Solicitor, Division of General Law.

CLYDE MARTZ,
Solicitor.

BRYNER WOOD

52 IBLA 156

Decided *January 21, 1981*

Appeal from decision of the Utah State Office, Bureau of Land Management,

⁵ *Ibid.*

dismissing protest against consummation of State exchange. U-13925.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Exchanges—State Exchanges: Effect of Application

State exchange applications pending on Oct. 21, 1976, may be processed under sec. 8(c) of the Taylor Grazing Act, 43 U.S.C. § 315g(c) (1970), only if the state had complied with all the requirements necessary to vest rights to the exchange in the state; all other applications must be processed under sec. 206 of the Federal Land Policy and Management Act of 1976.

2. Federal Land Policy and Management Act of 1976: Exchanges—State Exchanges: Generally

A protest against approval of a state exchange application is properly dismissed where the exchange is shown to be in the public interest under sec. 206 of the Federal Land Policy and Management Act of 1976, and it is immaterial that the protestants may be permittees or licensees of the selected lands whose grazing privileges would have been lost upon completion of the exchange, in that neither a licensee nor a permittee has a vested right in the land covered by the license or permit and such land is available for selection by a state.

APPEARANCES: Bryner Wood, *pro se.*

OPINION BY
ADMINISTRATIVE JUDGE
BURSKI

INTERIOR BOARD OF
LAND APPEALS

Bryner Wood, hereinafter appellant, has appealed from a decision of the Utah State Office, Bureau of

Land Management (BLM), dismissing appellant's protest of a proposed state exchange.

On Feb. 11, 1971, the State of Utah filed application U-13925, under sec. 8 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1272 (1934), *as amended*, 43 U.S.C. § 315g (1970), 43 CFR Part 2210, to exchange certain lands described therein.¹

On Feb. 29, 1980, appellant, through his attorney, filed a protest against the approval of the exchange stating:

1. The Protestant is the owner of a Bureau of Land Management Grazing Permit granted by the Bureau of Land Management, which permit is of long standing, having previously been given to the Protestant's parents. The permit is currently active and in use and has been used actively for several years.

2. That the Protestant is dependent in part for his livelihood [*sic*] on the continued use of said grazing permit.

3. That the Protestant and his predecessors in interest have held and/or used said grazing permit for more than thirty years.

4. That it is unreasonable and unfair to terminate the Protestant's continued right to and use of said grazing permit.

By a decision dated Mar. 25, 1980, BLM dismissed appellant's protest on the grounds that field reports showed that the subject lands were primarily valuable for occupancy or agriculture, and also, that the loss

of the lands would not interfere with the administration or value of the remaining lands in the district for grazing purposes.

[1] Sec. 8(c) of the Taylor Grazing Act, *as amended*, 43 U.S.C. § 315g(c) (1970), provided that the Secretary of the Interior shall proceed with an exchange, once any state has applied for it, "at the earliest practicable date and * * * [shall] cooperate fully with the State to that end." It has been held that the terms of sec. 8(c) are mandatory and that the Secretary must allow a proper state's application if the state otherwise meets the requirements of that section. *Donald L. Williams*, A-29033 (Dec. 13, 1962); *C O Bar Livestock Co.*, A-28498 (Sept. 18, 1961); *L. P. Chastain*, A-27101 (Apr. 27, 1955); *Joseph William Krall*, A-27029 (Feb. 4, 1955); *Clyde H. Ault*, A-27125 (Jan. 26, 1955).

There were, however, certain requirements which a state was obligated to meet before its rights could be deemed to have vested. If, as here, the selected lands were in a grazing district, no exchange was authorized "unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes." 43 U.S.C. § 315g(c) (1970). This, however, was not the

¹ All sec. 17, and W ½ sec. 20, T. 35 S., R. 17 W., Salt Lake meridian, Utah, containing 960 acres; in exchange for offered lands described as: S ½ SE ¼ sec. 9, S ½ SW ¼ sec. 10, W ½ W ½ sec. 15, all sec. 16, and E ½ NE ¼ sec. 21, T. 33 S., R. 18 W., Salt Lake meridian, Utah, containing 1,040 acres.

only requirement. The regulations, specifically 43 CFR Subpart 2203, required, *inter alia*, that a state submit a properly executed deed of conveyance of the offered property, and certificates showing that the offered property had not been encumbered, executed by the proper state officer, and the recorder of deeds. It was only upon the completion of *all of these steps* that approval of the state exchange became ministerial.

Thus, in *State of California*, 60 I.D. 322 (1949), *supplemented*, 60 I.D. 428 (1950), Solicitor White expressly held that an exchange application which had been filed on Feb. 19, 1942, was properly rejected on the basis of a reclamation withdrawal which did not occur until Nov. 6, 1947, precisely because the State had not completed the application process. The deficiencies in that case were failure to publish notice of the application, failure to execute a deed of conveyance of the offered property, and failure to provide certificates of nonencumbrance. The decision expressly noted that

as the State of California had not, prior to November 6, 1947, fully complied with all the requirements prescribed by section 8 of the Taylor Grazing Act, as amended, and the supplementary Departmental regulations, the State did not have on that date any vested rights in the selected lands, so as to prevent the withdrawal order of November 6, 1947, from being effective."

Id. at 328.

The question of when the state's right to an exchange vests is of some real import, since sec. 705(a) of the

Federal Land Policy and Management Act of 1976 (FLPMA) expressly repealed sec. 8(c) of the Taylor Grazing Act. In *Junior L. Dennis*, 40 IBLA 12 (1979), this Board held that the passage of FLPMA deprived the Department of authority to accept donations of land under the Act of July 14, 1960, 43 U.S.C. § 1364 (1970), which had also been repealed by FLPMA. In that case, two citizens who sought to donate land to the United States had signed and delivered a deed to the United States, which was duly recorded prior to the passage of FLPMA. Nevertheless, the Board, noting the repeal of the Act, held that a donation under the Act of July 14, 1960, *supra*, could only be consummated by a formal acceptance of the gift by the State Director, which had not occurred until June 28, 1978. The Board rejected the contention that the acceptance by the State Director could relate back prior to the repeal of FLPMA, noting that

utilization of the legal fiction of relation back would be justified if either the Department had the authority, subsequent to the enactment of FLPMA, to accept donations of land under the Act of July 14, 1960, which it did not, or, alternatively, if the Department's actions were ministerial, which they were not.

Id. at 16. Inasmuch as it is clear that authority to allow state exchanges under sec. 8(c) of the Taylor Grazing Act did not survive FLPMA, the only possible way in which allowance under sec. 8(c) can be justified requires a finding that

the actions of the Department in approving the same were ministerial.

The critical question, then, is whether the State's right to the exchange had vested as of Oct. 21, 1976. The case file discloses that much of the field work was not completed until 1979, and that as of Oct. 21, 1976, there had been no publication of the application, no deed of conveyance had been executed, and there had been no certificate of non-encumbrance provided. Thus, under *State of California, supra*, it is clear that the rights of the State had not vested as of the critical date and the application must therefore be processed under the aegis of sec. 206 of FLPMA.²

Sec. 206 of FLPMA, unlike sec. 8(c) of the Taylor Grazing Act, does not require approval of all state exchanges. Under sec. 8(c) of the Taylor Grazing Act, *supra*, allowance of a state exchange was not dependent upon a determination by the Secretary of the Interior that the exchange was in the public in-

terest. See *Solicitor's Opinion*, M-36178, 61 I.D. 270 (1954). Sec. 206 of FLPMA, on the other hand, clearly provides that an exchange may be approved "where the Secretary concerned determines that the public interest will be well served." See sec. 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1976). Thus, under sec. 206, a finding that the exchange is in the public interest is a prerequisite of its allowance. The record is replete with evidence of the public benefits which would flow from this exchange. Indeed, the State Office made a finding that it would benefit the public interest, even though it felt that no such finding was required. We hold that the requirements of sec. 206 of FLPMA have clearly been met.

[2] One Robert Holt, a stranger to the record, disputes appellant's contention that he (appellant) is the owner of the grazing permit covering the selected lands which are the subject of this appeal. The dispute is of little moment since it has been previously determined that even where protestants held grazing licenses or permits from the BLM, this fact would not alter the situation since a licensee or permittee does not have a vested right in the land covered by the license or permit and such land is available for selection by a state. *State of Utah*, A-25710 (Jan. 30, 1950).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office,

² We note that Organic Act Directive (OAD) 77-17 supports the processing of the instant application under sec. 8(c) of the Taylor Grazing Act. The rationale of that directive, however, is premised on a concept of relation back to the date of the application. Such a concept might have vitality when the sole remaining actions required are ministerial, but as noted above, rights to the State vest, and thus subsequent action becomes ministerial, only upon completion of various regulatory procedures which had not been accomplished herein. In any event, OAD's while providing guidance to BLM on many matters, are binding neither on this Board nor on the general public. Cf. *Milton D. Feinberg*, 37 IBLA 39, 85 I.D. 380 (1978) sustained (*On Reconsideration*), 40 IBLA 222, 86 I.D. 234 (1979).

Regulations implementing sec. 206 were recently promulgated on Jan. 6, 1981. See 46 FR 1634 (Jan. 6, 1981).

Bureau of Land Management, is affirmed as modified and the case files are remanded for further action consistent with the views expressed herein.

JAMES L. BURSKI
Administrative Judge

We concur:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

**ESTATE OF GLENN F. COY
RESOURCE SERVICE CO., INC.**

52 IBLA 182

Decided January 26, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, canceling oil and gas lease W-56373.

Affirmed in part, vacated in part, and remanded.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: First-Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds

of any sale of the lease or any interest therein, and any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b), and the offeror is required to disclose this interest at the time of filing under 43 CFR 3102.7.

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: Cancellation

The Department has authority to cancel leases administratively where the lease was granted pursuant to an underlying offer which violated the Departmental regulation requiring an offeror to disclose, at the time of filing, the existence of all parties holding interests in the offer.

3. Administrative Procedure: Generally—Appeals—Rules of Practice: Generally—Rules of Practice: Appeals: Generally—Words and Phrases

"Service." Where BLM sends a copy of its decision to an adversely affected party at his address of record on Sept. 21; where additional information containing the party's more recent address is filed with BLM on Oct. 5; and where BLM receives the mailed copy back as undeliverable on Oct. 16 but does not mail another copy to the more recent address, BLM has not mailed a copy to the party's last address of record, and there is no "service" under 43 CFR 1810.2. Where BLM has never served a copy of its decision on an adversely affected party, the time for this party to appeal has never commenced, and the decision is not effective *per* 43 CFR 4.21(a).

4. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Assignments or Transfers

Where no application for BLM's approval of a transfer of any interest in an offer and lease (if issued) has ever been filed,

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BLM should issue the lease, if appropriate, to the offeror only.

5. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Assignments or Transfers—Regulations: Generally

The regulations controlling transfer of oil and gas interests were amended on June 16, 1980, and the amended regulations govern where the interest holder has not sought approval of a transfer of his interest prior to this date. Under these amended regulations, BLM cannot consider any application for approval of a transfer of a lease interest until after the lease is issued.

APPEARANCES: Thomas W. Ehrmann, Esq., et al. for the Estate of Glenn F. Coy and Resource Service Co., Inc.

*OPINION BY
ADMINISTRATIVE
JUDGE STUEBING*

*INTERIOR BOARD OF LAND
APPEALS*

Glenn F. Coy, now deceased, filed a simultaneous noncompetitive oil and gas lease drawing entry card offer (DEC) on parcel WY 192 in the July 1976 drawing in the Wyoming State Office, Bureau of Land Management (BLM). This DEC was drawn with first priority, and, effective Nov. 1, 1976, BLM issued oil and gas lease W 56373 to Coy.

On Sept. 21, 1979, BLM rejected the DEC's of Gene Paul James and G. R. Strange, which had been drawn with second and third priorities, respectively, in the drawing for this parcel. The recited basis for doing so was that the lease had

been issued to Coy, the first qualified offeror. The decision rejecting James' DEC was sent to the address on his offer card, which probably was his leasing service's address.

On Oct. 5, 1979, Geosearch, Inc. (Geosearch), filed a protest against the continued validity of Coy's offer. Geosearch alleged that Fred Engle, d.b.a. Resource Service Co., Inc. (RSC), had had an interest in Coy's offer at the time it was filed, and that he had not disclosed this interest as required by 43 CFR 3102.7.

Geosearch based its standing to protest on its asserted interest in the second-drawn offer of Gene Paul James, stemming from an agreement dated Aug. 1, 1979, purportedly assigning it such an interest. Significantly, Geosearch's protest papers, filed on October 5, contain a copy of this agreement, which bears a different address for James than that on his card, to wit: 2420 Poloma Vista, Las Vegas, Nevada 89121. Moreover, a telephone number was included.

On Oct. 16, 1979, BLM received back the copy of the decision rejecting James' second-drawn offer which it had mailed to him earlier. The Postal service had marked it "Returned to sender. Addressee unknown." BLM did not attempt to remail this decision to James' address as indicated on his agreement with Geosearch.

BLM, pursuant to Geosearch's protest, notified Coy on Oct. 16, 1979, that it required further evi-

dence concerning any agreement between him and RSC. On Nov. 13, 1979, Coy responded, enclosing a copy of this agreement. On July 17, 1980, BLM issued its decision canceling Coy's lease because this agreement gave Engle an interest in Coy's offer for this parcel, and because Coy had not disclosed this interest when he filed his offer, as required by 43 CFR 3102.7. BLM also held that it need not consider James' second-drawn offer, as it had rejected this offer on Sept. 21, 1979, and he had not appealed this decision. As Geosearch took its asserted interest from James, BLM held, it had no cognizable interest in the matter. BLM concluded that the lands in the canceled lease would be relisted in the simultaneous system.

Coy and RSC filed a timely appeal of BLM's decision insofar as it canceled Coy's lease. Neither James nor Geosearch appealed, but there is no indication in the record that they were ever served with a copy of BLM's decision.¹

[1] The agreement between Coy and Fred Engle is the familiar service agreement which we have considered numerous times. *D. R. Weedon, Jr.*, 51 IBLA 378 (1980); *Donald W. Coyer (on Judicial Remand)*, 50 IBLA 306 (1980); *Frederick W. Lowey*, 40 IBLA 381 (1979); *Alfred L. Easterday*, 34 IBLA 195 (1978); *Sidney H. Schreter*, 32 IBLA 148 (1977); *Lola I. Doe*,

31 IBLA 394 (1977). We have also considered similar arrangements between other leasing services and their clients, *Gertrude Galauner*, 37 IBLA 266 (1978); *Marty E. Siwt*, 36 IBLA 374 (1978). This agreement gave Engle the exclusive right to negotiate for sublease, assignment or sale of any lease rights obtained by Coy, and an entitlement to a specific share of the proceeds of any sale and of any retained overriding royalties, whether or not arranged by Engle, for 5 years. This enforceable right was an "interest" as defined by 43 CFR 3100.0-5(b) and existed at the time Coy filed his offer, so that he was required to disclose it under 43 CFR 3102.7. *Ibid.* As noted in BLM's answer to appellant's statement of reasons, "The very fact that RSC believes that it has an interest in the Coy lease sufficient to give it standing to appeal the BLM decision admits as much."

[2] Cancellation is mandated by 43 CFR 3102.7 here. BLM has the authority to cancel a lease administratively where it discovers, subsequent to issuance, that the lease was granted in violation of regulations governing applications to lease. *Boesche v. Udall*, 373 U.S. 472 (1963). Specifically, it is proper for BLM to cancel a lease where it discovers that there was an undisclosed interest holder at the time the offer was filed. *D. R. Weedon, Jr., supra*. We have also held it proper to cancel leases where other defects in the offer are discovered after issuance. *Robert A. Chenoweth*, 38 IBLA 285

¹ Although Geosearch is named as a party to the decision, the record contains only one return receipt card evincing service, and it is from BSC.

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(1978) (insufficient filing fee); *Norman Monath*, 32 IBLA 392 (1977) (failure to pay advance annual rental); *W. H. Bird*, 72 I.D. 287 (1965) (offer card filed pursuant to improper scheme giving increased chance of success in the drawing); and *B. F. Sandoval, Jr.*, A-29975 (June 12, 1965), (failure to submit agency statements with offer card). In *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), the Court held that the Secretary must cancel an oil and gas lease issued in violation of a regulation of the Department.

Appellants Coy and RSC² argue that BLM may not cancel this lease by retrospectively applying the rule in *Lola I. Doe, supra*, as this offer was filed prior to the issuance of this decision. Appellants contend that the rule in *Doe* makes a "great leap forward" from prior Departmental regulation and adjudications as to what constitutes an "interest" under 43 CFR 3100.0-5(b) and 3102.7. Accordingly, they argue, the rule in *Doe* should not be applied retrospectively, citing *Safarik v. Udall*, 304 F.2d 944 (D.C. Cir. 1962); *Runnells v. Andrus*, 484 F. Supp. 1234 (D. Utah 1980); *Gertrude H. D'Amico*, 39 IBLA 68 (1979); and *A. M. Shaffer*, 73 I.D. 293 (1966). We conclude that these cases are of no comfort to appel-

lants, as the circumstances here are materially different.

It is true that *Doe* was the first case to come before the Board in which BLM had discovered that a leasing service's agreement with its clients gave it an enforceable right to share in the proceeds of its clients' offers. However, the rule in *Doe* was not, as appellants suggest, a departure from any well-established Departmental principles, so that there is no basis for limiting its application to future cases. *Gertrude D'Amico, supra*. To the contrary, it has consistently been Departmental policy that anyone who, at the time an oil and gas lease offer is filed, has a legally enforceable entitlement to share in the proceeds from any sale of the lease must disclose this interest at this time, or the offer is void. The reason for this rule is to prevent unqualified persons from avoiding disqualification by using "straw men" to act for them so as to hide their identities and the fact of their disqualification. Disqualifying factors which a person might attempt to hide in this manner include lack of citizenship, status as a Departmental employee (*Hill v. Williams*, 59 I.D. 370 (1947)), holding maximum acreage of oil and gas leases in a particular state (*John H. Trigg*, 60 I.D. 166 (1948)), or having violated the rule against multiple filings by making another competing offer for the same parcel. Moreover, the Government is entitled to know the identities of persons who have acquired or who

² RSC's standing to participate in this appeal apparently flows from the interest created by the Feb. 27, 1976, agreement with Coy, as it has not alleged that there has been any other subsequent agreement giving it any interest, or that there is any other basis for appearing.

seek to acquire interests in Federally owned lands and/or minerals. *W. H. Gilmore*, 41 IBLA 25, 30 (1979); *see H. J. Enevoldsen*, 44 IBLA 70, 86 I.D. 643 (1979).

The first statement of this policy came on July 23, 1926, 51 L.D. 504 (1926), concerning drawings for canceled oil and gas prospecting permits, which were the predominant vehicle for initiating leases at that time:

On June 3, 1926, in considering a protest filed as the result of a drawing held in accordance with Circular No. 929 (50 L. D. 387), upon the cancellation of an oil and gas prospecting permit the Department directed that—

Hereafter parties desiring to file applications for participation in drawings of this kind be required to allege that they are filing in their own interest and not in the interest of any other person or persons, association, or corporation; or to show clearly in whose interest if not in their own exclusive interest.

It must be stated in each application that the applicant files the same in good faith for his or its own benefit, and not directly or indirectly in whole or in part in behalf of any other person or persons, association, or corporation, or if made in the interest of any other person or persons, association, or corporation, a full disclosure thereof must be made, accompanied by a showing of the qualifications of all the interested parties. Any such application filed that does not meet the above requirements will not be allowed to participate in the drawings when held.

Any applicant who fails to disclose any and all interests other than his own which shall tend to give an advantage in the drawing, will forfeit any claim to a return or repayment of moneys tendered with his application and subject the permit, in the event that one is awarded to him, to cancellation for fraud. [Italics supplied.]

In 1946, the Department promulgated the first regulation requiring disclosure of all parties in interest to the offer. 43 CFR 192.43 (1946). The regulation was first adopted in its present form on Apr. 21, 1961, 26 FR 3422, first codified at 43 CFR 192.42(e)(3)(iii) (1961), providing as follows:

(e) Each offer, when first filed, shall be accompanied by:

* * * * *

(3)(iii) A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. All interested parties must furnish evidence of their qualifications to hold such lease interest.

This regulation is presently set out at 43 CFR 3102.7.

Moreover, on June 13, 1970, the Department promulgated a regulation defining an "interest" at 43 CFR 3100.0-5(b) as follows:

An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or

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pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.

The appellants argue that these regulations are unclear and cite the rule in *A. M. Shaffer, supra*,³ as a basis for excusing their noncompliance. We reject this argument. As we observed in *D. R. Weedon, Jr., supra*, no one who held or granted the exclusive right to participate in a precise share of any proceeds from the sale or assignment of the lease and from any proceeds derived from retained overriding royalties could possibly entertain any serious doubt that such a right constituted an "interest" within the context of 43 CFR 3100.0-5(b) and 3102.7. Nor could one doubt that long-standing Departmental policy and regulation required the disclosure of the existence of such an interest at the time the offer was filed. In fact, it is difficult to imagine a more demonstrable form of an "interest" than a written contract guaranteeing a person a share of the proceeds from any sale of the lease, plus a specific share of the proceeds accruing thereafter to overriding royalties retained by the client.

The other cases cited by appellants, *Runnells v. Andrus, supra*,

³ *A. M. Shaffer, supra*, involved a good-faith attempt by a filing agent to comply with the regulations. The agent, who had no interest in the offer, incorrectly complied with the regulation requiring disclosure of all interested parties and allowing 15 days to file an interest statement instead of complying with the slightly different agency-statement regulation requiring the filing agent to submit an agency statement with the offer. The Department held that the regulations did not clearly prohibit this procedure and declined to reject the offers.

and *Safarik v. Udall, supra*, involve situations where a party was following a procedure which had apparently been sanctioned previously by official Departmental decision, so that it was unfair to work a change in procedure without prior notice. The present case is materially different, as the Department had issued no decision condoning a failure to disclose a vested contractual right extant at the time of filing of the offer, or holding that a right such as that created by Engle's contract did not constitute an "interest."⁴ In the absence of such a decision, there was no reasonable basis for Engle and his clients to believe that this practice was beyond the scope of the regulations, which clearly provide otherwise.

BLM was unaware of the nature of the relationships between Engle and his clients until the protest against Doe's offer brought it to light in 1976. Until this time, no case had arisen in which there was an undisclosed interest created by contract between a leasing service and its clients. BLM and this Board

⁴ Previous to the filing of Coy's offer, the Department had considered two leasing service contracts and determined that they did not create enforceable interests which must be disclosed. In *John V. Steffens*, 74 I.D. 46 (1967); and *R. M. Barton* (5 cases), 9 IBLA 243 (1973), 9 IBLA 70 (1973), 7 IBLA 68 (1972), 5 IBLA 1 (1972), and 4 IBLA 229 (1972), it was held that no interest had vested in the leasing service because its entitlement to any lease proceeds was expressly at the client's option and because he was free not to exercise the option. This ruling was followed in *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977). In contrast, Engle's entitlement vested immediately on formation of his agreement with his clients.

each found that the contract created an undisclosed interest, reaching a result consistent with well-established Departmental policy. In these circumstances, it works no injustice to apply the result of this decision to this case, rather than prospectively. *Retail Wholesale and Department Store Union v. NLRB*, 466 F. 2d 380, 390 (D.C. Cir. 1972).

We note that this case does not present the question of the validity of a purported amendment and disclaimer of this interest by Engle. This offer was filed in July 1976, well before the filing of this amendment and disclaimer in January 1977. Thus, this document, even if legally effective, does not apply to Coy's offer, and references to this document in BLM's decision are inapt.

[3] We cannot affirm BLM's holding in its decision of July 17, 1980, that James' second-drawn offer need not be considered because it had been previously rejected by decision dated Sept. 21, 1979.⁵ BLM's decision rejecting James' offer has never become final, owing to BLM's failure to serve him with it.

"Service" of a decision may be made on a person either by delivering a copy to him or by sending the document by certified mail to his address of record in BLM. 43 CFR 1810.2. BLM did send a copy to James' only address of record on September 21, but this copy was returned on October 16 as undeliver-

able. However, in the interim, on October 5, Geosearch had filed its protest, which included a new address for James as of August 1979. BLM apparently did not notice this information.

The inclusion of this information in the protest was adequate to inform BLM of James' address of record. Where, as here, the question of whether a person's address of record is correct arises due to the return of mail as undeliverable, BLM should examine the case record thoroughly to see if it contains an updated address. By failing to send another copy of its September 21 decision to James at the address indicated in this protest, BLM failed to send a copy to his last address of record and so failed to serve him.

A person who wishes to appeal a decision adversely affecting him to this Board must do so within 30 days after he is served with the decision. 43 CFR 4.411(a). As James was never served, he may still file a notice of appeal of this decision. Furthermore, James' offer is still viable, as BLM's decision of Sept. 21, 1979, which rejected it has never become final because James may still file an appeal from this decision. 43 CFR 4.21(a); *Geosearch, Inc.*, 51 IBLA 59, 61 (1980).

Normally, we would remand to BLM to mail a copy of the September 21 decision to James' last address of record. However, BLM's subsequent decision canceling Coy's lease has eliminated the basis for the September 21 decision, i.e., that the issuance of the lease to a senior offeror justified rejection of the

⁵ We make this determination on our own initiative in the absence of participation by either James or Geosearch in view of the uncertainty as to whether these parties were served with copies of BLM's decision.

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second-drawn offer. Accordingly, on remand, BLM should vacate the decision of Sept. 21, 1979, and adjudicate James' offer in lieu of relisting this parcel.

[4] Finally, we note that Geosearch does not have a presently cognizable interest in James' offer.⁶ As we held in *D. R. Weedon, Jr.*, *supra* at 387, Geosearch has never applied to BLM for approval of a transfer of any interest in James' offer or lease (if issued) as described in 43 CFR 3106.3-4. While the protest filed on Oct. 5, 1978, does contain a copy of a private agreement between it and James, it is not on proper form, does not contain the required fee or transferee's statement, and does not request approval of such a transfer. 43 CFR 3106.2, 3106.3-4. In any event, BLM could not have approved of such a request, as, at the time the protest was filed, Geosearch had not established its qualifications to hold a lease (43 CFR 3106.1-2) or filed the required interest statement (43 CFR 3106.1-4). *See Newton Oil Co.*, A-30453 (Nov. 30, 1965).

Nothing in the record shows that Geosearch has subsequently submitted a proper application for approval of such an assignment. An assignment of whatever interest an oil and gas lease offeror may hold is ineffective until it is approved by BLM. *See William G. Beanland*, 21 IBLA 66 (1975); *Amoco Produc-*

tion Co., 16 IBLA 215 (1974). Thus, in the absence of an approved application, BLM may not issue this lease to anyone other than James, if his offer is found to be valid.

[5] The regulations governing transfers recently have been amended and now provide that no offer may be transferred or assigned prior to issuance of the lease. 43 CFR 3112.4-3 (1980).⁷ As Geosearch failed to seek approval of this transfer prior to June 16, 1980, the effective date of this change, it now falls under these provisions. Thus, BLM cannot consider an application for approval of a transfer until after the lease issues. Accordingly, BLM should consider the merits of James' offer and, if appropriate, issue the lease to him, and not in any part to Geosearch. Following issuance, BLM may consider an application for assignment of James' lease (if issued).⁸

Therefore, pursuant to the authority delegated to the Board of

⁷ This regulation provides as follows:

"No application, offer, lease or interest therein may be transferred or assigned prior to issuance of the lease as evidenced by the signing of the lease by the authorized officer on behalf of the United States as provided in § 3112.4-2 of this title. No agreement or option to transfer or assign such application, offer, lease or interest therein shall be made or given prior to the effective date of the lease or 60 days from the applicant's receipt of priority, whichever comes first. The existence of such an agreement or option shall result in disapproval of the subsequent assignment.

⁸ As the issue is not presented for resolution, we do not comment on whether BLM may properly exercise its discretion not to approve this assignment (if it is submitted for approval after issuance of the lease) because it was not submitted for approval within 90 days of execution of the assignment by the parties. 43 CFR 3106.3-1.

⁶ Again, we make this determination on our own initiative in the absence of participation by Geosearch. It is unnecessary to delay our ruling on the question of Geosearch's present interests in order to allow it to appear, as Geosearch has appeared and argued this identical question in *D. R. Weedon, Jr.*, *supra*.

Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, vacated in part, and remanded.

EDWARD W. STUEBING

Administrative Judge

We concur:

BERNARD V. PARRETTE

Chief Administrative Judge

ANNE POINDEXTER LEWIS

Administrative Judge

MARY PATRICIA ANNE
NEWMAN GIBSON ET AL

52 IBLA 216

Decided *January 30, 1981*

Appeals from decisions of the Nevada State Office, Bureau of Land Management, rejecting Indian allotment applications. N-25501, etc.

Affirmed.

1. Act of February 8, 1887—Indian Allotments on Public Domain: Lands Subject to—Patents of Public Lands: Effect

The effect of the issuance of a patent is to transfer legal title from the United States and to remove the land from jurisdiction of the Department of Interior. Where BLM's records show lands have been patented, an Indian allotment application filed under the General Allotment Act of Feb. 8, 1887, for such lands is properly rejected.

APPEARANCES: Each appellant named in the Appendix, *pro se*.

OPINION BY
ADMINISTRATIVE
JUDGE LEWIS

INTERIOR BOARD OF LAND APPEALS

The persons listed in the appendix hereto have appealed from decisions of the Nevada State Office, Bureau of Land Management (BLM), rejecting their applications filed for Indian allotments on alleged public lands in Clark County, Nevada, pursuant to sec. 4, Act of Feb. 8, 1887, *as amended*, 25 U.S.C. § 334 (1976). Because of the similarity of issues and the obvious relationship among these appellants, the Board, *sua sponte*, has consolidated the appeals for consideration.

On each application form the applicants checked "no" in response to the question whether the land was occupied by the applicant or the minor child. All applicants, except in N-25506, stated that there were no improvements on the land. In N-25506 the applicant stated that there were improvements on the land, but does not describe these improvements. In response to the question, "Do you or the minor child claim a valid bona fide settlement?" all applicants checked "no."

BLM rejected applications N-25501, N-25504, and N-25505 because the applicant had failed to submit certification from the Commissioner of Indian Affairs that he was eligible for an Indian allotment as required by 43 CFR 2531.1(b) and 43 CFR 2531.1(d) when he was filing on behalf of a minor child.

BLM rejected all the applications in issue because the lands requested in the applications have been transferred from Federal ownership and

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are not subject to entry under the public land laws.

In her statement of reasons, Mary Patricia Anne Newman Gibson presents the following contentions:

This claim was not filed under the 4th Section of the Act of Feb. 8-1887 only. But also under 43 U.S. Code 190, (Act of July 4-1884 C 180 Sec 1 Stat. 96) 43 U.S. Code (Act of March 3-1875 C 131 and 15, 18 Stat. 420) Section 4 of the Act of Feb. 8-1887 (24 Stat. L 388) as amended by the Act of Feb. 28-1891 (26 Stats. L 794) and the act of June 25-1910 (36 Stats. L 855 Et. Seq where applicable and in pari materia with my tribes' treaty commitments with the United States of America) Said rights being reserved to me under the Indian Citizenship Act because of my Indian Descent under the act of June 2-1924 (43 Stats. 253) See 8 U.S.C. 1401 25 U.S.C. 332, 334, 345, 346, 190, 337, 43 U.S.C., 190, 189, etc.

It seems most of them are being overlooked. They are all recorded on this claim.

See—*Choats v. Trapp* 224 U.S. 413 (1912) [?]

See—U.S.C.A. Const. Amend. 5.

The appeals of the other applicants present essentially the same arguments. Cathy Sue Slowey and Phyllis L. Slowey Evans also refer to Part 3, 43 CFR 2212.² Further, these two applicants state that BLM did not notify them in its decisions that they had the right to appeal.

First, we note that BLM should have notified the applicants in its decisions that they had the right to

appeal. However, we do not feel that the applicants were prejudiced by this omission as they did in fact appeal and their appeals are being considered by the Board in this decision.

The case files in N-25339, N-25493, N-25501, N-25502, N-25504, N-25505, N-25506, and N-25613 contain a copy of patent No. 1133536, issued Dec. 28, 1951, by the United States to the Husite Co. for certain lands including the lands sought by appellants. The remaining 5 case files contain a copy of patent No. 1137526 issued Jan. 27, 1953, by the United States to the same company for certain lands including those sought by appellants.

[1] In a case in which Federal officers have acted within the scope of their authority, a patent for land once issued passes beyond the control of the Executive Branch of Government. *Germania Iron Co. v. United States*, 165 U.S. 379 (1897); *United States v. State of Washington*, 233 F.2d 811 (9th Cir. 1956). The effect of the issuance of a land patent is to transfer the legal title from the United States. *Robert Dale Marston*, 51 IBLA 115 (1980); *Federal-American Partners*, 37 IBLA 330 (1978); *State of Alaska*, 35 IBLA 140 (1978); *Basille Johnson*, 21 IBLA 54 (1975). Appellants have not asserted that the patents involved were improperly issued.

The Department has held where BLM's records show lands have been patented, the United States does not have title to them, and an Indian allotment application for such lands is properly rejected.

¹ We note that the Indian allotment case reported at 224 U.S. 413 is *Heckman v. United States*. *Choate v. Trapp* appears at 224 U.S. 665.

² 43 CFR Subpart 2212 deals with miscellaneous state exchanges.

Maudra June Underwood Lentell, 49 IBLA 317 (1980); *Anquita L. Kluentner*, A-30483 (Nov. 18, 1965). Since the above discussion is dispositive of these appeals, it is unnecessary to reach the issue of appellants' eligibility to file the applications.

The authority cited by appellants is not in point because the instant cases involve lands which had been transferred from Federal ownership at the time appellants' applications were filed.

Therefore, pursuant to the

authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

ANNE POINDEXTER LEWIS
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

EDWARD W. STUEBING
Administrative Judge

APPENDIX

IBLA Docket Number	BLM Number of Appli- cation	Name of Applicant	Description of Land Sought
80-172-----	N-25502---	Mary Patricia Anne Newman Gibson	SW¼ sec. 32, T. 20 S., R. 59 E.
80-175-----	N-25501---	Jerry Wayne Gibson for Cindy Kay Gibson, a minor child	NE¼ sec. 32, T. 20 S., R. 59 E.
	N-25504---	Jerry Wayne Gibson for Theresa Ann Gibson, a minor child	NW¼ sec. 32, T. 20 S., R. 59 E.
	N-25505---	Jerry Wayne Gibson for Gayla Culleen Gibson, a minor child	SE¼ sec. 29, T. 20 S., R. 59 E.
	N-25506---	Jerry Wayne Gibson-----	SE¼ sec. 32, T. 20 S., R. 59 E.
80-181-----	N-25485---	Jimmy Lorn Gibson for Lori Christine Gibson, a minor child	NW¼ sec. 30, T. 20 S., R. 59 E.
	N-25486---	Jimmy Lorn Gibson for Kelly Renée Gibson, a minor child	SW¼ sec. 30, T. 20 S., R. 59 E.
	N-25488---	Jimmy Lorn Gibson for Dana Michelle Gibson	NE¼ sec. 30, T. 20 S., R. 59 E.
80-250-----	N-25611---	Phyllis Louise Slowey Evans for James Lee Evans, a minor child	SW¼ sec. 31, T. 20 S., R. 59 E.
	N-25612---	Phyllis Louise Slowey Evans for Jimmy Lorn Evans, a minor child	NW¼ sec. 31, T. 20 S., R. 59 E.
	N-25613---	Phyllis Louise Slowey Evans-----	SE¼ sec. 31, T. 20 S., R. 59 E.
80-252-----	N-25493---	Cathy Sue Slowey-----	NE¼ sec. 31, T. 20 S., R. 59 E.
80-334-----	N-25339---	Jerry Weldon Underwood-----	NW¼ sec. 5, T. 21 S., R. 59 E.

**EFFECT OF MINING CLAIMS ON SECRETARIAL AUTHORITY
TO ISSUE PROSPECTING PERMITS & PREFERENCE RIGHT LEASES
FOR COAL & PHOSPHATE**

January 8, 1981

**EFFECT OF MINING CLAIMS ON
SECRETARIAL AUTHORITY TO
ISSUE PROSPECTING PERMITS
AND PREFERENCE RIGHT
LEASES FOR COAL AND PHOS-
PHATE (MODIFYING SOLICI-
TOR'S OPINION M-36893 OF
AUG. 2, 1977, AND ITS SUPPLE-
MENT OF NOV. 19, 1979, UPON
THE SAME SUBJECT): THE
"UNCLAIMED, UNDEVELOPED"
ISSUE***

M-36893 (Supp. II)

January 8, 1981

**Coal Leases and Permits: Permits:
Generally**

Limitation of a coal prospecting permit to "unclaimed, undeveloped" lands restricts it to lands without valid, vested rights, existing at the time of issuance of the permit, which are adverse to the prospecting permit which is sought, and any preference right lease which may be earned pursuant to such a permit.

A prospecting permit may be issued for coal for which there is no valid, adverse claim at the time of issuance, notwithstanding the existence then of nonadverse claims, entries or leases.

Issuances of a prospecting permit is presumed to be regular if no valid, adverse interest appeared in the land office records at the time of issuance of the permit.

**Phosphate Leases and Permits:
Permits**

Limitation of a phosphate prospecting permit to "unclaimed, undeveloped" lands restricts it to lands without valid, vested rights, existing at the time of issuance of the permit, which are adverse to the prospecting permit which is sought, and any

preference right lease which may be earned pursuant to such a permit.

A prospecting permit may be issued for phosphate for which there is no valid, adverse claim at the time of issuance, notwithstanding the existence then of nonadverse claims, entries or leases.

Issuance of a prospecting permit is presumed to be regular if no valid, adverse interest appeared in the land office records at the time of issuance of the permit.

**Multiple Mineral Development Act:
Generally**

No mining claim located after the effective date of the Multiple Mineral Development Act can be adverse to any prospecting permit for coal or phosphate. No such claim renders the land unavailable for a prospecting permit for coal or phosphate under the restriction of prospecting permits to lands which are "unclaimed, undeveloped."

To: Secretary

From: Solicitor

**SUBJECT: The Effect of Mining
Claims on Secretarial Authority
to Issue Prospecting Permits and
Preference Right Leases for Coal
and Phosphate (Modifying Solic-
itor's Opinion M-36893 of Au-
gust 2, 1977, and its Supplement
of November 19, 1979, upon the
same subject); The "Unclaimed,
Undeveloped" Issue**

In view of continuing uncertainties regarding the status of certain pending applications for preference right coal leases pursuant to 30 U.S.C. § 201(b) (1970), we have reviewed the Solicitor's Opinion M-36893 of Aug. 2, 1977, 84 I.D. 442, and its Supplement of Nov. 19,

*Not in chronological order.

1979, 86 I.D. 627, collectively referred to as the "prior Opinion," together with two memoranda from the Director, Bureau of Land Management, to Acting Assistant Secretary, Program Development and Budget, dated Feb. 18, 1977, and to the Solicitor, dated Apr. 29, 1977. I have concluded, for the reasons stated herein, that:

1. The conclusions of the prior Opinion must be limited to conflicts with valid, unpatented mining claims that are adverse to or in conflict with the interest sought or obtained by a prospecting permit or preference right lease; and

2. The prospecting permit and preference right lease must be presumed to be regular in the absence of evidence of adverse claim in the federal land office at the time of issuance of the permit.

Much of the discussion in the prior Opinion, and the opposing comments of the Bureau of Land Management in its two 1977 memoranda, dealt with whether or not the statutory reference to "unclaimed" land meant land which was not subject to *any* valid mining claims or other claims which could ripen into full ownership of land (the conclusion of the prior Opinion), or only to coal claims pursuant to the 1873 Coal Lands Act, 17 Stat. 607, 30 U.S.C. §§ 71-76 (the BLM view).¹

¹ The statutory provisions for prospecting permits for phosphate upon "unclaimed, undeveloped" land were not enacted until 1960. Pub. L. 86-391, § 1(a) 74 Stat. 7, 30 U.S.C. § 221(b). The BLM dismissed the restriction as a "borrowed nullity," without legal meaning, at most only applicable to Coal Lands Act entries on lands to be covered by phosphate permits.

It was acknowledged in both analyses that there is nothing in the legislative history of either the Mineral Lands Leasing Act of Feb. 25, 1920, c. 85, 41 Stat. 437, or the 1960 phosphate amendments, PL 86-391, 30 U.S.C. § 211(b) and (c), indicating *any* Congressional thought or purpose for the "unclaimed, undeveloped" restriction. Each analysis then engages in supposition to support its conclusion, and the various procedural ramifications that follow that conclusion. The result, in my opinion, is that any such specific legislative intent is not ascertainable and may never have existed.

A grant by the United States of any rights in the public lands pursuant to the Mineral Lands Leasing Act is subject to all then vested, accrued rights. Prior to that Act, under the General Mining Law of 1872 a person who located and properly maintained a valid mining claim based upon discovery of any valuable mineral, other than coal, could obtain a fee patent which included *all* minerals. Acquisition of fee title to lands known to be valuable for coal, or the development of coal deposits, was pursuant to the Coal Lands Act of 1873. Although the Minerals Lands Leasing Act removed certain additional minerals from application of the General Mining Law, so that location of mining claims could not be based upon them, nevertheless a patent of a mining claim based upon a locatable mineral would include the minerals subject to the Mineral Lands Leasing Act (until enact-

FOR COAL & PHOSPHATE

January 8, 1981

ment of the Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521-531).

The Mineral Lands Leasing Act provided new means of establishing rights to produce the minerals subject to it—leases, and prospecting permits by which preference right leases might be earned.² Of the three types of deposits for which prospecting permits could be issued originally (coal, oil and gas, and sodium), the “unclaimed, undeveloped” language was made applicable only to coal. The threshold question is why? What was it about coal that distinguished it?

After acknowledging the absence in the legislative history of any indication of why Congress included the language as an express restriction only upon prospecting permits for coal, the prior Opinion presumed and concluded that the legislative purpose was to prevent the use of information gained from any existing claims or development, for any mineral, to assist in obtaining preferential rights to coal leases. I find it difficult to accept the premise that Congress had such a specific and special purpose, without some suggestion of it in the extensive his-

toric material surrounding the enactment of the Act. Furthermore, I am unable to perceive any basis in law or presumed legislative intent to differentiate between coal, oil and gas, and sodium, in imputing that purpose to Congress.

I find the arguments by the BLM in its two 1977 memoranda to be more persuasive, although it is concluded that there is no express legislative history to support its position. Yet the absence of recorded express Congressional consideration seems more consistent with the BLM premise that the language was simply for protection of the existing rights of coal land claimants than with the supposition that Congress had a more elaborate and affirmative motive.

But why was coal alone the subject of the restrictive language? And as prior vested rights are protected by law generally, why would it be necessary to use such language to preserve existing claims—must not there be some other purpose? And why was the reference to “undeveloped” included with “unclaimed”—does not that suggest some other intent in the use of the restrictive words? In the absence of any expression of Congressional direction upon or before enactment of the Mineral Lands Leasing Act, it is not possible to answer those questions conclusively. But I think the explanation by the BLM set forth below is the more plausible one.

² Although the Act originally provided for leasing of coal, oil and gas, phosphates, sodium, and oil shale, prospecting permits were authorized only for coal, oil and gas and sodium. Other minerals later became subject to leasing pursuant to the Act—sulphur in Louisiana (1926), potassium (1927), and sulphur in New Mexico (1932), each with provisions for prospecting permits but without the “unclaimed, undeveloped” language. 30 U.S.C. §§ 271-276, 281-287.

Prior to enactment of the Mineral Lands Leasing Act, of the three minerals to be put under its prospecting permit-lease system, *only* coal was *not* subject to the General Mining Law and to location of mining claims. It was only coal for which there was an independent statutory basis for development and acquisition of mineral lands. Although it may not have been necessary to safeguard then existing coal rights under the Coal Lands Act by specific reference when Congress authorized prospecting permits for coal pursuant to the new Mineral Lands Leasing Act, it is reasonable to assume, as the BLM did, that some express recognition of vested coal interests was advisable. The language may have been included simply to avoid any question of whether or not coal prospecting permits could be issued for lands on which there already existed either pending applications for coal entry (30 U.S.C. § 71) or persons in actual possession of opened and improved coal mines whose claims for them were timely filed (30 U.S.C. §§ 72, 73). For either type of lawful coal entry, the entryman was required to make submissions to the government by which it became informed of such claims or interests, unlike unpatented mining claims for other minerals under the General Mining Law. Thus it was appropriate for the government to ascertain the existence of Coal Lands Act entries before issuing a coal prospecting permit under the Mineral Lands Leasing Act. There was no feasible procedure to make a like

determination with regard to unpatented mining claims under the General Mining Law prior to enactment of Section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 174.

However, I can not accept the BLM's 1977 contention that the "unclaimed, undeveloped" restriction upon prospecting permits is limited to Coal Lands Act entries. Although they may have been in the immediate contemplation of the legislation draftsmen in 1919 or 1920, it is my opinion that any prospecting permit pursuant to the Mineral Lands Leasing Act, whether for coal or any other mineral, must be subject to all vested rights in the land which existed at the time of issuance of the permit. That is true whether or not there is any express reference to them in the Act or in the permits themselves.

The prior Opinion concentrates upon the "unclaimed" issue, although it does give attention to the term "undeveloped." I do not consider that the two words are independent as used in the Act. The restriction is not "unclaimed" *or* "undeveloped" land, nor even "unclaimed" *and* "undeveloped" land. The words are separated merely by a comma. Grammatical structure and punctuation are not conclusive in statutory or other legal construction, but I am of the opinion that as they appear the two words are probably used jointly only for the purpose of generally recognizing vested rights. Inasmuch as some real physical development has always been necessary for the validity

of any form of claim under the General Mining Law and the Coal Lands Act, the use in tandem of the two words may have only indicated that the restriction was limited to lands subject to bona fide claims, those creating vested rights, as distinguished from mere record filings.

I do agree with the conclusion in the prior Opinion that only *valid* mining claims removed land from the "unclaimed" category. However, I do not believe that there is any separate basis of exclusion of land that has been "developed" without regard to whether or not it is "claimed."³ In my opinion, it is the existence of adverse valid, vested claims or rights at the time of issuance of prospecting permits which is determinative. The fact that unauthorized development may have occurred, or that development took place under some earlier authorization or entitlement which had been extinguished at the time of issuance of a prospecting permit, or that it was for some other mineral, would not have made land unavailable for a prospecting permit—even for coal.

In my opinion, the long history of interpretation and application of the statutory restriction by the BLM and its predecessor, the Gen-

eral Land Office, which is described in the BLM's 1977 memoranda, must be given serious weight in a current analysis. The interpretation of a statutory directive by the administrative agency charged with its application, without Congressional objection, for several decades, is authoritative if not conclusive. Furthermore, the spirit and reasoning of *Bryant et al. v. Yellen et al.*, — U.S. —, 65 L. Ed. 2d 184 (1980), and *Andrus v. Shell Oil Co.* — U.S. —, 64 L. Ed. 2d 593 (1980), strongly suggest that an administrative construction and application of long duration may become conclusive upon the Department. The practice, or policy, of the BLM is consistent with the obvious Congressional policies to (i) allow, even encourage or require, independent development of different minerals, and (ii) eliminate by the Multiple Mineral Development Act of 1954, and its predecessors at 30 U.S.C. §§ 284, 274 and 502, the conflict of rights by which one form of entry, claim or development, for one type of mineral, precluded all others.

The enactment in 1960 of PL 86-381, which amended the Mineral Lands Leasing Act to allow prospecting permits for phosphate, creates an apparent enigma. That authorization does contain the same restriction to lands "unclaimed, undeveloped." It is unlikely that it was meant to apply only to the Coal Lands Act or entries made pursuant

³ Sec. 73 of 30 U.S.C. allowed a coal entryman 60 days after entry and improvement pursuant to § 72 in which to make his filing with the manager of the district land office. That might be considered to be a period in which the land is "developed" before it is "claimed," and such an entryman would be protected against issuance of coal prospecting permits to others during that time.

to it. There is no reference to it in the legislative history of the 1960 amendment, and the BLM's explanation that it was "borrowed indiscriminately and without thought" from provisions applicable to coal may be valid, based upon our own informal intradepartmental inquiries. In practice since 1960 the BLM has treated that restriction as "virtually meaningless," although it has taken the position that a phosphate prospecting permit, or a preference right phosphate lease, can not be validly issued for lands subject to a valid phosphate mining claim.⁴

Accordingly, it is my conclusion that the limitation of coal and phosphate prospecting permits to "unclaimed, undeveloped" lands restricts them to lands without existing, valid, vested rights which are legally adverse to the prospecting permit which is sought, and any preference right lease which might be earned pursuant to that permit. The determination is to be made as of the date of issuance of the permit. Thus, for example, any mining claim located prior to the effective date of the Multiple Mineral Development Act would be adverse to any prospecting permit issued after such location, if the claim was valid at the time of issuance of the permit. No mining claim located after that effective date would be adverse because it could not "ripen" into ownership of the mineral which is subject to the prospecting permit issued pursuant to the Mineral Lands Leasing Act.

Deposits of a mineral as to which there is a prior adverse right may not be considered in ascertaining entitlement to a preference right lease; and, of course, no such lease may be validly issued for the lands themselves which are subject to the adverse interest. However, a prospecting permit may be properly issued for a mineral for which there is no valid adverse claim, notwithstanding the existence of non-adverse claims, entries or leases based upon other minerals or authorizations. Prior or existing "development" which is not an incident or basis of an adverse interest does not preclude proper issuance of a prospecting permit.

It is my further conclusion that as to procedures for verifying the "unclaimed, undeveloped" status of land, the method attributed to *Roos v. Altman*, 54 I.D. 47 (1932), and discussed but distinguished in the 1979 supplement of the prior Opinion, 86 I.D. at 635-636, is the most appropriate. Although a prospecting permit may not be validly issued for lands for which there is an adverse interest, or other legal impediment, the issuance of a permit should be presumed to be regular if no interest to the contrary appeared in the land office records at the time of permit issuance, until and unless it is proven to have been improperly issued. The general practice of the Department discussed in the 1979 supplement of prior Opinion, for leases issued or to be issued pursuant to the Mineral Lands Leasing Act, is appropriate for processing of preference right lease applications made pursuant to prospecting permits under that Act.

⁴BLM 1977 memoranda, n.2 *supra*; see Arthur L. Rankin, 73 I.D. 305 (1966).

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SUPPLEMENT TO SOLICITOR OPINION NO. M-36914, ON
FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE,
FISH & WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE
BUREAU OF LAND MANAGEMENT
January 16, 1981

The burden of identification and resolution of conflicting adverse claims may be placed upon the permittee/applicant, such as by prosecution of private contest proceedings or use of provisions of Sec. 527 of 30 U.S.C. However, if no indication of any such vested, adverse claim is presented, then, in the absence of affirmative challenge, the preference right lease may be issued if otherwise proper. Such issuance is at the risk of the lessee that actual adverse interests may exist. Upon a later showing that at the time of issuance of the permit, the lease may be cancelled as to the land in conflict by the BLM upon its own motion or in accordance with advice or protests by others, as described in the 1979 supplement, 86 I.D. at 636.

To the extent it is not inconsistent with the opinions and conclusions expressed herein, the prior Opinion remains in force and effect.

CLYDE O. MARTZ
Solicitor

SUPPLEMENT TO SOLICITOR OPINION NO. M-36914, ON FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH & WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE BUREAU OF LAND MANAGEMENT*

M-36914 (Supp.)

January 16, 1981

Taylor Grazing Act: Generally—Federal Land Policy and Management

Act: Generally—Water and Water Rights: Federal Appropriation

Neither FLPMA nor the Taylor Grazing Act authorizes appropriation of water or provide an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law.

Water and Water Rights: State Laws—Water and Water Rights: Federal Appropriation

The United States should comply with the substantive and procedural provisions of state law when acquiring and appropriating water except

1. where Congress or the Executive has reserved land or water for particular Federal purposes;
2. where Congress has clearly mandated that unappropriated water on the public lands is reasonably required for a Federal program or purpose and that water cannot be acquired in a manner conforming to all substantive requirements of state law;
3. the United States is entitled to a priority date as of its historic date of first use where water has been used historically for consumptive beneficial uses recognized by state law but without having conformed to procedural requirements prescribed by state law.

To: Secretary

From: Solicitor

SUBJECT: Supplement to Solicitor Opinion No. M-36914, on Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management

*Not in chronological order.

Introduction

The Solicitor's Opinion No. M-36914 of June 25, 1979 (herein called the "opinion") made a comprehensive analysis of the nature and extent of Federal rights to use water on lands administered by the National Park Service, Fish and Wildlife Service, Bureau of Reclamation (now the Water and Power Resources Service) and the Bureau of Land Management. It defined and characterized the reserved water rights those agencies may assert under various statutes, executive orders, and Secretarial orders. It also discussed other forms of water rights assertable by Federal agencies, including rights initiated by application of water to beneficial use for congressionally authorized or mandated purposes.¹

Concerns were raised regarding the exact nature, basis and character of the right of the Federal Government to appropriate water for specific purposes authorized or required by Act of Congress. In response to those concerns, the Secretary, following consultation with the governors of the seventeen western states, opted not to implement certain provisions of the Opinion dealing with Federal non-reserved water rights outlined therein except (i) when the agencies receive specific approval determined on a case-by-case basis, from the appropriate Assistant Secretary, or the Secretary to assert such a right, or (ii) when required

to submit all claims for water rights in the course of litigation.²

The President's Water Policy Implementation Task Force Report on Federal Non-Indian Water Rights thereafter appearing in June 1980 has raised questions about the Report's relationship with the Opinion and the Secretarial instruction. Further uncertainty appears to exist within agencies of the Interior Department regarding (i) the steps that should be taken pursuant to the President's Directive of June 6, 1978, to expeditiously identify, establish and quantify federal water rights; and (ii) the legal basis and procedures to be used for assertion of non-reserved water rights in on-going adjudication proceedings and in negotiations with the states consistent with the Solicitor's Opinion, the Secretary's instruction of Feb. 4, 1980 and the Task Force Report.

To clear up such uncertainties, I am issuing this supplement to the Opinion.³ To the extent the Opinion is inconsistent with this supplement, it is modified and superseded hereby.

I. Federal Water Rights Defined

Water Rights assertable by Federal agencies fall into the following categories:

² This decision of the Secretary was announced in a letter of Feb. 4, 1980 to Governors Matheson of Utah and Herschler of Wyoming.

³ This supplement does not affect or apply to any water right(s) that may be claimed by or on behalf of any Indian or Indian Tribe. This supplement is also not intended to modify or supersede any portion of the Opinion numbered M-36914 of June 25, 1979 dealing with the reserved water rights of the non-Indian land management agencies in the Department.

¹ Pages 15-18, 86 I.D. 574-78 and 64-71, 86 I.D. 611-16. This right has become commonly known as the Federal non-reserved water right.

SUPPLEMENT TO SOLICITOR OPINION NO. M-36914, ON 255
 FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE,
 FISH & WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE
 BUREAU OF LAND MANAGEMENT
 January 16, 1981

1. A water right created expressly or by implication through the reservation of land, measured by the needs of water to fulfill the specific purposes of the reservation and subject to all rights which have vested under State law prior to the effective date of the reservation; this is the commonly recognized federal reserved water right discussed at length in the Opinion.⁴⁷
2. A water right initiated either (i) by application or other appropriate act prescribed by State law; or (ii) by the historic use of water on public lands for consumptive beneficial uses. This right is limited to quantities of water required for beneficial uses recognized by state law. Its priority date is fixed by applicable state law in all cases except for historic consumptive beneficial uses of water not heretofore perfected by permitting or other procedural requirements of state law, in such cases, for reasons discussed herein, the priority date vests as of the historic date of first use.
3. A right to use such unappropriated water arising on the public lands of the United States as may be reasonably required for Federal purposes expressly or impliedly mandated by the Act of Congress. Such right dates from the date of the Act if the Act is self-executing or from the date of implementing administrative action if the

Act contemplates implementation by administrative action. The legal basis for this right is set out in this Supplemental Opinion.

4. Water rights that are acquired by the United States through purchase, exchange, condemnation or gift.

II. Federal Non-Reserved Water Rights—Legal Basis and Nature

Except where Congress has reserved land or water for particular federal purposes, Federal agencies should, as a matter of policy, acquire water rights in accordance with the substantive and procedural provisions of state law. There are two limited exceptions to this legal policy.

The first situation is where water has been used historically by federal agencies for consumptive beneficial uses recognized by State law but without conforming to the filing, permitting, or other administrative procedures prescribed by state law. Most, if not all, of these uses are *de minimus* or small in quantity and have long been integrated into the regimen of water use and development in the watershed. Unappropriated water is and has been historically available for uses on the public lands, as recognized in *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899), notwithstanding any past failure of the United States to conform to procedures prescribed by state law for the initiation of water rights.

⁴⁷In the future it is my opinion that most federal water rights will be founded on appropriation or purchase. As to federal reservations created in the future, this office strongly supports the recommendations of the Non-Indian Reserved Water Rights Task Force that, as a matter of policy, reservations of land created by Executive action to be placed under the administration and management of this Department contain a specific provision as to whether or not reserved water rights are to be claimed to meet the purposes of that reservation. If such a policy is not mandated Government-wide by Executive Order, it should be adopted as a requirement by this Department.

The second situation is where a legal basis exists for asserting a federal right to use water in a manner not conforming to all substantive requirements of state law. Federal claims in such cases may be founded on Federal supremacy if and where clearly mandated by Act of Congress. Such claims may also be supported by the dominion the United States has and continues to exercise over unappropriated waters arising on the public lands.

Only the foregoing two situations are encompassed by the non-reserved water right theory detailed in the Opinion. Water right claims thereunder assuredly will be limited in number, limited in impact and are clearly supported by the following principles:

1. The United States acquired dominion over Western lands ceded from foreign powers and not previously disposed of, together with waters on, under or flowing through such lands.⁵

2. Article IV, sec. 3 of the Constitution vested Congress with sole authority over the management and disposition of such waters; those which are not disposed of by Act of Congress remain under the dominion of the United States.⁶

3. By certain general statutes in

the mid 1800's⁷ Congress authorized private persons, through compliance with local laws and customs, to appropriate non-navigable water on the public domain; and by enabling acts providing for the admission of western states to the Union, it conferred jurisdiction on the states to dedicate such waters to public use and permit their appropriation in accordance with state law. In no such act, however, did the Congress relinquish its right to exercise future dominion over unappropriated water on public land to the extent it was needed from time to time for Congressionally authorized uses upon such lands nor could any such act or state constitution divest the United States of its right by Federal supremacy to use water arising on public domain lands for Federal purposes subject, of course, to all prior vested rights.⁸ In other words, Congress retains the right to otherwise provide for future use of presently unappropriated water.

4. As stated by the Supreme Court in *United States v. Rio Grande Dam and Irrigation Co.*, *supra*, the right of the state to establish its own system of water law is limited by two exceptions, the first of which is the right of the United States as a land owner to demand the continued availability of water for use on its own property; the second ex-

⁵ *Borah Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935); See, Opinion pgs. 1-15. See, also Solicitor Opinion M-33969 (Nov. 7, 1950), "Compliance by the Department with State Law Concerning Water Rights".

⁶ *United States v. Grand River Dam Authority*, 363 U.S. 229, 255 (1960); Cf. *Kleppe v. New Mexico*, 426 U.S. 529, 539-41 (1976).

⁷ Act of July 26, 1866, § 9 (14 Stat. 253), re-enacted as § 2339, R. S. (43 U.S.C. § 661, 1946 ed.); Act of July 9, 1870, § 17 (16 Stat. 218), re-enacted as § 2340, R.S. (43 U.S.C. § 661, 1946 ed.); and the Act of Mar. 3, 1877, § 1 (43 U.S.C. § 321, 1946 ed.)

⁸ *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); *Kleppe v. New Mexico*, 426 U.S. 539 (1976); *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955); F. Trelease, *Federal-State Relations in Water Law* 147 (Legal Study No. 5 prepared for National Water Commission, Sept. 7, 1971).

January 16, 1981

ception is the navigation servitude. This statement has been reiterated by the Court consistently through the years. *California v. United States*, *supra* at 662.

5. Notwithstanding express directives in sec. 8 of the Reclamation Act of 1902 for the United States to comply with State water law, the Supreme Court has recognized the right of Congress to mandate particular uses in excess or in derogation of provisions of state law. *Id.* Dicta in *New Mexico v. United States*, *supra*, at 702, 709 n. 16, 718 n. 24 and *California v. United States*, *supra*, at 654, 657-658, 670 n. 23, sometimes cited for a contrary conclusion, related only to substantive compliance with State law in cases where the use is not mandated by Act of Congress and is only incidental to the purpose of a statutory authorization or directive.

6. Neither the *New Mexico* case nor any other case has precluded the exercise of a Federal right for failure in the past to meet the filing, permitting and other procedural requirements of State law.

7. Whether a particular paramount Federal purpose is mandated by act of Congress rests on the reasonable interpretation of the Act and its legislative history.

Without cataloging the presence or absence of such mandated uses under all major statutes dealing with land management issues for Departmental agencies, I do believe it is appropriate to readdress Congressional intention under

FLPMA⁹ and the Taylor Grazing Act.¹⁰

As to FLPMA, it is clear, as the 1979 Opinion noted, that FLPMA authorizes a wide range of land management activities that require the use of water, *i.e.*, livestock grazing, habitat and food for fish, wildlife, and domestic animals, timber production, recreation and mining to name a few. However, FLPMA does not authorize or otherwise mandate the Department to appropriate or otherwise utilize water outside state recognized beneficial use concepts for the broad general purposes outlined as management objectives in the Act. To the contrary, sec. 701 (g), 43 U.S.C. § 1701 (g), states:

Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests or rights in water resource development or control;

Reading FLPMA as a whole and paying special attention to sec. 701 (g), I conclude that FLPMA does authorize appropriation of water for land management uses but does not give an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law. The same analysis and conclusion is

⁹ 43 U.S.C. § 1701 *et seq.*

¹⁰ 43 U.S.C. § 315a *et seq.*

equally applicable to the Taylor Grazing Act. To the extent the Opinion M-36914 of June 25, 1979, is inconsistent with these conclusions it is withdrawn.

This opinion was prepared with the assistance of Gary Fisher, Special Assistant to the Associate Solicitor for Energy and Resources and John R. Little, Jr., Regional Solicitor, Denver, Colorado.

CLYDE O. MARTZ
Solicitor

EUGENE V. VOGEL

52 IBLA 280

Decided *February 9, 1981*

Appeal from decision of the Oregon State Office, Bureau of Land Management, rejecting application for right-of-way for water diversion project. OR 18527.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Generally—Federal Land Policy and Management Act of 1976: Rights-of-Way

The standard of review in the case of a right-of-way application for a water diversion project is whether the decision demonstrated a reasoned analysis of the factors involved, with due regard for the public interest. A decision to reject such an application will not be affirmed where the record lacks sufficient reasons to support it.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way

Rejection of a right-of-way application for a water diversion project will not be

affirmed where the record does not support a finding that approval would be incompatible with BLM's timber management plan; that it would adversely affect wildlife; or that it would result in a cumulative adverse impact contrary to the public interest.

APPEARANCES: Eugene V. Vogel,
pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

Eugene V. Vogel has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated Apr. 26, 1979, rejecting his application for a 10-foot right-of-way, OR 18527, for a water diversion project to be located on lot 7, sec. 29, T. 38 S., R. 7 W., Willamette meridian, Josephine County, Oregon. Appellant filed his application pursuant to sec. 501 (a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716(a) (1976).

The project, intended to provide water in the amount of 0.085 cubic feet per second (cfs) for irrigation and domestic use,¹ would consist of a dam in the bed of a small unnamed spring tributary of the McMullin

¹The original water rights permit from the State of Oregon entitled appellant to appropriate 0.080 cfs for irrigation and 0.005 cfs for domestic use. However, appellant has advised the Board that he is abandoning his right to appropriate irrigation water, and is having his permit changed to allow only 0.005 cfs for domestic use.

Creek² and a collection pool connected by approximately 530 feet of 1-inch diameter underground plastic pipe to a 1,000-gallon concrete storage tank. Approximately 400 feet of pipe would lead from the storage tank to the edge of appellant's property, situated in sec. 32, T. 38 S., R. 7 W., Willamette meridian, Josephine County, Oregon.

BLM's reasons for rejection of appellant's application were that the project (1) would conflict with its timber management plan because it would require extra cost and care to protect appellant's facilities, (2) would result in a lack of water for wildlife during the summer months, and (3) might establish a precedent contrary to the public interest in view of the potential for newly constructed homes on adjacent private land and associated increased water consumption. These reasons were based on an Environmental Assessment Record (EAR) and a land report prepared by BLM resource specialists.

In his statement of reasons for appeal, appellant contends, in regard to timber management, that an underground 1-inch diameter pipe

would present "little or no obstacle to timber management" and that the storage tank would be situated in such a way as to present "the least obstacle to road building and logging." Furthermore, he indicates a willingness to release BLM in writing from any liability for injury to his pipe or tank caused by BLM authorized logging operations. In regard to wildlife, appellant contends that there is adequate water in the area for wildlife in the form of several springs and the East Fork of the McMullin Creek, but he states that he would be willing to design the project so as to provide "a preliminary tank for wildlife before the water flows into my holding tank or else a second tank for wildlife which catches the overflow."

With respect to water use by other homeowners he indicated he had no knowledge whether others would apply for similar installations, but he felt most of the other private property in the area had the East Fork of the McMullin Creek running through it.

[1, 2] The Secretary or his duly authorized representative has the discretion to accept or reject a right-of-way application for a water diversion project filed under sec. 501 of FLPMA, *supra*. *Stanley S. Leach*, 35 IBLA 53 (1978). The standard for review of a decision rejecting an application is whether the decision represents a reasoned analysis of the factors involved with due regard for the public interest. Where no sufficient reason exists to disturb such a decision, it will be af-

² In appellant's permit from the State of Oregon, and in his application to the Department, the source of water is described as a spring. We assume for the purpose of this decision that the spring does not fall within the scope of the withdrawal by Executive order of Apr. 17, 1926, preserving for general public use and benefit unreserved public lands containing springs or waterholes needed or used by the public for watering purposes. 43 CFR 2311. A determination that land is not embraced within the withdrawal would be necessary before any right-of-way could be granted affecting a spring on public lands.

firmed. *Stanley S. Leach, supra*; *Jack M. Vaughan*, 25 IBLA 303 (1976). In this case there is sufficient reason.

The record does not support a finding that appellant's proposed water diversion project is incompatible with BLM's timber management plan. The land report states that the timber management plan for this area called for a three-stage partial cut program. The first entry was made in 1973, when logging roads were built into the area. The second cutting "is not in the Medford District's five year timber sale plan at this time, but will probably be made within ten years." A logging road which ends near the proposed site of the storage tank may be extended to cross the site in order to reach land to the east. Although the land report states that "plans for timber management in the area * * * would require extra cost and care to protect [appellant's] facilities," that remark is neither substantiated nor explained. A 1-inch plastic pipe buried a foot underground should not pose any significant problem. Also, the storage tank could be placed at a point along the route of the pipe, including on appellant's land, so as not to conflict with any future logging operations. Moreover, appellant has declared his willingness to locate his storage tank so as to present the least obstacle to road building and logging and to release BLM in writing from any liability. There does not appear to be any reason why such a release could not be accepted.

The area, identified as part of crucial deer winter range, supports

populations of black tailed deer, and a variety of small mammals such as squirrels and rabbits, and birds. Both the EAR and land report concur that appellant's proposed project would probably result in a lack of water for such wildlife during the summer months, although the impact to their habitat would be minimal. However, as pointed out above, appellant has offered to devise a project to provide adequate water for wildlife. There is no evidence that a system could not be set up which would be compatible with wildlife use. In addition, the entire stream flow is not to be diverted to appellant's exclusive use. He now intends to use only 0.005 cfs for his domestic use.

BLM stated in its decision that allowance of the right-of-way will "set a precedent contrary to the public interest in that the cumulative effect of granting similar applications in the area would be significant and adverse." The basis for that statement appears to be the Board decision in *Stanley S. Leach, supra*, in which we held that BLM properly rejected a right-of-way application for a pipeline to convey water from a spring on public lands to private lands where it had determined that the overall effect of granting similar applications in a given area would be adverse to the public interest and allowance of one application might establish a precedent contrary to the public interest.

However, in the *Leach* case the State Department of Fish and Game had filed a protest with the State Water Board objecting to Leach's request to appropriate 1,200 gallons of water per day from a

spring on public land. In this case the State had approved appellant's water appropriation with no apparent objection. In addition, in *Leach* there was no offer to take steps to attempt to insure adequate water for wildlife. There was mention of overflow from Leach's tank. Overflow does not guarantee water for wildlife, especially in times of shortage. On the other hand, appellant's offer to build a preliminary tank for wildlife indicates a willingness to put a priority on wildlife use. Also the EAR indicates there would be no significant impact on water quality from construction of this facility; there are no rare or endangered species known to exist in the area; no cultural or historic resources; and no public interest in the proposal.

Given the facts in this case, the *Leach* rationale is not dispositive. BLM cannot reject a request for use of the public lands solely on the basis that the granting of a right might result in a deluge of similar applications by others. See *East Canyon Irrigation Co.*, 47 IBLA 155, 169 (1980). Under that reasoning, no one would ever be allowed to make any use of Federal land or its resources, no matter how innocuous the effect of such use, because the cumulative effect of numerous people making the same use of the same land would be undesirable and contrary to the public interest.

Each application for a discretionary use deserves to be treated on its own merits. The record of this case plainly establishes that it will not have any significant adverse effect

on the land or any of the resource values. The allowance of this application does not by any means mandate the allowance of every similar future application regardless of the consequences. FLPMA declared that it is the policy of the United States that management of the public lands be on the basis of multiple use. Sec. 102(a)(7), 43 U.S.C. § 1701(a)(7) (1976). The granting of this application would be in keeping with this stated policy.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR, 4.1, the decision appealed from is set aside and the case remanded to BLM for issuance of the right-of-way with appropriate stipulations.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

UNITED STATES

v.

AIMEE MARION BOWAN (EDEN-
SHAW) AND PHYLLIS JOSE-
PHINE KIMBALL

8 IBIA 218

Decided February 12, 1981

Appeal from order by Chief Adminis-
trative Law Judge L. K. Luoma in

Alaska Native Disenrollment contest requiring the Bureau of Indian Affairs to retain appellees on the roll of beneficiaries of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976).

Reversed.

1. Indian Tribes: Alaskan Groups—Alaska Native Claims Settlement Act: Aboriginal Claims—Alaska Native Claims Settlement Act: Enrollment

The provisions of the Alaska Native Claims Settlement Act defining the class of persons entitled to share in benefits under the Act are not ambiguous so as to require reference to the legislative history to determine whether persons becoming United States citizens after Dec. 18, 1971, the effective date of the Act, are entitled to be enrolled.

2. Alaska Native Claims Settlement Act: Enrollment—Administrative Practice—Statutory Construction: Administrative Construction

Interpretation of the Alaska Native Claims Settlement Act by the Bureau of Indian Affairs contemporaneous with the enactment of the statute and continued over the succeeding 9 years is relevant to a determination of the application to be given to the statute. The Agency refusal to enroll persons who were not United States citizens on Dec. 18, 1971, the effective date of the Act, is a reasonable application of the Act and of Departmental regulations implementing the Act, and gives the language of the statute (43 U.S.C. § 1604 (1976)), its common and ordinary meaning.

APPEARANCES: Carol Shapiro, Esq., for appellees; Bruce Schultheis, Esq., Anchorage Regional Solicitor's Office, for appellant.

**OPINION BY
ADMINISTRATIVE JUDGE
ARNESS**

**INTERIOR BOARD OF
INDIAN APPEALS**

*Procedural and Factual
Background*

On Feb. 26, 1980, the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, appealed from a determination by the Department's Chief Administrative Law Judge that appellees Aimee Marion Bowen and Phyllis Josephine Kimball (contestees below) should remain enrolled as Alaska Natives under the Alaska Native Claims Settlement Act, the Act of Dec. 18, 1971, 85 Stat. 688 (hereinafter ANCSA), 43 U.S.C. §§ 1601-1628 (1976) (further references to U.S.C. are to 1976 edition). Appellees are sisters who were born prior to 1934 in Canada, the daughters of a Canadian father and an American mother. Both parents were members of the Haida Tribe of Indians. The appellees' father was born in Masset, British Columbia, as were appellees. Appellees' mother was born at Hydaburg, Alaska.

The family moved to Hydaburg in 1940. Appellees' father did not become a United States citizen; however, appellees obtained United States citizenship by naturalization in 1974. Both women are married to American citizens. They were enrolled as Alaska Natives for the purpose of obtaining benefits under ANCSA in 1973 based upon applications which represented them both

February 12, 1981

to be American citizens. Appellees explain their representations concerning nationality were based upon a belief encouraged by their parents that they enjoyed dual citizenship. The easy access given them between the United States and Canada when they travelled between the two countries is cited by them as support for their past belief they were Americans, although they now no longer contend they were American citizens before naturalization in 1974.

Issue on Appeal

The issue to be resolved on appeal concerns whether the Chief Administrative Law Judge correctly found that acquisition by appellees of United States citizenship after Dec. 18, 1971, the effective date of ANCSA, does not preclude their enrollment for benefits as Alaska Natives.

Discussion and Decision

Following an analysis of contestees' circumstances, the factfinder below correctly applied United States law respecting determination of contestees' nationality, holding

[a]s their father was born in Canada to a Canadian father and was never naturalized as a U.S. citizen, contestees cannot claim derivative citizenship through him. Nor can they claim citizenship by birth to a U.S. citizen mother because the statute expressly provides for derivative citizenship through fathers only. Although Congress amended the law in 1934 by granting citizenship rights to foreign-born children of citizen mothers (*see* 48 Stat. 797), contestees cannot benefit from

the amendment as it was specifically made prospective only (*see Montana v. Kennedy*, 366 U.S. 308 (1961); *Lee Chuck Ngow v. Brownell*, 152 F. Supp. 427 (1957)). [Act of February 10, 1855, 10 Stat. 604.]

(Decision dated Jan. 31, 1980, at p. 4).

The opinion continues on to conclude that ANCSA is ambiguous concerning whether the Act limits benefits only to persons who were citizens on Dec. 18, 1971. The opinion thus questions whether Congress intended to create a definite, closed class of beneficiary or an open-ended classification capable of continuing enlargement, and proceeds to find in an analysis of the legislative history of the Act an interpretation which permits contestees to share in the benefits conferred by the statute based upon considerations of equity. This determination and the legislative analysis stated for its rationale are erroneous and require reversal.

a. The statute is not ambiguous

If a statute is unambiguous its legislative history is irrelevant. *United Air Lines v. McMann*, 434 U.S. 192, 199 (1977). ANCSA defines "Native" at 43 U.S.C. § 1602 (b) as one entitled to share in the benefits of the Act who is "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian * * * Eskimo, or Aleut blood, or combination thereof." At sec. 1604(a) the Secretary is required to prepare a roll of all Natives "born on or before, and who are living on, December 18,

1971." The roll of eligible Natives must be prepared within 2 years from the effective date of the Act.

The Act is intended, according to the statutory declaration of purpose, to benefit only Natives who are "citizens of the United States or of Alaska" (43 U.S.C. § 1601(c)). ANCSA repeals all prior Alaskan Indian allotment authority, except that pending applications for allotment may be approved provided the applicants shall not then be eligible to receive benefits under ANCSA (43 U.S.C. § 1617). ANCSA also revokes prior Indian reserves (43 U.S.C. § 1618(a)) unless an election is made to retain prior reservations in lieu of benefits offered by ANCSA (43 U.S.C. § 1618(b)).

Dec. 18, 1971, is established by 43 U.S.C. § 1617 as the ending date for purposes of elections to be made under ANCSA. One must choose between benefits available under ANCSA or the earliest allotment statutes as of that date; moreover, the eligibility must, of necessity, depend upon the status of the Native concerned upon the date of the Act.¹ Thus, the Act provides at 43 U.S.C. § 1617(a), "[n]o Native covered by the provisions of this chapter, and no descendant of his, may hereafter avail himself of an allotment." At sec. 1617(b), provision is made that any allotments elected to be taken in lieu of benefits under the Act must be offset against the land grant provided under ANCSA. In light of the foregoing, ANCSA

clearly establishes Dec. 18, 1971, as the day upon which agency administration of the Act's provision is to turn.

A subsequent Act amending ANCSA, the Act of Jan. 2, 1976, 89 Stat. 1145, refers to and approves the Departmental regulations respecting enrollment and administration of the Departmental regulations by the Secretary. The 1976 amendment extends the time for enrollment, but specifically limits enrollment to "those Natives * * * who would have been qualified if the * * * [extended] deadline had been met." The thrust of the statutory language throughout ANCSA (*as amended*) is directed by deadlines which focus on the effective date of the Act for all purposes of enforcement of the Act's provisions.

The opinion below, finding the Act to be ambiguous, postulates an equitable basis for permitting enrollment of appellees based upon their claim of aboriginal title. While considerations respecting aboriginal title are the common unifying thesis of ANCSA (as the opinion appealed from observes), all prior claims of any nature based upon such title are extinguished by the Act, whether compensated or not. *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977); *Koniag v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), *aff'd in part, rev'd in part*, 580 F.2d 601 (1978), *cert. denied*, 99 S. Ct. 733 (1979)). The decision below assumes, however, that compensation is required for every type of claim

¹ *Dwight Tevok (Deceased)*, 29 IBLA 160 (1977) (*rev'g prior decision*, 22 IBLA 296 (1975)).

which may be based upon aboriginal title regardless whether the claim is cognizable under ANCSA.² This thesis, which is at the center of the holding requiring appellees to be enrolled under ANCSA, is at odds with the holding in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), and a series of earlier cases which establish the principle that aboriginal title is subject to extinguishment without compensation at the will of Congress.³ These cases remain a correct statement of American law on this point. Since claims based upon aboriginal title are not compensable of right, and since nothing outside the terms of the statutory grant entitles appellees to share in the benefits created by ANCSA, the fact that appellees were not qualified on account of citizenship to be enrolled prevents their retention on the rolls.⁴

² The decision also opines that correctness of determination of claims is subordinate to speed in settling them. ("Congress was obviously not too concerned about the extent to which Natives could actually prove their claims" (Decision dated Jan. 31, 1980, at p. 5).) This finding is contrary to the logic of judicial determinations mandating due process administrative standards in ANCSA determinations which are binding upon the Department. *Cf. Koniag v. Andrus*, 580 F.2d 601, 609 (D.C. Cir. 1978).

³ *Cf. United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). Thus, prior to ANCSA there was conflict concerning whether aboriginal title in Alaska was extinguished by the treaty of cession or later acts or whether it continued until ANCSA. *Cf. Miller v. United States*, 159 F.2d 997 (9th Cir. 1947), and *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452 (Ct. Cl. 1959). Contrary to the assumption implicit in the opinion below, there was not consensus on the question whether Native titles survived transfer of Alaska to United States control.

⁴ As the Court points out in *Koniag v. Kleppe*, above, at 405 F. Supp. 1364-5, the Act establishes a sort of quid pro quo—all claims

b. Contemporaneous and practical interpretation of the Act bars contestees claims

The BIA contends that the continued and contemporaneous administration by that agency of ANCSA through the application of implementing Departmental regulations indicates the interpretation properly to be given to the statute in practice. It has apparently been BIA policy to regard the Departmental regulations appearing at 25 CFR Part 43h as limiting the class of beneficiaries entitled to enrollment under ANCSA to a closed group fixed by the Dec. 18, 1971, effective date. It is an axiom of statutory construction that long continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration is entitled to consideration when determining the statutory meaning. *Palmore v. United States*, 411 U.S. 389 (1973). It is also true that the interpretation of an act made by the agency charged with enforcement of the statute is considered to be an appropriate means to demonstrate that the agency interpretation embodies the common and ordinary meaning of the law. *Oil Shale Corp. v. Morton*, 370 F. Supp. 108 (D. Colo. 1973). The agency position here is a reasonable interpretation consistent with the internal logic of the Act and the common and ordinary meaning of

are extinguished in exchange for benefits under the Act for qualified claimants and corporations. Citizenship is a crucial factor in the determination of qualification for individuals.

the words of section 1604. It is inconsistent with the language of ANCSA to permit enlargement of the beneficiary class by naturalization while excluding native American children born after the effective date of the Act, and yet to use the December effective date (or enlargements of that date permitted by amendment) to determine all other claims under the Act. The Act does not contemplate the creation of an ever-expanding enrollment by naturalization of newly qualified members who will become entitled to share in the fixed estate created by Congress for Native Alaskans.⁵

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed. Appellees are not Alaska Natives as defined by ANCSA and are not entitled to enrollment for benefits under the Act. Agency officials of the BIA charged with enforcement of Departmental regulations respecting enrollment are directed to take appropriate action to disenroll appel-

lees consistent with this opinion, which is final for the Department.

FRANKLIN ARNESS

Administrative Judge

I CONCUR:

WM. PHILIP HORTON

Chief Administrative Judge

LAKE COAL CO., INC.

3 IBSMA 9

Decided February 17, 1981

Petition by the Office of Surface Mining Reclamation and Enforcement (OSM) for review of the July 15, 1980, summary decision of Administrative Law Judge Tom M. Allen, in Docket No. NX 0-111-P, vacating Notice of Violation No. 79-2-47-12 on grounds related to the timing of OSM's answer to Lake Coal Company's petition filed pursuant to 43 CFR 4.1150-4.1152.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

Under 43 CFR 4.1153 OSM has an absolute right to submit an answer to a petition within 30 days of its receipt of a copy of the petition. After that time, an Administrative Law Judge has discretion to regulate the scope of OSM's answer in a manner reasonably related to any prejudice suffered by the opposing party as a result of OSM's delay.

⁵ Cf. 43 U.S.C. § 1601(b) (1976). The reference to the legislative history of the Act in the decision below seeks to find a basis for enrollment in the provisions of the Act which extinguish whatever aboriginal title remains in Alaskan Natives or Native groups. This rationale assumes the existence of such title, an assumption not justified by the Act, prior decisions, or the legislative history. ANCSA extinguishes whatever aboriginal title remains; it does not recognize such title, nor does the legislative history indicate any intent to do so. (See H.R. Rep. Nos. 3100, 7039, 7432, and 92-10, 92d Cong., 1st Sess. May 3, 4, 5, 6, and 7, 1971; H.R. Rep. 92-523, 92d Cong., 1st Sess. reprinted in [1971] U.S. Code Cong. & Ad. News 2198; Conf. Rep. 92-746 reprinted in U.S. Code Cong. & Ad. News 2253.)

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

When an answer is filed by OSM after the time prescribed in 43 CFR 4.1153 but before any claim of prejudice from the delay is raised by the petitioner, it is an abuse of discretion for an Administrative Law Judge to issue, *sua sponte*, a summary decision in favor of the petitioner on the basis of presumed prejudice to the petitioner.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, and Marianne O'Brien, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Forrest E. Cook, Esq., Whitesburg, Kentucky, for Lake Coal Co., Inc.

*OPINION BY INTERIOR
BOARD OF SURFACE
MINING AND
RECLAMATION APPEALS*

The Office of Surface Mining Reclamation and Enforcement (OSM) has petitioned the Board, pursuant to 43 CFR 4.1270, for review of a summary decision issued by the Hearings Division vacating Notice of Violation No. 79-2-47-12. The summary decision was based on OSM's failure to answer, within the 30-day period specified in 43 CFR 4.1153, the petition of Lake Coal Company (Lake) for review of the

notice and a proposed civil penalty. We reverse that decision and remand the case for further proceedings.

Background

An inspection of the Ned's Branch surface coal mine, permitted to and operated by Lake Coal Company, Inc., in Letcher County, Kentucky, was conducted by OSM on Oct. 30, 1979. Following this inspection a notice of violation was issued to Lake in which were alleged eight violations of the Surface Mining Control and Reclamation Act of 1977 (Act)¹ and the Department's initial program regulations.² A notice of a proposed civil penalty based on the notice of violation was subsequently issued to Lake by OSM.

A conference to review the proposed civil penalty assessments was held by OSM, pursuant to 30 CFR 723.17, on Feb. 12, 1980. This review was concluded formally by a letter to Lake from the Assessment Conference Officer, dated Apr. 11, 1980, by which Lake was advised that the original proposed assessments had been affirmed in some respects and revised in others.

By petition filed with the Hearings Division on May 5, 1980, accompanied by full payment of the proposed assessment, Lake requested a formal hearing on the fact of the alleged violations and the amount of the proposed civil pen-

¹ Act of Aug. 3, 1977, 91 Stat. 445-532, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

² 30 CFR Chapter VII, Subchapter B.

alty assessment, in accordance with 30 CFR 723.18 and 43 CFR 4.1150-4.1152. In an amendment to its petition, filed May 19, 1980, Lake asserted that the OSM inspector who issued the notice failed to present credentials prior to the inspection and that the descriptions of the alleged violations were insufficient to put Lake on notice of the actual conditions and locations of the alleged violations.

On July 14, 1980, OSM filed with the Hearings Division both a motion to dismiss Lake's petition and an answer to the petition.³ One day later the summary decision vacating the notice of violation was issued, without any intervening filing by Lake concerning the timing of OSM's motion/answer. The Administrative Law Judge rejected any consideration of OSM's answer, because it was filed within the 30-day period specified in 43 CFR 4.1153 and Lake was presumed to have been prejudiced by the delay. Consequently, Lake's allegations in its petition were accepted as facts unrebutted by OSM.

Discussion

[1] We determined in *Addington Brothers Mining, Inc.*, 2 IBSMA 90, 87 I.D. 186 (1980), that the language of 43 CFR 4.1153 is directory

³ In support of dismissal of Lake's petition OSM asserted that it was not filed within the time specified in 43 CFR 4.1107. The Administrative Law Judge did not rule on this motion; nor does the Board do so by this decision. We note, however, that because the last day of the 15-day filing period for Lake under 43 CFR 4.1151(b) was a Saturday, OSM's claim apparently is incorrect. See 43 CFR 4.22(e).

in nature. Under that provision OSM has an absolute right to submit an answer to a petition within 30 days of its receipt of the petition. After that time the Administrative Law Judge has discretion to regulate the scope of OSM's answer in a manner reasonably related to prejudice suffered by the opposing party as a result of OSM's delay.⁴

[2] While in *Addington* the Board did not in terms express a requirement that any sanction for noncompliance with 43 CFR 4.1153 must be preceded by objection from the opposing party, it did emphasize that an Administrative Law Judge "may receive an answer, without sanctions, at any time prior to a suitable motion by the petitioner." 2 IBSMA at 93, 87 I.D. at 188. Further, in *Badger Coal Co.*, 2 IBSMA 147, 87 I.D. 319 (1980), a subsequent decision concerning the comparable time limitation set forth at 30 CFR 723.18(b), the Board expressly indicated that responsibility for objecting to a delay by OSM and for demonstrating actual prejudice resulting from that delay lies with the opposing party. 2 IBSMA at 152, 87 I.D. at 321.

In the instant case OSM's answer was filed without any objection by Lake to its timing. Moreover, the only prejudice considered to have resulted from OSM's delay was that

⁴ Conceivably prejudice might be demonstrated that could not be remedied by regulation of the scope of OSM's answer. Under this circumstance, it may be appropriate to terminate the proceeding by a summary decision against OSM.

presumed by the Administrative Law Judge,⁵ unsupported by a showing of actual prejudice by Lake.⁶ A mere presumption of prejudice from OSM's noncompliance with 43 CFR 4.1153 is not adequate under the Board's prior decisions to warrant a sanction against a late answer.

In accordance with the foregoing the decision below is reversed and this case is remanded for further proceedings consistent with this decision.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

⁵In this regard, the Administrative Law Judge stated:

"It would appear that the holding of \$4,900 of petitioner's funds during a time of national recession would certainly be the basis for a finding of disadvantage where the Act provides only 6 percent interest or interest at the Department of Treasury rate if that sum is ordered returned to the petition[er], where that same amount of money may perhaps earn a higher interest rate if invested in other certificates of deposit which are advertised daily in the newspapers. It is also a disadvantage to be deprived of one's capital for any excessive period of time, and therefore I find that any unreasonable delay in the hearing of the issues created by the pleadings occasioned by the respondent failing to answer in compliance with the requirements of 43 CFR 4.1150 *et seq.* amounts to the rights of this petitioner being prejudiced thereby, and the answer is not considered" (Summary Decision of July 15, 1980, at p. 2).

⁶Indeed, before the Board Lake did not put forth any factual basis for a finding of prejudice. In its brief, Lake merely characterized the decision below as a reasonable exercise of discretion vested in the Administrative Law Judge.

WILLIAM FRANCIS RICE
3 IB SMA 17

Decided February 19, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from the July 9, 1980, summary decision of Administrative Law Judge Tom M. Allen in Docket No. NX 0-187-R vacating Cessation Order No. 80-2-29-5 and Notice of Violation No. 80-2-29-18 on the ground that OSM failed to file its answer in accordance with 43 CFR 4.1165.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

Although an Administrative Law Judge has discretion to take appropriate action to correct the late filing of an answer in a proceeding to review a notice of violation or a cessation order, except in extreme circumstances it is not appropriate to vacate the notice or order.

APPEARANCES: Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS

The Office of Surface Mining Reclamation and Enforcement

(OSM) has appealed the July 9, 1980, summary decision of Administrative Law Judge Tom M. Allen vacating Cessation Order No. 80-2-29-5 and Notice of Violation No. 80-2-29-18. We reverse that decision and remand the case for further proceedings.

*Factual and Procedural
Background*

On Apr. 18, 1980, inspectors for OSM issued a notice of violation to William Francis Rice for several alleged failures to comply with the Surface Mining Control and Reclamation Act of 1977¹ and the initial program regulations and a cessation order "for opening and developing a site for surface coal mining operations without a permit."² On Apr. 25, in accordance with 30 CFR 722.15, an informal minesite review hearing was held at the site in Johnson County, Kentucky. Robert McKenzie, the OSM minesite hearing officer, sustained violation 2 of the notice of violation and the cessation order in a letter dated Apr. 30, 1980. The letter was accompanied by a minesite hearing report dated Apr. 25, 1980.

By letter dated May 15, 1980, and filed with the Hearings Division on May 19, 1980, Rice requested a hearing before an Administrative Law Judge, enclosed a copy of the April 30 letter, and asked that the transcript of the minesite review hearing be made a part of the ad-

ministrative record. This letter was docketed as Docket No. NX 0-187-R and assigned to Administrative Law Judge Allen on May 22, 1980. On June 5, 1980, the Administrative Law Judge sent a letter to Rice informing him that his letter of May 15 did not conform to the requirements of 43 CFR 4.1164 and requiring an amendment of the application within 10 days of receipt of the letter.³ On June 16, 1980, Rice filed an amended application with the original of the minesite hearing transcript.

On July 9, 1980, 23 days after the filing of Rice's amended application, the Administrative Law Judge, sua sponte, issued a summary decision vacating both the notice of violation and the cessation order on the grounds that OSM's failure to file its answer within 20 days in accordance with 43 CFR 4.1165 amounted to "an abandonment of its prosecutorial posture." The Field Solicitor received this decision on July 14, 1980; on the same date her answer was mailed.⁴ The answer was filed with the Administrative Law Judge on July 17, 81

³ The Administrative Law Judge sent a copy of his letter to the OSM Field Solicitor in Knoxville.

⁴ As to this coincidence, OSM states:

"Despite the coincidence of dates, the answer of OSM was not filed in response to the dismissal by the Administrative Law Judge. The lateness of the Answer was due to a severe backlog of typing, and a mistake in calendaring receipt of the Amended Application. The mistake was discovered Friday, July 11. When the responsible attorney returned from three days of hearings, the Answer was typed and sent out Monday, July 14." (OSM Brief at 2, n. 1).

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

² OSM Brief at 2. See *Claypool Construction Co., Inc.*, 2 IBSMA 81, 87 I.D. 168 (1980).

days after the filing of Rice's amended application for review.

OSM filed a notice of appeal on Aug. 7, 1980, and, after receiving an extension of time, a brief on Sept. 10, 1980. Rice did not file a brief.⁵

Discussion

In *Addington Brothers Mining, Inc.*, 2 IBSMA 90, 87 I.D. 186 (1980), we held that 43 CFR 4.1153 entitles OSM to file an answer within 30 days of receipt of a copy of a petition for review of a proposed civil penalty and that, after that time, an Administrative Law Judge has discretion to regulate the scope of a late answer in any reasonable manner and to receive a late answer, without imposing sanctions, any time before the filing of a motion by an opposing party. In that case the regulation read: "OSM *shall have 30 days* from receipt of a copy of the petition within which to file an answer." (Italics added.) In this case 43 CFR 4.1165 reads that OSM "*shall file an answer within 20 days* of service of a copy of" an application for review. (Italics added.) The Administrative Law Judge held that "there is a vast difference

between the language of 4.1153 and 4.1165" and that the latter "leaves no doubt that the instructions of the regulations are mandatory."

[1] It is true that the language of these two regulations is different. However, both the nature of a pleading and the consequences of its tardiness must be considered in determining what constitutes reasonable regulation by an Administrative Law Judge. Both in proceedings to review notices of violation or cessation orders and to review proposed civil penalties, the answer is in effect the third pleading. The notice of violation or cessation order, and accompanying notice of proposed civil penalty assessment in a civil penalty proceeding, constitutes the first pleading. An application or petition for review is the second pleading and the one that principally joins the issues. OSM's answer, the third pleading, is usually merely an iteration of the facts underlying the issuance of the notice of violation or cessation order, as well as a denial of applicant's or petitioner's allegations. As such its tardiness matters little to either the applicant's ability to prepare its case or the Administrative Law Judge's ability to conduct a hearing. Occasionally, where an application or petition for review alleges matters not contained in the notice of violation or cessation order, *e.g.*, that an inspector did not present credentials properly, OSM's answer will contain responses important to focussing the issues. Where this is so, a tardy

⁵ Rice did, however, file a motion to strike OSM's brief on the grounds that it had objected to an extension of time for its filing and that the brief had been filed 3 days after the extended deadline ordered by the Board. OSM was granted a 4-day extension, from Sept. 8 to 12. OSM filed its brief on Sept. 10, not Sept. 15, as Rice asserts. (Rice's response to the motion for an extension was filed Sept. 15.) Rice's motion to strike is denied.

answer may disadvantage the applicant or inconvenience the Administrative Law Judge. As we said in *Addington, supra*, in these circumstances an Administrative Law Judge may take appropriate corrective action. If it would not disadvantage an applicant, the Administrative Law Judge could postpone the hearing, segregate the contents of the tardy answer that go beyond those of the notice of violation for a separate hearing, or order a more definite statement. But the relief fashioned must address the prejudice shown and may not, except in extreme circumstances, include vacating a notice of violation or cessation order. See *Badger Coal Co.*, 2 IBSMA 147, 87 I.D. 319 (1980).

Thus, it was inappropriate for the Administrative Law Judge to vacate the notice of violation and the cessation order in this case. That decision is reversed and the case is remanded to the Hearings Division.

WILL A. IRWIN

Chief Administrative Judge

ADMINISTRATIVE JUDGE
FRISHBERG CONCURRING:

I concur. The regulations provide no penalties or sanctions resulting from the failure to answer within 20 days. 43 CFR 4.1165-70. In construing apparently mandatory statutory language, the Solicitor of this Department concluded:

When no consequences attach to failure to comply, when no penalty is imposed for delay, and when there are no negative words restraining the doing of

the Act after the time specified * * * the courts will deem the statute directory merely. [Citing *Diamond Match Co. v. U.S.*, 181 F. Supp. 952 (Cust. Ct. 3rd Div. 1960); *Fort Worth National Corp. v. Federal Savings & Loan Insurance Corp.*, 469 F.2d 47 (5th Cir. 1972).]

Solicitor's Opinion, M-36876, 81 I.D. 316, 322 (1974).

As stated by the Fifth Circuit Court: "A statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provisions." (Citations omitted; italics added.) *Fort Worth, supra* at 58. On the same page the court quoted the following language in *Diamond Match, supra* at 958-59, with approval:

[a]s a general rule, a statute which provides a time for the performance of an official duty will be construed as directory so far as the time of performance is concerned, especially where the statute fixes the time for convenience or orderly procedure. * * * Statutes fixing the time for performance of acts will ordinarily be held directory where there are no negative words restraining the doing of the act after the time specified and no penalty is imposed for delay.

To the same effect, see *Usery v. Whittin Machine Works, Inc.*, 554 F.2d 498, 501 (1st Cir. 1977); *Marshall v. Local U.* 1974, *Int. Ass'n of Mach.*, 558 F.2d 1354, 1357 (9th Cir. 1977).¹

¹ But cf. *Tri-state Bancorp. v. Bd. of Gov. Fed. Res. Sys.*, 524 F.2d 562, 565 (7th Cir. 1975), where the court distinguished *Fort Worth* and held the statute to be mandatory because it provided a consequence for failure to act within the prescribed time.

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The cases referred to above are concerned with statutory language. The same rationale applies to the interpretation of regulatory language. In *Tagala v. Gorsuch*, 411 F.2d 589 (9th Cir. 1969), the court considered a peremptory dismissal by the Bureau of Land Management of this Department of a late-filed statement of reasons under the following regulatory language:

If the notice of appeal did not include a statement of the reasons for the appeal, such a statement *must be filed* * * * within 30 days after the notice of appeal was filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal. [Italics added.] ⁽²⁾

The court reversed and remanded to the Department for the exercise of its discretion as to whether the appeal should be dismissed or the late filing accepted, following the holding in *Pressentin v. Seaton*, 284 F.2d 195, 199 (D.C. Cir. 1960). There the court had before it the same language. It stated:

Certainly rules are made to be followed; that is the essence of the rule of law. But the rule now before us was not a peremptory rule. It did not unequivocally provide that upon a late filing of the statement the appeal would be dismissed. It said that under such circumstances the appeal would be "subject to" dismissal. It left the door wide open to a consideration of circumstances. The situation is a familiar one in the courts, where the timely filing of notices of ap-

peals is jurisdictional and cannot be extended or excused, but the timely filing of subsequent briefs is frequently excused, the time extended, and other measures taken to preserve the substance of the adjudicatory process.

In the case before us it is not a notice of appeal or an opening brief that was filed late, but an answer to an application for review. The language of 43 CFR 4.1165, providing that OSM "shall file an answer within 20 days" of service of such application, was designed to aid "orderly procedure." *Diamond Match, supra*. I do not believe the Secretary intended that it be used to thwart "the substance of the adjudicatory process." *Pressentin, supra*.

NEWTON FRISHBERG

Administrative Judge

CONCORD COAL CORP.

3 IBSMA 26

Decided February 19, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Aug. 4, 1980, summary decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-288-R that vacated OSM's enforcement action against Concord Coal Corp., on the ground that OSM failed to comply with 43 CFR 4.1165 (a).

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative

² 43 CFR 1842.5-1 (1968). The same language appears in the present regulations at 43 CFR 4.412, except that appeals regarding public lands are now filed with the Board of Land Appeals instead of the Director of the Bureau of Land Management.

Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

A determination by an Administrative Law Judge, *sua sponte*, that an application for review is not in compliance with 43 CFR 4.1164 relieves OSM of its obligation to answer the application, and, unless otherwise ordered, OSM is entitled to the full 20 days prescribed in 43 CFR 4.1165(a) to answer an amended application.

APPEARANCES: Harold Chambers, Esq., Office of the Field Solicitor, Charlestown, West Virginia, Mark Squillace, Esq., Jay Pendergrass, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

**OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS**

This appeal was brought by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Aug. 4, 1980, decision of the Hearings Division that vacated Notice of Violation No. 80-I-107-42 on the ground that OSM abandoned its prosecutorial posture against Concord Coal Corp. (Concord) by failing to answer Concord's application for review of the notice within the 20-day period prescribed in 43 CFR 4.1165(a). We reverse that decision and remand the case for further proceedings.

Background

On June 20, 1980, Concord filed an application for review of Notice

of Violation No. 80-I-107-42 with the Hearings Division.¹ By a letter dated June 30, 1980, the Administrative Law Judge informed Concord and OSM that Concord's application was not in compliance with 43 CFR 4.1164. Concord was instructed to amend its application within 15 days to avoid dismissal of its case. No reference was made in the letter to either an obligation on the part of OSM to answer Concord's original application or to an acceptable time for an answer by OSM to any amended application by Concord.

On July 24, 1980, Concord filed an amended application for review and, on July 28, 1980, requested temporary relief. A summary decision vacating OSM's enforcement action against Concord was issued on Aug. 4, 1980, because OSM had failed to answer Concord's original application within 20 days of receiving it, in accordance with 43 CFR 4.1165(a). OSM filed an answer and a motion to dismiss Concord's applications for review and temporary relief on Aug. 5, 1980.

A notice of appeal from the summary decision was filed by OSM on Sept. 4, 1980. OSM submitted a brief in support of its appeal; Concord did not reply.

Discussion

[1] OSM was relieved of any ob-

¹ The notice was issued to Concord following an inspection of the Concord Nel mining operation in Logan County, West Virginia, by OSM pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act of Aug. 3, 1977, 91 Stat. 445-532, 30 U.S.C. §§ 1201-1328 (Supp. II 1978)). The notice alleged a failure by Concord to transport and place spoil material in accordance with the Department's initial program regulations at 30 CFR 715.15 (a) (7), (a) (8), and (b) (7).

ligation to respond to Concord's original application for review when the Administrative Law Judge determined, *sua sponte*, that the application was not in compliance with 43 CFR 4.1164.² In accordance with 43 CFR 4.1168 it was incumbent upon the Administrative Law Judge, in conjunction with his granting Concord leave to amend its defective application, to instruct OSM when to answer an amended application.³ The lack of such instruction could be properly viewed by OSM as indicating that it would be allowed the full 20 days provided under 43 CFR 4.1165(a) to answer.

OSM received Concord's amended application on July 24, 1980; therefore, OSM should have been allowed to file its answer on or before Aug. 13, 1980. The Administrative Law Judge issued his summary decision on Aug. 4, 1980, prior to the running of this time limitation.⁴

For the foregoing reasons the summary decision below is reversed and the case is remanded. OSM's

² Letter of Administrative Law Judge Tom M. Allen, dated June 30, 1980, to Kenneth W. Matheny.

³ 43 CFR 4.1168(b) provides: "Upon receipt of an initial or amended application for review or *subsequent to granting leave to amend*, the administrative law judge shall issue an order setting a time for filing an amended answer if the judge determines that such an answer is appropriate." (*Italics added.*)

⁴ Apart from the more particular failure of the Administrative Law Judge in this case to allow OSM a full 20 days from service of the amended application to answer, as provided in 43 CFR 4.1165, it was improper for him to vacate enforcement action on the basis of a late answer by OSM absent, at least, a showing of prejudice to the opposing party to justify such action. See *William Francis Rice*, 3 IBSMA 17, 88 I.D. 269 (1981). There was no showing of prejudice to Concord in this case.

answer, its motion to dismiss Concord's application for temporary relief, and its motion for a summary decision shall be accepted as having been timely filed with the Hearings Division on Aug. 5, 1980. Further proceedings in this case shall be suspended, however, pending the Board's decision in *Concord Coal Co.*, IBSMA 81-5.

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

HOLLAND LIVESTOCK RANCH AND JOHN J. CASEY

52 IBLA 326

Decided February 19, 1981

Appeal from a decision of Administrative Law Judge Dean F. Ratzman finding appellants liable for willful and repeated grazing trespasses and revoking certain of appellants' grazing privileges for a period of 8 years.

Affirmed.

1. Administrative Procedure: Burden of Proof—Administrative Procedure: Decisions—Administrative Procedure: Hearings—Evidence: Burden of Proof—Evidence: Sufficiency

After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that an individual has committed a graz-

ing trespass if that finding is in accordance with, and supported by, reliable, probative and substantial evidence.

Where the evidence as to specific trespass indicates that, of a number of cattle counted, some were located on intermingled private land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. The burden then shifts to the grazing license to rebut this presumption.

2. Grazing Permits and Licenses: Trespass—Trespass: Generally

In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his or her conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

3. Administrative Procedure: Hearings—Evidence: Generally—Grazing Permits and Licenses: Hearings—Hearings

Settlement agreements compromising prior trespasses may be considered an admission of liability only where, by the terms of a settlement, liability is admitted. Where, however, liability has been initially determined in a Departmental adjudication, such a determination is properly considered in a subsequent hearing. As probative of the issue of "repeated" violations, absent a stipulated settlement which *expressly* vacates the factual determinations made in the prior adjudication.

APPEARANCES: Thomas L. Belautegui, Esq., Johnson, Belaustegui &

Robison, P.C., Reno, Nevada, for appellants; Burton J. Stanley, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

This appeal arises from the decision of Administrative Law Judge Dean F. Ratzman, dated Feb. 14, 1980, directing Holland Livestock Ranch and John J. Casey to pay \$1,400 for willful and repeated trespasses, plus \$2,870.90 for impoundment costs, and revoking appellants' grazing privileges for a period of 8 years.¹

The decision below involves a number of trespasses in the Buffalo Hills Allotment, the Granite Mountain Fire Rehabilitation Closure Area of the Buffalo Hills Allotment, and the Wild Horse Closure Area of the Buffalo Hills Allotment. Appellants own, lease, or control areas of private land that intermingles with certain public lands.

The issues set out by appellants on appeal are as follows:

A. Whether the finding of trespass by the Administrative Law

¹ Holland Livestock Ranch is a co-partnership composed of three corporations: Bright-Holland Co., Maremont-Holland Co., and Nemeroff-Holland Co. John J. Casey owns a controlling interest in all three.

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Judge was supported by substantial evidence in the record.

B. Whether the decision was erroneous as a matter of law.

C. Whether the evidence of record shows that willfulness was established in the record.

D. Whether reliance upon certain prior "trespasses" to establish "repeatedness" was proper.

The issues that are pertinent in our resolution of the case at bar will be discussed with respect to the findings and conclusions of the decision appealed from the pertinent arguments presented by the appellants in their briefs.

We adopt, in its entirety, Judge Ratzman's summary of facts as follows:

A stipulation entered into by the parties (Exhibit 1) covered a number of matters. In the stipulation it is agreed that the following brands and earmarks were registered to Holland Livestock and/or John J. Casey. A circle on the left rib and hip combined with an earmark consisting of a split left split right; combination TF brand on the left hip and a spade brand on the left hip and left rib both used in conjunction with an earmark consisting of a split right ear and a cropped left ear.

The stipulation describes activities of James G. Hansen, a BLM Range Technician, who counted 127 cattle within the Granite Mountain Fire Rehabilitation Closure Area on July 19, 1977. Of these cattle one cow had a circle brand on the left hip, five cows displayed a combination TF brand on the left hip, and 36 cows had a spade brand on the left hip. These cattle were either on public lands or private lands with unrestricted access to public lands in the closure area. In addition Mr. Hansen saw on August 23,

1977, a cow and a calf with spade brands on the left hip and eight cows and three calves with cropped left split right earmarks, all on public lands or private lands with unrestricted access to public lands. He also observed 106 cows, six bulls and 38 calves on August 23 and 24, 1977, but was unable to identify them.

Work by BLM employee Brad Hines described in the stipulation is as follows: He discovered 78 cows and five bulls with a spade brand on the left hip, and a cow with a combination TF brand on the left hip, on public lands or on private lands with unrestricted access to public lands on September 14, 1977. Forty unidentifiable cattle were also found.

The stipulation sets forth that P. Edward Ryan, a BLM Natural Resource Specialist, saw two cows with spade brands on the left hip and two cows with cropped left split right earmarks in the Granite Mountain Fire Rehabilitation Closure Area on January 17, 1978. The cattle were on public lands or on private lands with unrestricted access to public lands. On January 18, 1978, he found 39 cows and four bulls with a cropped left split right earmark and two cows with a spade brand on the left hip, in the Squaw Valley area and on the west side of the Smoke Creek Desert in the Buffalo Hills Planning Unit. They were on public lands or private lands with unrestricted access to public lands. Although 192 cattle were seen on January 17 and 18, 1978, Mr. Ryan was able to identify only 49 of them.

Mr. Ryan also found two cows with a spade brand on the left hip and 35 cows with cropped left split right earmarks in the Granite Mountain Fire Rehabilitation Area on January 25, 1978. On the next day he discovered a cow with a spade brand on the left hip and 20 cows with a cropped left split right earmark in the Squaw Valley and Smoke Creek Desert area. A total of 167 cattle were discovered on those days but only 58 were identified. All the cattle were on public lands

or private lands with unrestricted access to public lands in an area closed to grazing.

The next part of the stipulation states that Michael S. McClellan, a BLM Natural Resource Specialist, saw 13 cows with a spade brand on the left hip and 23 cows with a cropped left split right earmark on March 8, 1978, in the Buffalo Hills Allotment on public lands or on private lands with unlimited access to public lands. None of the cattle were ear tagged. On March 9, 1978, 250 head of cattle were observed in the Buffalo Hills Planning Unit. On that day Mr. McClellan could identify 44 cows having a spade brand on the left hip and six with cropped left split right earmarks. These cattle were found on public lands. No ear tags were found on these cattle as required by respondent's grazing license.

A memorandum, dated June 22, 1978, from Ron Hall, a BLM Natural Resource Specialist, was also admitted into evidence. Ex. 1-A. The events discussed in the memorandum relate to the impoundment of 74 cows, bulls and yearlings, and 15 calves on June 13, 1978, from public lands or private lands with unrestricted

access to public lands. A brand inspection was also made the following day June 14, 1978. A total of 123 cows, bulls and yearlings, and 24 calves were impounded on that day. Mr. Casey arrived on June 14 to claim all the animals. Notice was given to him not to place any untagged cattle above the Crutcher Canyon drift fence. The cattle were released to Mr. Casey and he drove them toward the Squaw Valley Ranch. The next day, June 15, 1978, BLM employees discovered 59 cattle (17 were untagged) immediately north of the Crutcher Canyon drift fence. On June 16, 1978, Mr. Casey was seen moving cattle toward the Crutcher Canyon drift fence.

As has been indicated, Exhibit 1 [-A] covers the actions of five BLM employees in finding and impounding Casey cattle in the period June 13 through June 15, 1978. An itemized list of the impoundment costs involved in this contest, totaled \$2,870.90 Ex. 1-B. An outline of the percentage of lands in Federal ownership in comparison to private ownership was also entered into the record. This outline disclosed the following percentages in the Closure Areas of the Buffalo Hills Allotment:

1. Summary of Acreage Carrying Capacity in the Granite Mountain Rehabilitation Closure Area.

Ownership	Acres	Percent of total	AUMs	Percent of total
Public Land-----	39, 120	85	3, 481	60
J. Casey Land (unfenced)----	7, 220	15	2, 311	40
	46, 340	100	5, 792	100

2. Summary of Acreage and Estimated Carrying Capacity in the "Horse" Closure Area.

Ownership	Acres*	Percent of total	Est. carrying capacity*	Percent of total
Public Land-----	159, 219	95	11, 387	96
Unfenced Private-----	9, 170	5	453	4
Total-----	168, 389	100	11, 840	100

* These figures exclude the playa of the Smoke Creek Desert.

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Brad Hines, the Supervisory Range Conservationist for the BLM in the Sonoma-Gerlach Resource Area, testified he is familiar with the Buffalo Hills Planning Unit. Tr. 11. He identified grazing licenses issued to the respondent during 1977, 1978 and 1979. Ex. 6 and 7. There are three users in the Buffalo Hills Allotment. Tr. 13.

On July 15, 1977, Bob Neary and Brad Hines flew over the Closure Area and found 70 to 80 cattle in the burn Closure Area of the Buffalo Hills Allotment. A ground count was made on July 19, 1977 by James Hansen. Tr. 15. Another ground count was made on August 23, 1977. On September 14, 1977, Mr. Hines conducted a ground surveillance and identified 84 cattle with Mr. Casey's brands or earmarks in the Granite Mountain Fire Rehabilitation Area. Mr. Hansen made a ground count on August 23 and August 24, 1977 and identified 91 cattle in that area. Tr. 17.

A Notice of Trespass was sent to Mr. Casey by certified mail but was returned unclaimed. Ex. 8, Tr. 18. Mr. Casey's record address is 2905 South Virginia Street, Reno, Nevada.

Prior to January 17, 1978, an aerial survey disclosed there were 200 cattle in the closed areas of the allotment. Another ground count was made by Ed Ryan on January 25 and 26, 1978. Tr. 24. On April 26, 1978 a ground count was made, while on June 2, 1978 an aerial flight over the area was made. Tr. 25. A Trespass Notice was sent to Mr. Casey, January 16, 1978, but was returned unclaimed. Ex. 9.

A Notice of Closure of Federally Owned or Controlled Lands to Livestock Grazing (Ex. 10) was published in the Review-Miner, a weekly newspaper published in Lovelock, Nevada, in May 1978. The ban against grazing in the Horse Closure Area commenced on April 30, 1978. Mr. Hines personally informed Mr. Casey about the closure before it went into effect. Tr. 31. A certified letter notifying Mr. Casey of the closure was sent to him but was returned unclaimed. Ex. 11, Tr. 32.

On September 14, 1977, Mr. Hines met Jeanie Hunt, an employee of Mr. Casey, on the Granite Ranch when he was in the vicinity counting cattle. Tr. 33. Ms. Hunt informed Mr. Hines that there were no cattle north of the Granite Ranch. However, a subsequent count on the same day revealed there were 124 cattle belonging to Mr. Casey north of that ranch. Tr. 34.

With respect to alleged trespasses occurring in January, 1978, Mr. Hines made a phone call to Ms. Hunt on January 13, 1978 and told her that all livestock in the burn closure area were considered to be in trespass and that they should be removed. Tr. 35. On January 19, 1978, Mr. Casey contacted Mr. Hines and asked for a license to graze 200 cattle, which was the approximate number of cattle found in trespass. Mr. Casey was told where his cattle were and that any cattle in the burn closure area were in trespass. Mr. Hines refused to grant Mr. Casey's request. Tr. 35.

At a later meeting with Mr. Casey in Gerlach, Nevada, on June 6, 1978, Mr. Hines notified Mr. Casey that the cattle left on the range during a seven day period (the Bureau had agreed not to impound trespassing cattle in that period) were considered in willful trespass. Tr. 37. The explanation given by the latter for the continued trespasses was that he could not find any help to assist him in removing the cattle.

Mr. Chet Conard, District Manager of the BLM Winnemucca District, testified he received a phone call from Mr. Casey on June 12, 1978. At that time, Mr. Casey stated he had just rounded up approximately 300 head of livestock from the closed area and that there was no need to make further aerial inspections. Tr. 50. Mr. Conard informed Mr. Casey that the seven day extension granted to round up the trespassing cattle had expired. Tr. 50.

Dave Boyles, a horse wrangler with the BLM, was in the Granite Fire Rehabilitation Closure Area from June 6 through June 13, 1978. Tr. 56. He found cattle there at that time but neither Mr. Casey nor any of his employees were seen in the area. Tr. 57. While riding along the

Crutcher drift fence, Mr. Boyles found several gates open that allowed cattle to cross into the closed area. Tr. 60. Openings in parts of the fence were also found. He counted 54 head of cattle on June 8 and 9, and impounded an estimated total of 137 on June 13, 1978. Tr. 66. No evidence was found to indicate the additional cattle came through openings in the fence or through open gates that he inspected. Tr. 67.

Mr. Ron Hall, a Wild Horse Specialist with the BLM, was also in the Buffalo Hills Allotment on June 6 through 13, 1978. He identified 54 cattle with Casey brands and earmarks on June 8 and 9. Tr. 69. Neither Mr. Casey nor any of his employees were seen in the area removing cattle during that time. Mr. Casey signed a statement acknowledging that all the cattle impounded on June 13 and 14, 1978, belonged to him. Ex. 12, Tr. 70.

Michael Scott McClellan, a Natural Resource Specialist for the BLM, talked to Mr. Casey on March 8, 1978 at a location north of the Deep Hole Ranch. Cattle were seen scattered throughout the surrounding area. Mr. Casey admitted the cattle belonged to him. Tr. 73. The cattle were not eartagged, which violated a requirement in effect at that time. Mr. Casey stated he turned cattle out of Deep Hole Ranch himself because of muddy conditions at that ranch, and asserted that most of the land up to the Clear Creek Ranch belonged to him. Tr. 76. The land between the ranches is unfenced. Tr. 76. Mr. McClellan concluded that Casey cattle were in trespass and personally served Mr. Casey with a Trespass Notice on March 9, 1978. Ex. 13.

George Cramer, an employee of Mr. Casey during 1978, was not assigned responsibilities in controlling cattle in the closure area. Tr. 30. He moved cattle from Squaw Valley to above the Crutcher fence on two occasions. Tr. 40. The first time was around June 9, 1978. Tr. 31. Several days later he moved the same cattle. Tr. 32. Perhaps 100 head of cattle were moved a quarter of a mile above the fence the second time. Tr. 34. He be-

lieves the cattle could have returned through open gates along the fence. Mr. Casey worked with Mr. Cramer on both occasions when the cattle were moved.

On cross-examination, Mr. Cramer testified that Mr. Casey instructed him to keep the cattle above the Crutcher drift fence. Tr. 43. However, some cattle would stray down to the area below the fence. Mr. Cramer split his duty among several of the ranches belonging to Mr. Casey. Tr. 44. He would ride over to the burn closure area about once a month to search for cattle. The area was relatively empty of cattle. Every time he came back to the Fly Ranch he found the gates open. Tr. 66. He also helped repair and maintain fence at that property.

Mr. Cramer's estimate of the number of cattle moved on June 10, 1978, was 500. Tr. 49. He did not attempt to lock any of the gates that were left open, because he had concluded that it "would do no good." Tr. 53.

Mr. John J. Casey, the respondent, testified that his principal residence in 1978 was in Gerlach. Tr. 55. He uses his motel in Reno as a clearinghouse for all the mail he receives. He is there once a month. He stated that he has asked the BLM to send mail on an unrestricted basis so that his employees could pick it up. Tr. 56. He has had "manager problems," and conceded that in some instances the mail has not been properly handled. He believes that he was granted an extension of time to remove cattle which included June 13, 1978. Tr. 57. He testified that he was continuously in the closure area near Squaw Valley from June 6 to 13 removing cattle. Tr. 58. Mr. Casey contends he had ten persons help him remove cattle during that time. However, he could not provide the names of some, or state exactly how long each of them assisted him. Tr. 59. He believes that the cattle impounded after being found in the closure area walked back across the cattle guard into that area. He saw cattle doing so. Tr. 61. A gate along the Crutcher fence was found knocked down. Tr. 62.

Mr. Casey estimated he had 15 people, full or part-time, assist him in caring for his cattle in January through July, 1978. Tr. 67. They helped with branding and generally assisted in keeping the cattle in the proper areas. Tr. 69. They also shut any open gates that they found. Tr. 70. Mr. Casey believes he owns 10,000 acres of unfenced land in the Granite Mountain Fire Rehabilitation Closure Area and another 10,000 acres of unfenced land in the Horse Closure Area. Tr. 71.

During cross-examination, Mr. Casey said that he has had problems with horses breaking down gates and hunters leaving gates open. Tr. 76. He has known about these problems since 1970. In order to correct these problems, he has removed gates and replaced them with sections of fence. Tr. 76. When asked whether he was doing enough to keep cattle out of closed areas, Mr. Casey replied, "I sure am not." Tr. 79. He believes that to reduce trespassing he must remove 99 percent of the gates from the fences, and persuade the Bureau to remove wild horses. Tr. 79. He contends that he removed ten gates in 1977 and through June, 1978. In addition, he asserted that he has offered to place padlocks on the gates but did not receive cooperation from the Bureau. He will not install cattle guards because he believes they are ineffective. Tr. 80.

Mr. Casey blames his difficulties in receiving mail from the BLM in the last five or six years on a practice by the agency of transmitting it with instructions for restricted delivery. In his view the Bureau does not want him to receive some mail (he has asserted that the Bureau is trying to put him out of business). He also believes that at times his employees have been at fault in not picking up the mail. He denied that he has instructed his employees to reject certified mail from the BLM. On the other hand, several certified letters from the BLM, sent May, 1979, were exhibited to Mr. Casey at the hearing. Ex. R-2. These letters were sent unrestricted delivery

and both were returned unclaimed. Mr. Casey explained the reason for not receiving the certified letters on the need for someone to go to the post office to get them, and his understanding that "there's a lot of times when she can't get away." Tr. 90.

The respondent believes he removed 400 to 500 cattle from the closure areas in the period June 6 to 13, 1978. Tr. 92. He contends the majority were removed from his fields or other privately owned lands. He bases his opinion on estimates he has made using the odometer in a pickup truck. Tr. 94. Moreover, he maintains he was on the range every day from June 6 to 13, 1978, rounding up cattle. In regard to the cattle impounded on June 13, 1978, Mr. Casey stated they were all above the Crutcher drift fence prior to that day. He indicated that 147 cattle could negotiate the cattle guard in one hour. Tr. 96.

Mr. Casey is aware that there is unrestricted access to public lands from unfenced lands he owns. Tr. 97. He contends that he tries not to use his privately owned unfenced lands. Tr. 98. He does not obtain exchange of use permits because he believes they are issued on an inequitable basis. Although he moved cattle from Deep Hole to Clear Creek in March, 1978, the cattle were not ear-tagged nor was a trailing permit sought. Mr. Casey testified that it was not his intention to go on public land at that time. Tr. 101. His position is that he is unable to control cattle trespass because there are so many gates in the area. Despite this, he will try to keep cattle out of closed areas. Tr. 103. He stated that he has done everything within reason to keep cattle where they belong. Tr. 105.

According to Mr. Casey, the cattle enter the closed area because the feed is a lot better there. In addition, some of the cattle were raised in the closed area. Tr. 107. He conducts no regular program of fence inspection in the trespass areas. Before the closing of the areas he did not have problems with trespassing cattle. He

has 1300 head of cattle on the area under consideration at the present time. Tr. 109. He asserts that the only effective way of keeping cattle from finding their way through the fence and getting into the closure area would be to patrol the fence continuously. Tr. 110. The Crutcher drift fence is approximately 15 miles long. Mr. Casey believes locking the gates would be ineffective since people would cut down a part of the fence to get through. Tr. 111.

Andrew Fleming Jackson testified that at times three of his children worked on Mr. Casey's ranch from June 1977 to June 1978. He is aware of the gate problem on the Granite Mountain drift fence and the Crutcher Canyon drift fence. Tr. 115. Andrea Jackson testified she helped Mr. Casey move his cattle a couple of times in the period June 1977 to June 1978. Tr. 120. She and her brothers were not paid for their help. She has seen some of Mr. Casey's cattle in the burn area. Tr. 122.

A notice of Closure of the Granite Mountain Fire Rehabilitation Area, effective June 24, 1975, was published in the Review-Miner in Lovelock, Nevada, June, 1975. Ex. 4. This notice was also published in June, 1975 in the Nevada State Journal.

Grazing licenses issued to Mr. Casey in 1977 and 1978 were entered into the record. Ex. 6 and 7. These licenses state:

"Livestock use is not authorized in the area of the Granite Mountain Rehabilitation Project, described as that area south of the Granite Mountain Drift Fence.

* * * * *

"Only cattle bearing BLM issued ear tags will be authorized to graze on the Buffalo Hills Allotment after 3-1-78."

A Winnemucca Grazing District Advisory Board recommendation, concurred in by the BLM District Manager, placed maintenance responsibility for the Crutcher Canyon seasonal fence on Holland Livestock Ranch (owned by Mr. Casey) on April 30, 1968. Ex. 22d.

On appeal, appellants argue that "[i]n all prior proceedings between the parties, whenever a trespass has been found, it has been based upon direct evidence of actual trespass. In this proceeding, however, the Government seeks to establish the alleged trespass solely upon the *Access Theory*." Appellants contend that a presumption of trespass is not applicable in the instant case.

[1] Appellants misapprehend the nature and function of what they term the "access theory." The access theory is not a rule of positive law which requires a finding of trespass from the mere recitation that the grazing animals had "unrestricted access to" public lands. Rather, it is a rebuttable presumption which is drawn after the fact of unrestricted access is shown.

In *Home Insurance Co. v. Weide*, 78 U.S. (11 Wall.) 438, 441 (1870), the United States Supreme Court defined a presumption to be "an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known." As such, presumptions "place upon the adverse party the burden of offering further evidence in the sense that a verdict will be directed against him if he does not, but they do not affect the ultimate burden of proof, as to the preponderance of the evidence required." *Sowizral v. Hughes*, 333 F.2d 829, 833 (3d Cir. 1964) quoting *Prosser on Torts*, § 41, at 197 (2d ed. 1955).

Thus, "creation of a presumption is inevitably designed to affect the

burden of proof by shifting it from the party possessed of the procedural device to his adversary." *Brown v. Oklahoma Transportation Co.*, 588 P.2d 595, 601 (Okla. App. 1978). The effect of this shift is that "if proof of the basic facts are introduced into evidence, the presumed fact is also taken to be proved in the absence of evidence to the contrary." *State v. Jones*, 88 N.M. 107, 537 P.2d 1006 (1975). *Accord*, *Connizzo v. General American Life Ins. Co.*, 520 S.W.2d 661, 665 (Mo. App. 1975).

The presumption which arises from the presence of cattle on intermixed Federal and private lands is premised on the realization that "[a]s the boundaries between the Federal Range and private lands [are] of a legal rather than a physical nature it strains the credibility to believe that the animals grazing would respect the same." *Midland Livestock Co.*, 10 IBLA 389, 402 (1973). It is common knowledge that an unrestrained hungry cow will migrate to an area where forage is available. *See Alton Morrell and Sons*, 72 I.D. 100 (1965).

We reject appellant's assertion that the presumption herein is a substitute for actual factfinding, where "substantial" evidence of a reliable nature is required. The stipulation agreed to in Exhibit 1 sets out the facts and brings this case clearly within the scope of the presumption as delineated in *Bureau of Land Management v. Babcock*, 32 IBLA 174, 183-84, 84 I.D.

475, 479-80 (1977). The Board noted in *Babcock*, *supra*, that:

Appellant's land is included in an allotment with federal land. Within the allotment, no physical barriers separate the private land from the federal land. In the absence of any effective restraint, appellant's cattle were free to graze throughout the allotment. In the absence of evidence to the contrary, as we indicated, it is therefore reasonable to conclude that of the total forage consumed by appellant's cattle, federal forage comprised the same percentage as it comprised of the total forage available in the allotment, i.e., 33 percent.

32 IBLA at 184, 84 I.D. at 480.

This same presumption has been used to calculate damages in other grazing trespass cases involving allotments with mixed Federal and private lands. *See, e.g., Nick Chournos*, A-29040 (Nov. 6, 1962); *J. Leonard Neal*, 66 I.D. 215 (1959).

Appellants assert that the Government's reference to the decision in *Holland Livestock Ranch v. United States*, United States District Court, District of Nevada, Order and Summary Judgment, Civil No. R-79-78 BRT, Aug. 7, 1979, is inaccurate to the extent that it suggests affirmance of the "access" theory of trespass.

The District Court in *Holland Livestock Ranch v. United States*, *supra*, affirmed the "access theory of trespass" when it granted order and summary judgment for the Government. The order stated that:

The court having read and considered the administrative record lodged with the court, the testimony taken at the time of the hearing on the preliminary injunction and the memoranda of points and

Authority submitted by the parties here-to and good cause appearing therefore.

* * * * *

It is Further ordered and adjudged that Defendants motion for Summary Judgment be and the same is hereby granted.

It is well settled that a motion for Summary Judgment lies whenever there is no genuine issue as to any material fact. It may be made on the pleadings or the record or it may be supported by affidavits. The motion strikes at the heart of the claim. Clearly, if the decision below is premised on an erroneous theory of law, the decision will be set aside. By the grant of summary judgment in *Holland Livestock Ranch v. United States, supra*, the Court not only affirmed the result of the prior Board decision in *Bureau of Land Management v. Holland Livestock Ranch*, 39 IBLA 272, 86 I.D. 133 (1979), it also affirmed, perforce of logic, the legal theory upon which the Board's decision was based. That legal theory included the presumption of trespass arising from unrestricted access.

The stipulation which was entered into evidence, as well as the testimony of the BLM employees, clearly established a basis upon which to utilize this presumption. It then became appellants' obligation to show either that the underlying predicate of the presumption (*i.e.*, unrestricted access) did not, in fact, exist, or alternatively that other factors, such as the presence or absence of springs or forage, or supervision by appellant or his em-

ployees of the cattle's movements *rebutted* the presumption.

We note that, on appeal, appellants argue that this case is different from the other cases previously decided by the Board which involved the access presumption. Thus, they argue that the forage was superior on the private lands, that the greater bulk of the available water was on private lands, and that fences impaired access to Federal lands. Accordingly, they contend that any presumption which may arise was effectively overcome by their testimony and evidentiary submissions. We do not agree.

Concerning forage, for example, Exhibit 3 indicates that appellants' forage was 40 percent of the total in the Granite Mountain Fire Rehabilitation Closure Area and 4 percent of the total in the Buffalo Hills Horse Closure Area. These figures only include the carrying capacity of appellants' unfenced lands, a point to which we will return later. Suffice it to note that, while an insignificant amount of available forage on the Federal range would certainly undercut any presumption based upon unimpeded access, percentages of 60 and 96, respectively, are clearly above any level where this concern might be deemed relevant. Further, it is important to point out that the percentage of forage available on private lands is utilized in computing the amount of trespass assessed.

With respect to water sources, we note that while Casey did testify that 95 percent of the waters in the Squaw Valley area were located on

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his private lands, this answer was stricken by Judge Ratzman (2 Tr. 72-73). Moreover, Orthophoto Quad maps submitted after the close of the hearing indicate that over the entire two closure areas, 59 percent of the water resources are located on public lands, 34 percent are on appellants' lands and 7 percent are on other privately held lands. Admittedly, these figures suffer from two infirmities. They are not site specific to the areas of the trespasses and they do not relate to the quantity of available water at any specific source. Nevertheless, it was appellants' responsibility to introduce evidence that would establish the existence of water sources such as would overcome the presumption of trespass. This they did not do.²

Finally, as regards the question of access to the Federal range from fenced privately held land, appellant is apparently arguing that the cattle which were trespassed were actually located on privately fenced lands in which the gates were either open or destroyed or where the fence itself was cut. The Government strongly disputes this contention and argues that none of the cattle trespassed were located within the privately fenced areas. Our reading of the record supports the Government's view.

The testimony relating to open gates and cut fences related not only to the fences located on appellants' privately owned lands, it clearly

also referred to the Crutcher Canyon Drift Fence and the Granite Mountain Drift Fence (1 Tr. 60-65, 67; 2 Tr. 26, 33-34, 48, 50). The stipulation entered as Exhibit 1 repeatedly used the expression, "These cows [or cattle] were observed on public lands or private lands with unrestricted access to public lands in an area closed to grazing." Had the cattle been located on fenced lands, even fenced lands with open gates or cut segments, the cattle would not have *unrestricted* access to Federal lands. At the beginning of the first hearing counsel attempted to define precisely what was meant by the stipulation. The following colloquy ensued:

MR. LEE: Your Honor, we have agreed to this stipulation, and we have agreed to clarify for the record specifically what certain language means so that there is no confusion from your standpoint, or perhaps later at an appellate level, as to what is intended specifically by the language that basically concludes each paragraph, starting with the trespasses. And I think the first time it appears is on page 2, commencing at line 5, where it states, "These cattle were observed on public lands or private lands with unrestricted access to public lands in an area closed to grazing."

Now, that phrase is repeated throughout the stipulation by means of identifying the location where the cattle were observed. It is our intention that this—regardless of what the syntax may be or the phrasing—that the language specifically is to mean that the cattle were observed in the general area described, which is comprised of or consists of both public and private lands, and that no attempt was made to determine whether the cattle were on public or private lands; but that where the cattle were lo-

² Orthophoto Quad maps 2 and 6, however, do indicate the presence of a number of water sources located on Federal lands within the Squaw Valley area.

cated in that area, they had unrestricted access to public lands that were within the closure area. Is that correct, Burt?

MR. STANLEY: That's correct. In further clarification, *the language here is perhaps to cover the factual situation set forth in the Babcock case and in IBLA's decision in the John Casey case, the latest one.*

JUDGE RATZMAN: This was the last February—

MR. STANLEY: That's correct. I'll be putting that into evidence, Your Honor. Which basically said that the access theory of trespass is a viable one.

JUDGE RATZMAN: This was Judge Sweitzer and Judge Luoma being considered at the same time by the Board.

MR. STANLEY: That's correct.

JUDGE RATZMAN: Yes. I'm familiar with that. Is there anything other than that respecting Exhibit 1 and the attachments?

Exhibit 1 is received in evidence pursuant to stipulation of the counsel in this case. And the receipt will be subject to the reservation expressed by Mr. Lee, which in effect is a clarification of the general area and a relation to definitive statements made about the law, which will be applied to such areas. And it will be a matter for me to look at the cases and for counsel to address the matter in briefs, as far as how it would be applied in the case. [*Italics supplied.*]

(1 Tr. 5-6).

The two cases to which the Government's attorney adverted are *Bureau of Land Management v. Babcock*, *supra*, and *Bureau of Land Management v. Holland Livestock Ranch*, *supra*. Both of these cases involved situations in which the trespassing cattle were not on fenced private lands. See *Bureau of Land Management v. Babcock*, *supra* at 184, 84 I.D. at 480; *Bureau of Land Management v. Holland Livestock Ranch*, *supra*

at 282-86, 86 I.D. at 138-40. Thus, it seems clear that the Government was not attempting to trespass animals which were either on appellants' private fenced lands or north of the two drift fences, even where the fences had open gates or missing sections.

Moreover, if the Government was attempting to trespass such animals, Exhibit 3, which computes the relative percentages of the forage available on both the Federal and private lands would have been drafted to include the forage available on the privately fenced areas, in determining the proportional rate that the forage could be presumed to have been consumed by the trespassing cattle. Exhibit 3 actually expressly excluded the privately owned lands that were fenced from its computational base.

The discussions at the two hearings concerning the condition of the various fences were not designed to justify the trespassing of cattle which were observed within fenced lands. Rather, there were attempts to explain how the cattle came to be on the Federal range or on unfenced private lands. Thus, we find that the question of the condition of the fences is not relevant herein to the applicability of the presumption which arises from unrestricted access.

We find, therefore, that the evidence adduced at the hearing clearly supports Judge Ratzman's determination that the trespasses did in fact occur.

[2] We must now examine the nature of the trespasses. Appellants

argue that the "willfulness" of the trespasses was not established in this case. The quantum and nature of the evidence required as a prerequisite to a finding of "willfulness" has been examined in a number of prior decisions.

In determining whether grazing trespasses are willful, intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that a licensee's conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. *Herrera v. Bureau of Land Management*, 38 IBLA 262, 267 (1978); *Eldon Brinkerhoff*, 24 IBLA 324, 337, 83 I.D. 185, 190, (1976). *J. Leonard Neal, supra* at 215.

Where the number of cattle grazing on the Federal range exceeds the number allowed by license and such excess is attributable solely to a permittee's lack of control over his cattle and lack of diligence in taking corrective action after being informed by the Bureau of Land Management that the excess existed, a finding of willful trespass is warranted. *Cesar and Robert Siard*, 26 IBLA 29 (1976). The repetitive nature of grazing trespasses coupled with a negligent failure of permittee to take corrective action supports a finding of willful trespass. *Calvin C. Johnson*, 35 IBLA 306, 315 (1978).

Appellants argue that both Casey and his former employee Cramer testified to difficulties in keeping the gates closed and to their attempts to restrain appellants' cattle from entering into the closure areas. There is, indeed, much testimony by Casey relating his problems and attempts to rectify them. We note, however, that Judge Ratzman, who had heard all of the evidence, clearly did not believe Casey's testimony. Thus, Judge Ratzman declared:

I find that the respondent's trespasses were willful and repeated over a long period of time. Beginning in July of 1977 and continuing through June of 1978, cattle owned by Mr. Casey were in trespass time after time in areas closed to grazing. Large numbers, at times in the hundreds, were in trespass on the Federal Range. Mr. Casey knew or should have known of the problem, but made no diligent efforts to control his cattle. His cavalier attitude toward his obligations under grazing licenses is exemplified by his failure to establish a reliable method for the receipt of notices transmitted by the Bureau. Despite the shell and pea game that Mr. Casey plays with certified mail, it is clear that in some instances he received information about closed areas and particular trespasses. He was personally notified that there were cattle in trespass in a period beginning June 6, 1978 on a designated closure area. Mr. Casey did not promptly remove all the cattle although he was given an extension of time to do so. Subsequently, a large number of his cattle were impounded. At no time did any BLM personnel during the week after June 6, 1978, see Mr. Casey or any of his employees rounding up and removing cattle from the closure area. If his testimony that he removed four or five hundred cattle (or more) in the second week of

June, 1978, is to be believed, this only magnifies the extent of his trespass. His inability to keep cattle out of the closed areas, and his heavy reliance on volunteer or part-time help indicates the lack of a strong or sustained interest in prevention of trespasses.

Mr. Casey's uncooperative attitude is also exemplified by an occurrence on March 8, 1978. It was discovered at that time he was moving cattle from the Deep Hole Ranch without a trailing permit, and the cattle were not ear-tagged as required by his grazing license.

It is obvious that measures taken by Mr. Casey to remove his cattle from closed areas were ineffective since his own employee, Mr. Cramer, acknowledged that cattle would return to those areas within several days. Mr. Cramer was assigned to several ranches without fulltime assistance from other employees. I must conclude that no real effort was made to maintain control over the respondent's large herd of cattle. Although he was given the opportunity to submit tax records or other documents to establish the nature and duration of employment of persons who were hired to work on his ranch properties during the period in question, Mr. Casey elected to rely upon his general assertions.

The respondent's explanation for the repeated and significant trespasses was that there were a number of open gates on the Crutcher Canyon Drift Fence which allowed cattle to re-enter closed areas. An attempt to shift the blame for any cattle trespasses onto others who may have left gates open must be disregarded. *John E. Walton*, 8 IBLA 237, 238 (1972). He contended also that cattle guards which have been installed do not effectively keep cattle out. However, Mr. Casey has the responsibility of maintaining the Crutcher Canyon drift fence. His attitude seems to be that it is impossible to prevent the trespasses, although he acknowledged that patrolling along the fence would reduce the number of trespassing cattle.

In *Bureau of Land Management v. Holland Livestock Ranch et al.*, 39 IBLA 272, 297 the Interior Board of Land Appeals set forth the history of respondent's trespasses, quoting a portion of a decision of the Chief Administrative Law Judge:

"On January 13, 1956, Respondent's grazing license in the Nevada Grazing District No. 3 was suspended for 3 months. On November 23, 1960, Respondent's licenses were again revoked and future licenses were denied to Respondent in that district. A continuous series of 14 trespass citations and warning letters issued to Respondent for the Susanville District, beginning with 1960 and extending into 1968, were noted and itemized in a decision issued on September 4, 1969. Nine trespass citations, issued in 1969 for the Susanville District, resulted in a suspension of Respondent's grazing privileges for 5 years. Thirty-five additional trespass citations resulted in additional show cause orders which were either closed through offer of settlement or by a November 17, 1971, agreement between Complainant and Respondent. Three trespass citations, issued to Respondent in December 1972 and January 1973, were closed through a monetary settlement at twice the commercial rate. Four trespass citations resulted in a decision issued on January 7, 1974, which asserted monetary settlement against Respondent at twice the commercial rate.

"Nineteen trespass citations were issued from January 17, 1975, through March 19, 1976 in the Susanville and Winnemucca Districts, and one impoundment action was initiated in the Winnemucca District which resulted in a hearing on May 4, 1976.

"Most of the above history is reflected in documents incorporated in the case record in this proceeding (Exhibits 14-21). The Administrative Law Judges in earlier decisions concluded that Mr. Casey failed to control his cattle, was negligent, or had proclivity to ignore range rules not comporting with his personal concepts. I

concluded that he is an incorrigible trespasser upon the public lands."

(Decision at 15-17).

This Board has often noted the great deference which is accorded findings of Administrative Law Judges premised on conflicting testimony. *See, e.g., United States v. Melluzzo*, 32 IBLA 46 (1977), *aff'd, Melluzzo v. Andrus*, No. CIV-79-28-PHX-CAM (D. Ariz. May 20, 1980); *State Director for Utah v. Dunham*, 3 IBLA 155, 78 I.D. 272 (1971). This deference is based on the realization that the trier of fact, who presides over a hearing, has an opportunity to observe the witnesses and is in the best position to judge the weight to be accorded conflicting testimony. *United States v. Chartrand*, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973). As was noted long ago in *Creamer v. Bivert*, 113 S.W. 1118, 1120-21 (Mo. 1908):

[O]ne witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

See also First Federal Savings and Loan Ass'n of Fayetteville v. Federal Home Loan Bank Bd., 426 F. Supp. 454 (W.D. Ark. 1977); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949).

Intrinsic to Judge Ratzman's finding of willfulness was his rejection

of Casey's testimony. His findings are amply supported by the record and we will not disturb them here.

[3] Appellants also contend that the Judge erred in finding that the trespasses were "repeated" in nature. Appellants argue alternately that some of the trespasses were too remote in time to be relevant, others (approximately 42) were closed through settlement and compromise and may not properly be considered, and still others have not been finally adjudicated by Federal courts (although final Departmental decisions have issued on these trespasses).

With respect to the 1956 suspension, we think appellants' objection that such occurrences were too remote to be utilized is well taken. We have greater difficulty with the appellants' argument relating to the use of settlement and compromises reached in prior proceedings. Appellants argue that "[w]hatever the terms of those compromises Casey respectfully argues that they are irrelevant and inadmissible in that, the terms being unknown, the risk is too great that Casey will be penalized for conduct which may in fact not warrant punishment" ("Statement of Reasons at 21).

We note that Rule 408 of the Federal Rules of Evidence states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove lia-

bility for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The notes of the Advisory Committee on Proposed Rules make it plain that this rule encompasses completed settlements as well as offers and negotiations:

While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

Fed. R. Evid. 408 Note (1976).

Clearly, therefore, the submission of compromise agreements for proof of liability is prohibited in Federal courts. Courts have long noted, however, the general rule that administrative agencies are not bound by the strict rules of evidence. Thus, hearsay evidence is generally admissible in administrative adjudication. *See, e.g., Martin-Mendoza v. Immigration and Naturalization Service*, 499 F.2d 918 (9th Cir. 1974); *Brown v. Gamage*, 377 F.2d 154 (D.C. Cir. 1967).

We do not perceive the general exception recognized by the courts as providing carte blanche to consider any or all evidence that an agency may desire. Rather, we believe the proper test is one which takes into consideration the policy justifications implicit in any rule and applies them given the specific needs and concerns of the agency.

The rationale for the exclusion of offers of settlement (and presump-

tively the settlements themselves) as manifested in Rule 408 rests in the public policy favoring private resolution of disputes and thus avoidance of litigation. *See Overseas Motors, Inc. v. Import Motors Limited, Inc.*, 375 F. Supp. 499, 536-37 (E.D. Mich. 1974). Moreover, one must recognize that often settlements are merely an indication "that peace was bought." *Shipley v. Pittsburgh and Lake Erie R. Co.*, 83 F.Supp. 722, 762 (D. Pa. 1949).

Thus, the policy is one designed to increase the likelihood of amicable settlement of dispute prior to a resort to litigation, be it administrative or judicial. Taking this into consideration, we hold that all evidence relating to unsuccessful offers or negotiations aimed at achieving settlement must be excluded from consideration in agency adjudications. *Accord, Sternberger v. United States*, 401 F.2d 1012, 1017-18 (Ct. Cl. 1968); *Cesar and Robert Siard, supra* at 35.

We are less sanguine of the efficacy of an iron-clad exclusionary rule, however, when we turn to the question of the exclusion of settlement agreements themselves. Questions relating to the exclusion of consummated settlement agreements have generally arisen in the context of an attempt by a third party to introduce proof of a settlement between two other individuals in order to establish the liability of one of the parties signatory to the settlement. Courts have uniformly rejected these attempts. *See, e.g., Jackson v. Shell Oil Co.*, 401 F.2d

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639 (6th Cir. 1968); *Bratt v. Western Air Lines*, 169 F.2d 214 (10th Cir.), cert. denied, 335 U.S. 886 (1948). It seems obvious that, in any situation involving a multiplicity of parties, the admissibility of actual settlement agreements would work to virtually preclude individual settlements among the various participants. Exclusion in such situations clearly serves the purpose of facilitating settlement of disputes.

The situation which arises in grazing matters, however, partakes of differing considerations. As we have already noted, the past history of a grazing licensee or permittee is of critical importance in determining the permissible level of sanctions imposed for various violations, since a prerequisite to a revocation or a suspension of significant privileges for a period of years is a finding that the trespasses were both willful and repeated. See *Eldon Brinkeroff*, supra at 337, 83 I.D. at 190; *Eldon L. Smith*, A-30944 (Oct. 15, 1968). Total exclusion of all settlement agreements might well result in the refusal of BLM to enter into such arrangements, and thus work the result of actually inhibiting settlement agreements.

As an example, in any specific case BLM might initially determine that a trespass violation was willful. Under 43 CFR 4150.3(a)(2), the grazing licensee would be liable for twice the value of the forage consumed. The parties might subse-

quently agree that the willfulness of the trespass may not have been so clear. Accordingly, the parties would agree to settle the trespass as "nonwillful," the penalty for which is assessed only at the commercial value of the forage. See 43 CFR 4150.3(a)(1). If, however, the mere fact of settlement would preclude BLM from ever utilizing this trespass in the future to show a repeated course of conduct, BLM might well refuse to settle all but the most minor of offenses, and instead proceed to trial.

We agree that the mere fact that a settlement was reached does not, ipso facto, constitute an admission of culpability on the part of the licensee. But we do believe that the documents of settlement are properly admitted to determine the nature of the agreement. Thus, to the extent that an agreement expressly admits liability it is properly considered as probative of the "repeated" nature of subsequent violations. On the other hand, to the extent that the documents expressly deny liability, they may not be utilized as probative of the issue of "repeated" violations.

Applying this formula to the case before us, we find that, to the extent that Judge Ratzman considered the dismissal of the suits filed by the Government in *United States v. John J. Casey*, Civ. No. S 2171 (D. Cal.) and *United States v. John J. Casey*, Civ. No. LV 1713 (D. Nev.) as an admission of liability such action was erroneous. The stipulated consent decree expressly disclaimed

any admission of liability. See Exhibit 18A. However, to the extent that the stipulation entered into by appellants and the Government on Nov. 17, 1971, and subsequent action by then Hearing Examiner Graydon Holt merely altered the penalty assessed in Judge Holt's decision in *Holland Livestock Co.*, California 2-69-1 (SC), his findings of trespass represent a final administrative determination independent of any subsequent settlement arrangement. See Exhibits 17 and 18.

Appellants' attempt to exclude such factual determinations in *Holland Livestock Co.*, California 2-69-1(SC), and in other similar cases is of no avail. The stipulation into which the parties entered could have expressly nullified Judge Holt's findings of trespass. The stipulation clearly did not do so. Moreover, appellants' argument, if carried to its logical conclusion, would compel the exclusion of trespass assessments even where they had been affirmed by a Federal court of appeals and subsequently paid in full. Under appellants' theory, such assessments could not be used as evidence in a subsequent hearing, the reason being that an appellant could always argue that it had "settled" the matter, rather than incur the expense of filing a petition for certiorari with the Supreme Court. We reject such a view. We hold, therefore, that decisions of the Department which become final either by their rendition by this Board or by a failure of appeal from an adverse decision below, unless they are subsequently reversed or vacated, are properly

considered in determining whether repeated trespasses have occurred.

Finally, appellants' argument that it is improper to use decisions of this Board which are on appeal in determining the question of the repeated nature of trespasses must similarly be rejected. Decisions of this Board are final for the Department, 43 CFR 4.1, and fully effective upon their issuance. We recognize that it is always possible that in subsequent judicial review any decision of the Board may be overruled. But until that eventuality occurs, any decision of this Board is presumptively valid. It is true that, should the Board rely on factual findings which are subsequently nullified, subsequent decisions premised on such earlier findings may, themselves, become vulnerable. Nevertheless, the idea that the Board may not give cognizance to its own decisions, on the mere possibility that they may be reversed at some time in the near or distant future, is hereby expressly rejected.

In any event, we find that the evidence adduced in this record before us of the trespasses occurring in 1977 and 1978, would, by itself, support findings of both "willfulness" and "repeatedness."

Judge Ratzman imposed damages of \$1,400 for forage consumed, plus \$2,870.90 for impoundment costs, and revoked appellants' grazing privileges which were attached to the Fly Ranch, Hot Spring Field, Deep Hole Ranch, Great Boiling Springs, Squaw Valley Ranch, Parker Properties, Granite Ranch, Finley Ranch, and Clear Ranch, for

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a period of 8 years. The evidence in this record clearly supports the assessment of both the damages and impoundment costs. With respect to the suspension of grazing privileges, we are not unmindful of the severity of this penalty. Nevertheless, we must agree with Judge Ratzman that appellants' willful and repeated violation of the grazing laws and regulations have indicated that no lesser action will work a reformation of appellants' operations on the Federal range. The revocation is affirmed in all respects.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons stated herein.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

EDWARD W. STUEBING
Administrative Judge

APPEAL OF SYSTEMS TECHNOLOGY ASSOCIATES, INC.

IBCA-1108-4-76

Decided *February 19, 1981*

Contract No. 68-01-2782, Environmental Protection Agency.

Dismissed.

1. Contracts: Construction and Operation: Modification of Contracts: Duress

Where a termination settlement agreement was reached about 14 months after a decision of the Board in favor of appellant and the facts show that appellant was responsible for almost a year of the delay for refusal to allow Government auditors full access to the contract records, and the agreement was signed by appellant's president in an amount in excess of the amount authorized by appellant's board of directors, the Board finds that appellant failed to show that it entered the agreement because of duress on behalf of the Government.

APPEARANCES: Mr. Edward F. Canfield, Attorney at Law, Casey, Scott & Canfield, Washington, D.C., for Appellant; Mr. Donnell L. Nantkes, Government Counsel, Washington, D.C., for the Government.

OPINION BY
ADMINISTRATIVE
JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

In our decision dated Jan. 19, 1978, the appeal from a termination for default was sustained. We found that (1) the Government had frustrated performance by failing to timely buy or extend the lease on computers required for performance, (2) the Government had waived to original delivery schedule, and failed to show that the new schedule established was reasonable under the circumstances then existing, (3) modification No. 5 to the contract was a change order requiring equitable adjustments in sched-

ule and price, and (4) the contract was improperly terminated for default. The contract did not contain an applicable termination for convenience clause, but was remanded for an appropriate equitable adjustment for the changes and "to compensate for * * * [the] termination" under the second sentence of paragraph 11(e) of the default clause.

On Mar. 16, 1979, appellant's president and the contracting officer executed modification No. 15 (AX-66), which authorized the additional payment to appellant of \$1,200,639 and stating that this amount "shall represent an accord and satisfaction with respect to any and all claims either party ever had, has or might have arising under or in conjunction with contract No. 68-01-2782, all modifications thereto and the Interior Board of Contract Appeals decision (IBCA-1108-4-76) dated January 19, 1978." On June 11, 1979, appellant filed this appeal asking that the settlement of all claims dated Mar. 16, 1979, be disregarded on the grounds it was procured by duress, coercion and such arbitrary actions as to be tantamount to fraud and for the Board to determine the amounts properly due appellant. A hearing was held on Oct. 23 and 24, 1979, limited to the issue of whether there exists a binding agreement between the parties on the claims presented in the appeal.

Background

After the issuance of the Board decision sustaining the appeal on

Jan. 19, 1978, appellant sent a telegram on Jan. 30, 1978, to the administrator of the Environmental Protection Agency (EPA), stating that no action had been taken to implement the decision to date (AX-1). An undated response was received by appellant on Mar. 3, 1978, from the director of Contracts Management Division advising that actions had been taken by the contracting officer to schedule and hold a meeting on Feb. 14, 1978, regarding the settlement and that every effort would be made to effect timely settlement upon receipt of appellant's total cost basis termination proposal (AX-2). The notes of the meeting on Feb. 14, 1978, indicate that appellant suggested that the settlement proposal be submitted on a total cost basis (GX-A). By letter dated Mar. 29, 1978, the contracting officer advised that timely settlement cannot be effected without receipt of a termination proposal (AX-6). Concurrently, on Mar. 23, 1978, appellant wrote the Government indicating that proposed constructive change modifications would be submitted shortly (GX-D), and the Government responded on Apr. 5, 1978, to the effect that such claims would be considered by the contracting officer when and if submitted (AX-7).

Under date of May 8, 1978, appellant submitted a termination settlement proposal claiming \$1,330,713 for the completed work and work in process under the termination, \$131,638 for interest, \$1,554,000 for constructive changes compensation, and \$37,500 for settlement costs

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(AX-8). AX-9 contains the minutes of a meeting of the parties on June 19, 1978, which discloses a basic disagreement over whether the total cost basis or another basis was more appropriate for determining the amounts due appellant. By letter dated June 23, 1978, the contracting officer confirmed the position of the Government that the settlement proposal was required to be on a total cost basis, and advised that a revised settlement proposal would be needed and that the Government auditor required full access to all pertinent contract cost records which had been denied on June 5, 1978 (AX-10).

Appellant responded by letter dated July 6, 1978, pointing out that the Board's decision required an equitable adjustment pursuant to the second sentence of paragraph 11(e) of the default clause, and not a termination for convenience settlement (AX-11). Appellant contended that Part 8 of the Federal Procurement Regulations provides that the procedures set forth therein are not mandatory in the case of an equitable adjustment, but are to be used only as a guide. Appellant re-submitted its previous settlement claim for a total of \$3,053,851, protesting the Government's adherence to the total cost basis; and under the protest agreed to make available to Government auditors the cost records. By letter dated July 13, 1978, the Government renewed its request for a revised settlement proposal on a total cost basis and enclosed a letter of the same date requesting the

auditors to resume the audit (AX-12, 13).

By letter dated Aug. 21, 1978, appellant advised the contracting officer of difficulties with the auditors because of their insistence upon using the contract job cost ledgers which appellant claims were not required to be and were not, in fact, complete under the fixed price contract; but offered all the underlying worksheets supporting the elements of the claim (AX-15). GX-F dated Aug. 23, 1978, transmits to the contracting officer a field audit office report dated Aug. 18, 1978, concluding that "Since the contractor has refused to allow a review which we consider essential, and since the contractor has not submitted an acceptable termination proposal, we cannot provide an opinion of the settlement proposed as submitted." The underlying field audit office letter advises that appellant would provide only schedules of total costs without representing that the schedule was prepared from amounts recorded in the job cost ledger. Additionally, the letter repeats the appellant's position that the most appropriate settlement method would be the application of the percentage of contract completion to the contract amounts (including profit).

By letter dated Aug. 23, 1978, appellant requested the Government to approve the submission of the claim on a basis other than the inventory or total cost basis, citing previous reason given that the equitable adjustment was under the default clause terms and that the fixed price

contract pricing provisions of ASPR (ASPM No. 1) clearly show the distinction between fixed price and cost-reimbursement arrangements (AX-17). By letter dated Aug. 25, 1978, appellant made a Freedom of Information Act (FOIA) request for a copy of the latest audit report furnished the contracting officer (AX-18). The request was denied by the Government by letter dated Sept. 27, 1978, on the grounds that the report did not exist. Subsequent requests for the audit report were denied because of non-existence of the report until it was delivered to the respondent in mid-January 1979. Appellant's request dated Jan. 16, 1979, under the FOIA was denied by letter dated Feb. 7, 1979, on the grounds that the report is an inter/intra-agency document which would not be available under the FOIA to appellant (AX-50). An appeal from this denial was filed by appellant on Feb. 21, 1979, and on Mar. 2, 1979, the audit report was forwarded to appellant as a matter of discretion (AX-59). The report was received by appellant on Mar. 7, 1979.

The basic disagreement over the form of the settlement proposal and access of the Government auditors to the job cost records continued through September 1978. AX-23 is a letter dated Sept. 26, 1978, from appellant to the Government confirming a meeting of Sept. 12, 1978, and stating these differences. This letter also refers to the Government's willingness to consider partial settlement proposals for certain subcontracts and other costs. By let-

ter dated Oct. 4, 1978, appellant transmitted under protest its settlement proposal No. 5 prepared on a total cost basis, and agreed that the audit agency could examine the job cost ledgers. The proposal requested the total additional payment of \$2,718,448. On Oct. 4, 1978, the contracting officer forwarded the revised settlement proposal to the audit agency and requested the audit be reinitiated in view of appellant's willingness to allow examination of the job cost ledgers (GX-R).

Throughout the extended period of disagreement over the form of the settlement proposal and whether the auditors could have access to the job cost records, appellant was under financial pressures from its bank and a principal subcontractor, the Xerox Corporation. In a letter dated Oct. 10, 1978, Xerox agreed to a reduction of its claim by two thirds of \$554,525 (AX-29). Despite appellant's repeated requests and the Government's agreement to consider a partial settlement incorporating the Xerox claim, no partial settlement was agreed to by the Government. By letter dated Jan. 18, 1979, Xerox amended its claim by the addition of \$119,277 in interest charges because of the failure to achieve a timely settlement of the claim (AX-42).

By letter dated Jan. 29, 1979, the contracting officer confirmed telephone conversations regarding the audit report, indicating that the report had been received by respondent and the Government's desire to schedule a negotiation meeting

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(AX-48). This letter also advised of the Government's understanding that appellant desired a copy of the audit report before agreeing to a negotiation meeting and suggested that appellant seek the report pursuant to an FOIA request. Appellant's response dated Feb. 1, 1979, repeated its desire to have the audit report, but denied that it refused to attend any negotiating meeting based solely on the lack of the report (AX-49). A negotiation meeting was held on Feb. 8, 1979, in which the Government offered a total settlement payment of \$798,952. The meeting is evidenced by minutes of appellant (AX-51), a confirming letter from the contracting officer dated Feb. 9, 1979 (AX-52), and appellant's letter of Feb. 15, 1979 (AX-53). The latter document summarized the wide disparity between the parties on the items of the settlement offer, emphasizing the precarious financial condition of appellant and appellant's belief that the Government was not negotiating in good faith; but rather deliberately delaying a fair settlement in order to profit from the adverse financial condition of appellant. Typical of the supporting arguments of appellant that the Government's strategy was to place it under duress to force a reduced settlement was the Government's position that the Xerox claim should be paid by appellant before settlement. The Government responded by letter of Feb. 16, 1979, disavowing appellant's characterization of the negotiations and

asked that additional negotiation sessions be scheduled (AX-54).

Another negotiation meeting was held on Feb. 22, 1979, as reflected in minutes prepared by appellant (AX-55). A wide range of issues were discussed without significant changes in the positions of the parties on amounts to be allowed. The Government did agree that payment to Xerox would not be required prior to settlement agreement and to work with appellant and Xerox to finalize the amount of the claim. A letter from Xerox dated Mar. 2, 1979, to appellant agreed to waive the interest on their claim only if full payment is made prior to Mar. 16, 1979 (AX-58). The Xerox letter was forwarded to the Government on Mar. 6, 1979, requesting a prompt partial settlement of the subcontract claim (AX-60).

A negotiation meeting held on Mar. 7, 1979, is reported in appellant's minutes (AX-61). The minutes indicate that the parties reached tentative agreements for a partial settlement and/or a total amount for settlement, with the Xerox claim being paid direct by the Government. Two contract modifications were prepared by the Government; one for total settlement of all claims in the amount of \$1,200,639 and the other for partial settlement, excluding the constructive changes, in the amount of \$1,016,871 (AX-65). The modifications were reviewed by appellant's board of directors according to a telegraphic message (AX-63), and a meeting was arranged for the

morning of Mar. 16, 1979. On Mar. 15, 1979, the contracting officer called appellant's representative to advise that the Government would not consider the partial settlement, and that this information was being conveyed to make appellant aware of the change of position prior to the board of director's meeting that evening (AX-64). GX-L dated Mar. 15, 1979, is a letter from appellant's secretary to the contracting officer advising that the Board of directors had resolved to empower its president, Mr. Friedland, to execute a settlement modification in excess of \$1,200,000 as final settlement for all claims under the contract. A final negotiation meeting held on Mar. 16, 1979, is reported in appellant's minutes (AX-77). Mr. Friedland offered a total settlement amount of \$1,800,000 after attempting without success to secure Government consideration of a partial settlement approach. The Government representatives insisted on a total settlement that day for the amount of \$1,200,639 and had come to the meeting with two checks prepared to implement that agreement. After much discussion Mr. Friedland agreed, stating: "The financial condition of the company is such that I can't pursue it much further. We are prepared to accept your offer." Modification No. 15 for the total settlement in the amount of \$1,200,639 was then executed by the contracting officer and Mr. Friedland. One of the Government checks was in the amount of \$554,526 and payable to the Xerox Corporation and the other in the amount of

\$462,345 was payable to the Bank of Virginia, to whom appellant had made an assignment of the monies due under the contract (AX-67, 68). The balance of \$183,768 was paid to appellant on Apr. 18, 1979. A subsequent voucher for interest on the delayed payment to appellant was refused and returned to appellant (AX-69).

Discussion and Findings

Appellant contends that the Government knew of its adverse financial condition and that it deliberately used delaying and deceptive tactics to compel acceptance by a desperate contractor of an unreasonable and arbitrarily low settlement amount. The documentary evidence described above was reviewed in detail at the hearing and there is little dispute between the parties as to the events leading to the settlement agreement signed on Mar. 16, 1979. The primary issue is whether any act of the Government, or various actions taken together, constituted duress to compel appellant's agreement.

The actions of the Government that appear to be central to appellant's claim that the Government used its superior negotiation power to achieve an unconscionable agreement are:

1. The long delay between the Board decision on Jan. 19, 1978, and the actual negotiations of February and March 1979, and the insistence by the Government upon access to the job cost records as part of the audit process.

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2. The refusal of the Government to provide appellant with a copy of the audit report.

3. The continual discussion of acceptability of partial settlements, but the unwillingness to agree on anything short of a total settlement.

4. The insistence by the Government upon the use of the total cost basis of settlement over other methods preferred by appellant.

5. The question of whether the settlement offers were actually the personal decisions of the contracting officer or decisions of a superior officer hostile to appellant.

In extensive briefs, the parties have discussed at length the many cases dealing with economic duress. The essential elements of economic duress are summarized by Nash and Cibinic in Federal Procurement Law (1969 ed., p. 208) as: (1) A person compels another to assent to a transaction against his will; (2) such assent is induced by wrongfully threatening action the person has no legal right to take; and (3) the threatened action, if taken, will cause irreparable damage to the other person. Each of the actions complained of by appellant must be examined to determine whether such standards are met.

There is no question that serious negotiations between the parties did not occur for over a year after the Board's decision determining the liability of the Government to appellant. During this period, the Government undertook to audit appellant's records, but such audit

activities were suspended because of the refusal to allow the Government auditors to have access to the job cost records. Not until the transmittal of its letter of Oct. 4, 1978, did the appellant agree to permit the examination of the job cost ledgers. Prior to this time, appellant agreed only to provide the underlying worksheets supporting the cost elements of its claim and the schedules of total costs, without representing that the schedules were prepared from amounts recorded in the job cost ledgers. (GX-F). Appellant does not contend that the Government did not have the right to secure an audit of its contract performance costs before entering into settlement negotiations. However, it is clear that by refusing access to the job cost ledgers, appellant was insisting that the Government auditors reconstruct the total job costs from the underlying worksheets or rely on appellant's own summary schedules of costs.

Appellant does not contend that the job cost ledgers were not directly pertinent books and records relating to the contract, but rather, that the ledgers did not reflect its true costs. The right to examine the contract records is not made contingent upon what the contractor considers relevant and reflecting the true cost of performance. The audit of the contractor's records provides the means for the contracting officer to verify that expenditures were actually made in furtherance of contract performance. The auditor's recommendations concerning costs claimed by

the contractor and questioned by the auditor are not binding on the contracting officer. Instead, the differences between claimed costs and those questioned by the auditor are usually the subject of discussion and negotiation between the parties. Appellant insists that certain contract related costs were not recorded on the job cost ledger, and that the fact that such costs were recorded elsewhere in the general ledger, and that this practice accorded with proper accounting for costs on a fixed price contract. What is not clear is the reason why appellant was adamant in refusing access to the job cost ledger from January 1978 to October 1978. With the knowledge that the total costs claimed were not recorded on the job cost ledger, an explanation of added costs recorded in the general ledger could have been provided both to the auditor and later to the contracting officer during settlement negotiations.

By denying the auditor access to the job cost ledger, appellant was, in effect, insisting that the Government perform the audit only in the manner prescribed by it, *i.e.*, reconstruction of the costs from the underlying worksheets. The contract does not permit appellant to determine the means by which the Government should audit. Therefore, we find that the contractor's action to refuse access to the job cost ledger was an unauthorized denial of access to pertinent contract records. The delay in negotiations occasioned by the inability of the Government to complete the audit was therefore the

fault of the appellant and not the Government.

The second action of the Government on which appellant relies is the refusal to provide appellant with a copy of the audit report. In the documentary evidence discussed above, it is clear that the appellant was requesting a copy of the report long before it existed, and the Government so responded to its requests. After the audit report was received in January 1979, the contractor was advised by letter (AX-48), which stated he could seek a copy of the report under the Freedom of Information Act. The audit report is dated Jan. 12, 1979, and was furnished to appellant by letter of transmittal dated Mar. 2, 1979 (AX-59). Consequently, the complaint of refusal to provide appellant with a copy of the audit report actually involves only the 5- to 6-week period between its receipt by the contracting officer and its release to the appellant. Appellant's receipt of the audit report is noted as Mar. 7, 1979, which preceded the final settlement agreement by 9 days. Appellant has not shown that it was actually prejudiced by the lack of the report during the relatively brief period after receipt of it by the contracting officer and the furnishing of a copy to appellant. Having found that the long delay in securing the audit report was, in fact, the responsibility of the appellant, the actual receipt of the report by appellant after availability to the contracting officer renders the question moot.

Thirdly, appellant contends that the Government misled it in discussions concerning the acceptability of partial settlements without the actual intent to agree on anything other than a total settlement amount. The Government counters that the applicable termination settlement regulation (41 CFR 1-8.208-3(c)) requires the contracting officer to promptly examine each subcontract settlement required to be submitted to him and that no settlement agreement had been reached between appellant and its principal subcontractor Xerox. In the minutes of the negotiation meeting of Feb. 22, 1979, appellant's president is seen to have stated that final agreement on interest on the Xerox claim was still needed (AX-55). The record discloses that Xerox reduced its claim from \$1,848,419.73 to \$554,525 in its letter of Oct. 10, 1978 (AX-29). By letter dated Oct. 17, 1978, the Xerox offer was forwarded to the Government requesting the Government to settle this portion of the claim at the subcontractor's proposed amount (AX-30). There is no evidence that appellant agreed with Xerox on the amount claimed, but rather presented the Xerox proposal to the Government for payment. At this time, appellant had recently released its job cost ledgers to the auditors, so that the audit was again being undertaken. It is reasonable that the Government would desire to have the subcontractor claim audited along with other claimed costs. In

fact, note 7 of the audit report indicated that appellant concurred in the reduction of its own claimed costs in the amount \$15,000 for subcontract cancellation charges because such charges were duplicated in the amount claimed by Xerox. Again, the delay in securing the audit has been found to be the responsibility of the appellant.

In the few days prior to actual agreement, the Government prepared documents on a partial settlement basis and on a total settlement basis. The partial settlement proposal was withdrawn by the Government the day before final agreement was reached. Appellant challenges the propriety of withdrawing the partial settlement proposal. The Government defends its action on the basis that the partial settlement proposal did not clearly define what was covered by the settlement and what was not. In these circumstances, when settlement occurred on the following day, the Board questions the propriety of its detailed examination of the active negotiations during the final few days that did produce bilateral agreement. It is sufficient to say that we see no legal obligation on either party not to withdraw a proposal which has not been accepted. Upon closer examination by responsible officials in the Government, the partial settlement proposal was determined not to be in the best interests of the Government. Were this Board or any tribunal to determine that proposed settlements could not be withdrawn before agreement or

acceptance, the alternatives available to the parties in seeking a negotiated agreement would be severely limited.

Appellant also complains that the Government insisted on settlement on a total cost basis only. It should be noted that the total cost basis was first proposed by appellant in the first meeting of the parties and was thereafter insisted upon by the Government. There is little question that the total cost basis is not the favored method for computing equitable adjustments in the contract price. This is so because of the fact that seldom are the costs of the work attributable to the equitable adjustment segregable from the other contract costs; and, the Boards favor any other costing method that will more accurately determine those costs relating only to the equitable adjustment. However, upon a termination settlement, the costs of allowable equitable adjustments and contract costs are merged in the total costs of contract performance, making this method a more desirable and more readily implemented alternative. Appellant does not explain the disadvantages of the total cost method in the resultant impact on the settlement. Presumably, any costing method, properly applied with adequate cost data, would end up with the same result. The methods not favored in a given situation are considered less appropriate only because of the less probable chance of arriving at the true costs. The total cost method is frequently desired by claimants because all performance costs are considered. With the consideration

of all recorded costs in the audit, the only means by which appellant can be prejudiced is by his own inability to show the allocability and allowability of any expenditures. It would appear that appellant opposes the total cost approach in favor of using its own cost summaries and estimates including subjective cost estimates. This approach may well provide a higher claimed amount, but in the instance of recorded costs susceptible to audit, the Board continues to favor the actual costs recorded as opposed to any other method. (*See Brezina Construction Co., Inc.*, IBCA No. 757-1-69 (Aug. 10, 1973), 73-2 BCA par. 10,195.) Appellant cites no authority in support of the contention that the Government did not have the right to require the settlement on a total cost basis. Instead, appellant argues in its brief "[t]hat the government had a legal right to require compliance with Federal Procurement Regulations is irrelevant to this case." Appellant argues that the fact that the Government acts were legal does not mean that the acts are proper, correct, or non-coercive. Appellant relies on the restatement of the Law of Contracts, sections 492 and 493 which defines duress in terms of "any wrongful act" or "any wrongful threat" to compel or induce another to act without his volition or precludes exercise of free will and judgment; and considers the Government's position flawed in its perceived failure to show a coercive act must be illegal to be duress.

In arguing that it need not show the Government's actions were il-

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legal to constitute duress, we believe there appears an important difference in the views of the parties. The authorities and the cases agree that duress requires the wrongful act or an act one is not legally empowered to take to induce the action of the other party. That is not to say that the wrongful or not legally permissible act is illegal, *per se*. An illegal act is one contrary to law. An act that one may not legally be empowered to take against another party to a contract may simply not be a permissible act under the terms of the agreement, but not illegal, *per se*. Therefore, we must consider the actions of the Government in terms of whether the actions were legally permissible actions under the contract and the applicable regulations, and not to determine whether the actions were illegal actions that could not be taken under any circumstances because of prohibitions of the law. In this context, we find that the Government was legally within its rights under the contract to require that the settlement be presented and concluded on a total cost basis.

The last of the substantive objections of appellant is that the settlement offers were not the personal decisions of the contracting officer, but the decisions of a superior official hostile to appellant. Appellant contends that if the decisions were not those of the contracting officer, the decisions are null and void. It is well established that appellant is entitled to the independent consideration and judgment of the contracting officer of a claim. Here, the

question becomes one of little significance because the contracting officer, Mr. Tate, testified at the hearing and reaffirmed the fact that the amounts negotiated reflected his personal judgment (Tr. 87). The fact that decisions involving substantial amounts of money are required to be reviewed by superiors or by a review committee does not make the decision that of the higher authority approving it. Such reviews are required to assure that contracting officers have complied with the policy and regulations of the agency. No evidence has been submitted to show that the settlement amounts offered and finally accepted were not determined by Mr. Tate. Even with such a showing, Mr. Tate clearly accepted and ratified the final decision by his testimony. In those cases where it is found that the contracting officer did not exercise his independent judgment, the remedy accorded by the Boards is to remand the appeal for the personal consideration and judgment of the contracting officer. Here, the contracting officer testified at the hearing and endorsed the decision, so that even if a remand were otherwise appropriate, the action would be a futile prolonging of the appeal. The contracting officer indicated no inclination to question the settlement amount and his reaffirmation of the decision on remand can be presumed.

Appellant raised numerous other questions in the attempt to have the agreement set aside on grounds of duress, however, in view of our finding that appellant was responsible

for the delay of negotiations for 1 year in refusing access to the contract records for audit, consideration of all the actions complained of during this period would serve no useful purpose. The crucial period of time during which meaningful negotiations occurred was during the 6-week interval from early Feb. 1979 to Mar. 16, 1979. Considering the size of the claim and the substantial difference in the positions of the parties, it appears that an agreement was reached expeditiously, and without deliberate delay by the Government.

However, more importantly, the burden of showing duress is that of the party seeking to avoid the agreement. Appellant was clearly in a precarious financial condition, and this condition was made known to the Government. However, one seeking to avoid an agreement on the grounds of economic duress must show that the other party availed itself of this known condition to coerce the agreement. Here, appellant must be held accountable for extending the negotiating period by withholding its contract records from the auditor in violation of the contract requirements. Whatever additional financial pressures accruing to appellant during that time to sign an agreement it considered unconscionable must necessarily be considered difficulties of its own making. Appellant's action to sign the agreement cannot be viewed as an impulsive pressured action made necessary by improper acts of the Government. The action was the result of the considered and deliberate judgment of the board of di-

rectors on the day before the settlement agreement was executed. Appellant's president went to the meeting on Mar. 16, 1979, empowered by a resolution of the board of directors to settle all claims under the contract for an amount in excess of \$1,200,000 (GX-L). There is not in evidence any similar document by which the board of directors can be seen to authorize this appeal seeking to avoid the agreement reached in accordance with its prior authorization.

We find that appellant failed to prove that the settlement agreement signed by the parties on Mar. 16, 1979, was signed by appellant under duress.

Therefore, the appeal is dismissed.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF NERO & ASSOCIATES, INC.

IBCA-1292-8-79

Decided February 19, 1981

Contract No. 52500-CTS-400, Bureau of Land Management.

Denied.

1. Contracts: Disputes and Remedies: Jurisdiction—Contracts: Contract Disputes Act of 1978: Jurisdiction

A claim of mutual mistake asserted under a tree thinning contract is dismissed for

February 19, 1981

want of jurisdiction where the Board finds (i) that it has no authority under the Disputes clause to reform contracts and (ii) that since appellant did not elect to proceed under the Contract Disputes Act of 1978, the Board derives no reformation authority from the Act in this instance.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments

A claim predicated upon defective specifications is denied where assuming *arguendo* that the specifications were defective, the appellant failed to show that it incurred any additional costs by reason of the allegedly defective specifications.

3. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

A claim asserted under a Changed Conditions Clause by reason of alleged withholding of material information (first category) is denied where there is no evidence of record indicating that the Government either withheld material information or otherwise misrepresented the conditions the contractor would encounter in performing a tree thinning contract.

4. Contracts: Construction and Operation: Payments—Contracts: Disputes and Remedies Jurisdiction

A claim based primarily upon an overpayment to a contractor is approved where the Board finds the evidence of record substantiates the Government claim and it does not appear that the appellant has ever contested either the fact or the amount of the overpayment

or adjustments related to such overpayment which have the effect of reducing the amount of the Government's claim.

APPEARANCES: Mr. David M. Nero, Jr., President, Nero & Associates, Inc., Portland, Oregon, for Appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY
CHIEF ADMINISTRATIVE
JUDGE McGRAW
INTERIOR BOARD OF
CONTRACT APPEALS*

The appellant has taken a timely appeal from the denial by the contracting officer of its claim for additional compensation in the amount of \$84,831.47 and from the demand by that officer for payment to the Government of the sum of \$5,735.62.

On Apr. 3, 1975, the Small Business Administration (hereinafter SBA) entered into the instant contract with the Bureau of Land Management (hereinafter BLM). On the same date it entered into a subcontract with Nero & Associates, Inc., for the performance of the entire work covered by the contract (Appeal File Exh. Nos. 1 and 13).¹ Concerning this arrangement the contract states that the SBA has delegated responsibility for the administration of the subcontract to BLM with complete authority to take any action on behalf of the Government under the terms and conditions of the contract, subject to advance notice of contemplated ac-

¹ Reference to exhibits are to those contained in the Appeal File (hereinafter simply AF followed by the exhibit number or numbers).

tions being required to be given to the SBA in some circumstances not here pertinent. The contract and subcontract contemplated that the subcontractor would have the right to appeal a decision by the contracting officer and it has done so. Depending upon the context, we will sometimes refer to the appellant as the contractor, while at other times the terms used will be subcontractor or simply Nero.

The instant contract called for mechanical precommercial thinning of trees on approximately 1,573 acres of public lands in Coos and Douglas Counties, Oregon.

For performance of the required work, Nero quoted the figure of \$72,315.07.² In a letter to SBA under date of Mar. 11, 1975, Nero states: "In view of the time constraints, it would be greatly appreciated if you would accept our proposal and execute the contract immediately without further negotiations * * *" (AF 8, p. 2). Under the terms of the contract, work was to be completed within 120 calendar days from the date of receipt of the notice to proceed by the contractor. The notice to proceed was received on May 23, 1975, establishing Sept. 20, 1975, as the completion date. The contract work was accepted as complete on Oct. 31, 1975, or 41 days after the scheduled completion date. No actual damages were assessed by the

Government for the delayed performance (AF 1, 3, and 27).

Throughout performance of the work the contractor was plagued by problems with personnel. A month after receiving the notice to proceed on May 23, 1975, only 7 percent of the required work had been done but 25 percent of the contract time had elapsed. Two months later with 78 percent of the contract time having gone by, only 52 percent of the work had been accomplished (AF 17 and 20). Responding to the letter inquiries from the contracting officer, the contractor attributed the delays experienced in performing the contract work (i) to the need to train personnel, (ii) to the efficiency of thinning crews dropping off considerably after a crew member was bitten by a rattlesnake, and (iii) to a limitation of size of the crews that could be employed (AF 18 and 23). In a letter to the contracting officer dated Sept. 18, 1975, the contractor noted that it had experienced a large turnover of personnel and low production until late August and that since then production had been up and crews operating at greater efficiency but it was still experiencing a large turnover of personnel (AF 23).

Another cause for delay was assigned by the contractor in a letter written to BLM under date of July 11, 1975, from which the following is quoted:

² See cost breakdown which accompanied Nero's letter to SBA dated Mar. 11, 1975 (AF 8).

4. A significant factor which has also affected our production was the inadvert-

ent omission of pull back time in our bid proposal. Due to this (oversight) it is taking more time and labor dollars than originally planned. Please be advised that we plan to request a Contract modification as soon as recalculations are completed.

(AF 18, p. 2).

The contractor ceased work on the project on Oct. 31, 1975 (AF 3). During contract performance, BLM had contemplated asserting a claim for actual damages for delayed performance under clause 23 of the "Additional General Provisions." At a conference held on Nov. 11, 1975, however, it was decided that no damages should be levied against the contractor since the contract was basically complete (94 percent) and overall work on the contract had been good (AF 27).

In November of 1975 the Bureau discovered that the contractor had been overpaid the sum of \$6,837.80 (AF 29). This resulted from having included payment for item 6, unit 1 (191 acres @ \$35.80 per acre) in the amount of \$6,837.80 in the fifth partial payment and having included the same item for payment in the same amount in the sixth partial payment (AF 30 and 30A). Although apparently acknowledging that an overpayment in the stated amount occurred, the contractor has refused to honor the Bureau's demand for repayment possibly because of its pending claim (AF 29-35). Giving effect to \$1,000 retained by the Government on a

special payment certificate and adjustments made relating to the required contract work, the Government's claim for overpayment under the instant contract has been reduced to the amount of \$5,735.62 (AF 35).³

By a letter dated May 18, 1976, a law firm retained by the contractor presented the claim for additional compensation now in issue to SBA. The claim letter asserts (i) that after receipt of the request for proposal, employees of the contractor visited the site and estimated the cost of the work to be in the amount of \$86,330.95 (an average price per acre of \$54.88), predicated upon field work sheets reflecting estimated densities ranging from 450 stems per acre to 927 stems per acre; (ii) that BLM representatives reviewed Nero's field worksheets and the estimated densities indicated thereon but made no attempt to question the reasonableness of the

³ The manner in which the Government's claim has been computed is shown in the contracting officer's decision from which the following is quoted:

"Overpayment
The final payment voucher to you shows:

Items 1 through 6	
(Total) -----	\$69,242.53
less Equitable Adjustment (faulty thinning) -----	-1,174.65
less actual cost of BLM pull back as agreed at meeting -----	-209.10
	<hr/> \$67,858.78
Total paid through partial # 6 -----	73,594.40
Total overpayment ---	<hr/> \$ 5,735.62"

(AF 54, p. 3).

estimated densities; ⁴ (iii) that during the course of negotiations with Nero prior to the submission of its bid proposal, BLM represented that it had estimated the cost of the contract work to be approximately \$70,000 to \$74,000; ⁵ (iv) that in these negotiations representatives of BLM indicated to the SBA and to Nero that BLM's interest in entering into an agreement with SBA relative to an 8(a) contract was largely dependent upon Nero's willingness to accept a subcontract consistent with BLM's alleged estimate of the cost of the work; and (v) that based upon these negotiations with BLM and SBA, Nero revised its estimate of the cost of the work and prepared new field work sheets and new estimating detail to reduce its proposal to the level demanded by BLM.

Noted in the letter is the fact that on Mar. 11, 1975, Nero presented its formal proposal in the total sum of \$72,312.94 for an average price per acre of \$45.97 and that it was this proposal which was incorporated into the subcontract

with SBA which was forwarded to Nero for execution on Mar. 31, 1975. The letter asserts that the work required to be performed under the subcontract proved to be more extensive, more difficult, more time consuming, and more expensive than anticipated by Nero with the largest single factor in the additional cost being the density of the stems actually encountered. Another assertion made in the letter is that by actual tree count during performance of the subcontract work the densities averaged approximately 1,700 stems per acre or approximately three times the estimated densities. In completing the work the contractor is said to have incurred costs of approximately \$154,074 and to have been paid the sum of \$69,242.53.⁶ The claimed amount of \$84,831.47 is the difference between the costs allegedly incurred and the payments made (\$154,074—\$69,242.53).

The rationale for the claim asserted is contained in the law firm's letter dated May 18, 1976, from which the following is quoted:

It is the subcontractor's position that, during the course of these discussions and negotiations prior to submission of the proposal, BLM withheld relevant information from Nero and SBA, failed to disclose pertinent information as to the cost of the work about which it had knowledge, or about which it should have had knowledge due to its superior knowledge and expertise, and actively (misled) Nero and SBA with respect to the difficulty and cost of the work. Altern-

⁴ Immediately thereafter the letter states: "We have now learned that the aerial photographs and other information used by the BLM in preparing the contract specifications clearly demonstrate average densities of approximately 1,700 stems per acre, consistent with the density actually encountered" (AF 42, letter dated May 18, 1976, to SBA, p. 4).

⁵ Concerning this estimate the letter states: "We understand that this estimate was confirmed by a certified estimate furnished by BLM to SBA pursuant to the requirements of the 8(a) program. In fact, we now believe that the estimates of the cost of the work actually prepared by BLM prior to negotiations exceeded \$100,000." (See AF 42, letter dated May 18, 1976, to SBA, p. 4.)

⁶ This figure does not include the amount of the overpayment claimed for by the Government.

tively, the parties both to the contract between BLM and SBA and to the subcontract between SBA and Nero were operating under mutual mistake as to the extent and difficulty of the work and the cost of performing the work. In either event the subcontract and contract should be reformed, and Nero is entitled to additional compensation under the subcontract in the amount of \$84,831.47. Alternatively, Nero is entitled to an equitable adjustment of the subcontract, pursuant to the provisions of Article 4 of the General Provisions, (Standard Form 23A),⁷ and other contract provisions, in the sum of \$84,831.47.

(AF 42, letter dated May 18, 1976, to SBA, pp. 1-2).

Responding to the claim letter under date of June 14, 1976, SBA advised the law firm (i) that BLM had given permission to release their price estimate which was enclosed; (ii) that the SBA files contained no information regarding the estimated density or stems per acre to be thinned on the acreage specified in the contract, other than the range of 300 to 9,500 trees per acre set forth in Section I, General Information, Paragraph B of the subcontract; and (iii) that all matters pertaining to the administration of the subcontract (including questions related to possible reformation) had been delegated to BLM. The letter concluded by indicating that further discussions regarding possible increase in the contract

price should be conducted directly with BLM (AF 43).

In a letter to the contracting officer under date of July 13, 1978, concerning a meeting with BLM personnel a day or two earlier, the law firm representing the contractor referred to the requirements and specifications for precommercial thinning and specifically to Section I, Paragraph A ("The contractor will select approximately 300 desirable leave trees per acre and cut competitive trees"), and Section II, Paragraph C ("Approximately 300 vigorous well-formed leave trees per acre conforming to an average 12 x 12 foot spacing will be identified by the contractor") after which it states:

At the time Nero began performing this contract, its employees were instructed by BLM supervisors to space the leave trees such that there would be 12 feet between a given leave tree and any other leave trees. As Mr. Batdorff described this instruction process, the inspectors advised the contractor's employees to take a 12-foot pole and swing it around any given leave tree to insure that the pole does not come in contact with any other leave tree while making its circumference.

(AF 52, letter of July 13, 1978, pp. 1, 2).

Additional arguments in support of the contractor's position were advanced in the law firm's letter to the contracting officer of Aug. 21, 1978. After adverting to the U.S. Department of Agriculture's Miscellaneous Publication No. 255 which

⁷ The General Provisions of Standard Form 23A are not part of the contract terms. The instant contract does include the General Provisions of Standard Form 19 (Rev. 7-73), one which is clause 1, "Changes And Changed Conditions" (AF 1).

had been enclosed with the contracting officer's letter of Aug. 18, 1978, the letter acknowledged that the publication does state that on 12- by 12-foot spacing the average number of trees per acre is 302. This is said to be the necessary result if the trees are cut in a basically square formation with the sides of the squares equalling 12 feet. To obtain this result, however, more than 12 feet must be left between approximately one-third of all trees, as is said to be shown by an illustration enclosed with the letter.

Reportedly acting upon instructions received from the BLM, the contractor's employees cut trees in equilateral triangular formation, each side of the triangle equaling 12 feet, which resulted in there being 12 feet between any given leave tree and the next leave tree but also resulted in 350 leave trees per acre, rather than 302. According to the Aug. 21, 1978, letter, the effect of following the process described by BLM's inspectors was that the contractors' initial thinning work resulted in approximately 350 leave trees per acre, or approximately 17 percent more leave trees per acre than the approximately 300 contemplated by the specifications. Nero's employees were reportedly instructed to rework those areas in which they had left 350 leave trees per acre, resulting in substantial increased costs to Nero (AF 52).

Jim Batdorff, COAR, Coos Bay,

has acknowledged that in the July meeting with contractor personnel the use of a 12-foot pole was suggested as a *guide* that could be used as a "rule-of-thumb" in determining approximate spacing. He also asserts, however, that the basis for payment was approximately 300 vigorous well-formed leave trees per acre conforming to an average of 12- by 12-foot spacing and not on the "pole-spacing." Emphasizing forestry practice and field conditions likely to be encountered, Mr. Batdorff states:

In regards to there being more trees on a 12 x 12 foot spacing based on an equilateral triangular formation than a perfect square—in theory he is correct. However, in forestry it is common practice to assume "spacing" measurements and "acreage" measurements to be "square" and not equilateral triangular. This is enforced by table 20, Miscellaneous Publication No. 255 previously sent to Nero's lawyer. In actuality, field conditions are not as simple and uniform as assumed by Nero's lawyer. Slope must be considered, etc. In all probability under field conditions, spacing would not be an exact "square" or any other describable form including an equilateral triangle. (AF 53).

In the decision from which the instant appeal was taken the contracting officer found (i) there were no discussions involving BLM people prior to the submission of Nero's proposal and there were no representatives of BLM and SBA that met with Nero's personnel to dis-

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cuss the project prior to the submittal of the bid proposal; (ii) only one proposal was ever received from Nero and that was by letter to Mr. Pells, SBA, dated Mar. 11, 1975, which gave a total price of \$72,315.07; (iii) the BLM's estimate for performing the work was \$78,650 which was not disclosed to Nero prior to award; (iv) as Nero's proposal (\$72,315.07) was only 8 percent under the Government's estimate (\$78,650), there was no reason to question the bid proposal; (v) there is no evidence that more work was required or performed by Nero than was indicated in the contract;⁸ and (vi) the amount owed to the Government, as a result of an overpayment, is the sum of \$5,735.62.

By letter dated Aug. 17, 1979, the contractor timely appealed the denial of its claim for additional compensation, stating:

Our claim, as outlined in our letter dated 18 May 1976, is confirmed and continued. Further, we expect to show, via documentation and material witnesses, that the very core of this problem was the result of certain local Government Employees' attitude toward the award of contract to a minority contractor under

the provisions of Section 8(a) of the Small Business Act.¹⁰¹

Contractor's Claim for Additional Compensation—\$84,831.47

[1] An alternative basis for the relief sought in the claim letter dated May 18, 1976, is reformation of the contract on the ground of mutual mistake. In the portion of the July 11, 1975, letter, quoted above (AF 18), the contractor asserted that it had inadvertently omitted pull back time from its bid proposal. A unilateral error made by one of the parties to a contract is not a mutual mistake, however, and there is no other evidence in the record supporting a claim of mutual mistake. In any event, it is clear that the Board has no authority under the Disputes clause to reform contracts. *American Ligurian Co., Inc.*, IBCA-492-4-65 (Jan. 21, 1966), 73 I.D. 15, 66-1 BCA par. 5,326. While the Contract Disputes Act does vest boards of contract appeals with authority to reform contracts in cases where a contractor shows that it is entitled to such relief, this is not a case where such

⁸ In especially pertinent part the decision states: "[O]n inspection of units if the average spacing comes out to 12' x 12' it is accepted, the actual number of trees are not counted. The claim of extra work has not been substantiated" (AF 54, "Finding of Facts, Decision of the Contracting Officer," p. 2).

¹⁰¹ A BLM memorandum pertaining to a conference held on Nov. 11, 1975, which included representatives of the contractor, SBA, and BLM states: "Nero & Associates, represented by their Attorney, Fred Smith, presented their case. The basic problems in not finishing the contract, according to the attorney, were racial discrimination, sabotage, and internal personnel problems. * * * One former company employee is presently being sought for misuse of company equipment and funds" (AF 27, memorandum dated Nov. 18, 1975, p. 2).

authority could be exercised even if a mutual mistake had been shown to exist. In the case at hand the contract was entered into on Apr. 3, 1975. The claim involved in the appeal was presented to the contracting officer for decision after the effective date of the Act (Mar. 1, 1979). In such circumstances the contractor could have but failed to elect to have its claim processed under the provisions of the Contract Disputes Act of 1978. *See Nome Pharmacy, Inc.*, ASBCA No. 24333 (Feb. 7, 1980), 80-1 BCA par. 14,279 at 70,325.

[2] In the claim letters of July 13 and Aug. 21, 1978, the contractor predicates its claim upon defective specifications. According to the contractor, the specifications were defective in that compliance with the specification requirement for 12- by 12-foot spacing between leave trees results in 350 leave trees per acre rather than the approximately 300 leave trees per acre contemplated by the specifications. The claim letters assert that in the initial thinning the contractor followed the 12- by 12-foot spacing requirement and ended up with 350 leave trees per acre.

It is contended that the contractor was subsequently required to rework areas containing 350 leave trees per acre which resulted in substantial increased costs to the con-

tractor. Addressing this question in the findings from which the instant appeal was taken, the contracting officer says that on inspection of units if the average spacing comes out to 12 by 12 feet the work was accepted and the actual number of trees were not counted.

Except for the bald statements in the claim letters of July 13 and Aug. 21, 1978, the record before us is devoid of evidence to show that the contractor was ever required to rework areas where the average spacing between leave trees was 12 by 12 feet. The mere fact that a specification is defective in some respects does not entitle a contractor to an increase in the contract price unless it can show that its costs have been increased to some extent by reason of the defective specifications. This the appellant has failed to do. *See Frank A. Hill*, AGBCA No. 78-106-4 (Nov. 28, 1980), 80-2 BCA par. 14,794. Insofar as the claim is predicated upon defective specifications, the claim is denied.

[3] In the claim letter of May 18, 1976, the contractor asserts as an alternative ground for relief that it is entitled to an equitable adjustment under the Changed Conditions Clause.¹⁰ Reliance upon this clause is apparently based upon the allega-

¹⁰ See n.7, *supra*, and accompanying text.

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tions the appellant has made concerning the withholding of relevant information¹¹ from Nero and SBA by BLM during the course of discussions and negotiations prior to the submission of Nero's bid proposal. In these discussions and negotiations BLM is said to have stated that it had estimated the cost of the work to be in the range of \$70,000 to \$74,000. BLM is also said to have indicated that its interest in entering into an agreement with SBA relative to an 8(a) contract was largely dependent upon Nero's willingness to accept a subcontract consistent with BLM's alleged estimate of the cost of the work.

According to the claim letter, Nero's original estimate for performing the contract work was in the amount of \$86,330.95. By reason of the negotiations with BLM and SBA prior to submission of its bid proposal, however, Nero is said to have revised its estimate of the cost of the work, and prepared new field work sheets and new estimating detail to reduce its proposal to the level demanded by BLM. Since in the notice of appeal the appellant

says its claim, as outlined in the letter of May 18, 1976, is confirmed and continued, that letter is seen as setting forth the principal grounds for the appeal. If the events described in that letter actually occurred, they would also lend credence to allegation in the notice of appeal concerning the attitude of some of the Government's employees toward the award of a contract to a minority contractor under the provisions of sec. 8(a) of the Small Business Act.

In the notice of appeal the appellant indicates that it expects to substantiate the very serious charges made against the Government and particularly the BLM, "via documentation and material witnesses." As no oral hearing was requested, no testimony has been received from any witness in support of the allegations made by the appellant. In response to the Order Settling Record, the appellant requested no documents to be added to those contained in the appeal file. The documents contained in the appeal file do not support the appellant's allegations. In fact, a number of them unequivocally refute them. As to the conference which allegedly took place between Nero, SBA, and BLM prior to the submission of Nero's bid proposal and at which the BLM is alleged to have withheld material

¹¹ The information allegedly withheld by BLM included estimates of the costs of the work prepared by BLM prior to negotiations purported to have been held which exceeded \$100,000. The record shows that BLM's estimate for the cost of doing the work was in the amount of \$78,850 (AF 54).

information¹² and in effect coerced Nero into submitting a much lower bid proposal than it had initially prepared, the contracting officer flatly denies that such a conference ever took place or that representatives of BLM had any conversations with representatives of the appellant prior to the submission of Nero's bid proposal. SBA has stated that its memorandum of negotiation indicates that the price proposed by Nero was accepted by SBA and BLM as submitted (AF 43).

Based upon the record made in these proceedings, the Board finds that the allegations made against the Government and particularly the BLM are entirely lacking in substance. We find no evidence of the withholding of material information or misrepresentation on the part of the Government. Insofar as the claim is based upon the Differing Site Conditions Clause, the claim is denied.¹³

¹² BLM representatives were said to have reviewed Nero's bid proposal prior to submission without questioning the densities reflected therein ranging from 450 to 927 stems per acre, even though aerial photographs and other data in BLM's possession demonstrated densities of approximately 1,700 stems per acre (AF 42, letter dated May 18, 1976, to SBA, p. 2).

The records fail to disclose that any aerial surveys were made of tracts of land involved in the three thinning. Concerning this aspect of the case, SBA states: "[O]ur file contains no information regarding the estimated density or stems per acre to be thinned on the acreage specified in the contract, other than the range of 300 to 9,500 trees per acre set forth in Section I, General Information, Paragraph B of the subcontract * * * (AF 43, letter dated June 14, 1976, p. 1).

¹³ See *Tectonics, Inc.*, VACAB No. 1187 (Nov. 16, 1976), 77-1 BCA par. 12,228, denying a changed conditions claim where the Board found that absent affirmative repre-

Government's Claim for Overpayment—\$5,735.62

[4] The Government asserts that when it processed the voucher for partial payment No. 5, it included for payment under item No. 6 thereof an item designated as C-C-75-10 Myrtle Point, Unit 1, in the amount of \$6,837.80 (AF 30A). The voucher prepared by BLM for partial payment No. 6 is said to have also included the item designated above in the amount of \$6,837.80 (AF 30). Taking into account other adjustments between the parties related to the contract,¹⁴ the net amount claimed to be due the Government by reason of the overpayment is in the amount of \$5,735.62.

The Government's assertions¹⁵ being substantiated by the record before us and it appearing that the appellant has never contested either the fact of the overpayment in the amount specified or the net amount of the Government's claim as set forth in the findings from which the instant appeal was taken, we find and determine that the appellant is indebted to the Government in the amount claimed of \$5,735.62.

Summary

1. The appellant's claim for additional compensation in the amount of \$84,831.47 is denied.

sentations by the Government or failure of the Government to disclose vital data not readily available to the bidder, the contractor was chargeable with such knowledge as would have been revealed by an adequate site investigation.

¹⁴ See n.3, *supra*.

¹⁵ See Govt. Brief at 11 for a more detailed discussion of the basis for the Government's claim.

v.

AREA DIRECTOR, ABERDEEN

February 20, 1981

2. The Government's claim against the appellant in the amount of \$5,735.62 is allowed.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

FORT BERTHOLD LAND AND LIVESTOCK ASSOCIATION

V.

AREA DIRECTOR, ABERDEEN
AREA OFFICE, BUREAU OF
INDIAN AFFAIRS

8 IBIA 230

Decided February 20, 1981

Appeal from decision of the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, raising minimum grazing rental rate for allotted land on the Fort Berthold Indian Reservation.

Affirmed.

1. Grazing Permits and Licenses: Generally—Indian Lands: Grazing: Rental Rates

In ascertaining the reasonableness of a rental rate increase for grazing lands permitted under authority of 25 CFR Part 151, it was error for the Administrative Law Judge to conclude that "fair annual return" to which Indian landowners are entitled under the regu-

lations is "something different and less than fair market value."

2. Grazing Permits and Licenses: Generally—Indian Lands: Grazing: Rental Rates

The independent market survey utilized by the Bureau of Indian Affairs in justifying an increase in grazing rental rates on the Fort Berthold Reservation cannot be regarded as invalid on grounds that off-reservation transactions were included in the survey.

3. Bureau of Indian Affairs: Administrative Appeals: Generally—Grazing Permits and Licenses: Generally—Indian Lands: Grazing: Rental Rates

In reviewing action of the Bureau of Indian Affairs in raising grazing rental rates, the Board of Indian Appeals should overturn the action only if it is found to be unreasonable. As long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for the Board to substitute its judgment for the agency's.

APPEARANCES: Phillip D. Armstrong, Esq., Minot, North Dakota, for appellant; Roger W. Thomas, Esq., Office of the Field Solicitor, Aberdeen, South Dakota, for respondent.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

The Board here reaches a final decision on an appeal taken by the Fort Berthold Land and Livestock

Association, an organization composed primarily of Indian ranchers, from an action taken Oct. 4, 1979, by the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, raising the minimum acceptable grazing rental on the Fort Berthold Indian Reservation for the permit Nov. 1, 1976, through Oct. 31, 1980.

In February 1980 the Commissioner referred the above matter to the Board of Indian Appeals for review and final Department decision pursuant to the provisions of 25 CFR 2.19(b). By order dated Feb. 13, 1980, the Board referred the appeal to the Hearings Division of the Office of Hearings and Appeals for an expedited factfinding hearing and recommended decision by an Administrative Law Judge. The assigned Administrative Law Judge, Keith L. Burrowes, declined to hold a factfinding hearing at that time and instead filed a recommend decision with the Board on Apr. 11, 1980, in which he concluded that the Bureau's action was improper as a matter of law. Judge Burrowes' legal opinion was rejected by the Board in a decision rendered June 6, 1980 (8 IBIA 90, 87 I.D. 201). The matter was remanded to the Administrative Law Judge with renewed instructions to ascertain the reasonableness of the rental rate set by the Bureau following an evidentiary hearing.

On Sept. 25, 1980, Judge Burrowes entered a recommended decision regarding the reasonableness of the disputed rental rate increase. Interested parties were allowed un-

til mid-November to file exceptions or other comments with the Board regarding the recommended decision. Final comments were received Nov. 21, 1980, and all briefs have now been considered.¹

Statement of the Issue

The matter at issue is the reasonableness of grazing fees set by the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota, which fees applied to the Fort Berthold Indian Reservation of North Dakota, and to, among others, the Fort Berthold Land and Livestock Association for certain lands permitted for the period Nov. 1, 1979, to Oct. 31, 1980. The increase in question pertains only to individually owned trust lands for which the minimum grazing rental was raised from \$42 in 1979 to \$57 for the year 1979-80.²

Discussion, Findings, and Conclusions

In setting the minimum rental rate in question the Bureau relied in part on a market survey of 37 rentals of grazing land on or near the Fort Berthold Indian Reserva-

¹ Appellant's statement dated Nov. 17, 1980, raises a procedural objection to the submission by the Bureau, through counsel, of its exceptions to the recommended decision. The objection is unfounded. The Board's regulations specifically authorize the filing of written exceptions to recommended decisions by Administrative Law Judges (see 43 CFR 4.368 (1979), 46 FR 7334, 7338 (Jan. 23, 1981)), and this privilege was conveyed by the Board to all parties by order dated Oct. 9, 1980.

² It is for the governing tribe to establish minimum grazing rental rates for the use of tribal land. 25 CFR 151.13(a).

v.

AREA DIRECTOR, ABERDEEN

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tion. The survey was prepared by Darrell Rasmusson, an independent appraiser-contractor, "for the purpose of providing some indication of the current prices being paid for cash rent of grazing land" (Rasmusson Narrative at 1). Mr. Rasmusson characterized the survey data provided in his report as the product of "arms length transactions where the landlord and tenant negotiated for the best rates possible with the least amount of government supervision." *Ibid.* Mr. Rasmusson stated that the survey data was gathered to show the "fair market value" of grazing rentals in the surveyed tracts (Tr. 13, 29).

Some of the grazing land surveyed by the independent appraiser had been leased on a price-per-acre basis. Other lands were leased or permitted on an animal unit basis. For comparison purposes, all data used by the contractor was broken down into fees per animal unit month (AUM) (Rasmusson Narrative at 3). In the grazing trade, an "animal unit" refers to one adult cow with unweaned calf by her side or the equivalent thereof based on comparable forage consumption.³

The specific rental to be paid by a permittee of Indian grazing lands is determined on the basis of the AUM rate fixed for the range unit measured against its established carrying capacity. Carrying capac-

ity may vary between tracts based on the amount of available forage, water, and other factors. The carrying capacity of a tract is multiplied by the AUM rate to arrive at the monthly fee. (Thus, grazing tracts A and B may be adjoining, of equal size, and assigned the same AUM rate. However, tract B may have twice the carrying capacity of tract A owing to density of forage and water sources. Tract B, because of its greater carrying capacity, will accommodate more cattle and produce more rental for the Indian landowner.) The Bureau of Indian Affairs calculates annual grazing rental rates on a 10-month basis to account for seasonal fluctuations in grazing productivity.

On the data collected in the case before us, the independent appraiser concluded that in the Fort Berthold area grazing leases and permits for a duration of 3-5 years were being let during the period in question for \$4.50 to \$6.90 per AUM, or a median price of \$5.70 per AUM (Rasmusson Narrative at 3).

The independent market study of Darrell Rasmusson was reviewed by Mr. Jim Quackenbush, a range conservationist with the Bureau of Indian Affairs, who had the responsibility of submitting a recommendation to his supervisor, the Assistant Superintendent, Fort Berthold Agency, regarding the establishment of a "fair rental rate for allotted land on the Reservation" (Tr. 38). Mr. Quackenbush, who has

³ See Tr. at 10; Rasmusson Narrative at 3; see also 25 CFR 153.1(e).

been a range conservationist with the Bureau for 7 years and who is experienced in proposing fair rental rates for Indian lands, testified that his objective was to recommend a grazing rental rate which coincided with "fair market value" (Tr. 38, 40, 50, 61, 64). Mr. Quackenbush stated that other factors were utilized in formulating a recommendation but that they, too, were geared to "fair market value." Ultimately, Mr. Quackenbush recommended that the Bureau adopt an annual grazing rental rate of \$57 and the Aberdeen Area Director accepted this recommendation.

*Legality of "Fair Market Value"
Standard*

[1] Appellant's main argument in this appeal is that it was error for the Bureau to establish a minimum grazing rental on the basis of what "fair market value" for such grazing privileges may be. Judge Burrowes agreed with appellant noting that the regulations require the establishment of a rate which "shall provide a fair annual return to the land owners." See 25 CFR 151.13 (b). According to Judge Burrowes, "the 'fair annual return' due to the Indian land owners under these regulations is something different (and less) than the fair market value" (Recommended Decision at 2).

Judge Burrowes refers to no legal authority for his conclusion that fair annual return is something different and less than fair market value. The only authority cited in his opinion for this proposition is a fragment of the testimony given by

Mr. Quackenbush. As we have already noted, however, Mr. Quackenbush repeatedly testified that he perceived his task to be the development of a rental rate consistent with "fair market value." Mr. Quackenbush summarized his understanding of the general grazing regulations and the import of the phrase "fair annual return" contained therein during cross-examination:

Q. 25 CFR 151.13(b) dealing with the establishment of grazing fees. Does not that section require the Area Director to establish a minimum acceptable rental rate which provides a fair annual return?

A. Yes.

Q. Well that isn't the same as fair market value, is it?

A. I would say it's the same thing. If they are not getting fair market value, they are not getting a fair annual return.

(Tr. 64).

The Board agrees with the position of the Bureau whose brief states on this point:

We submit that the term "fair annual return" has substantially the same meaning as "fair market value."

There is no language in 25 CFR Part 151 that might possibly be construed to require "fair annual return" to have some other meaning. In § 151.1 there are set forth many definitions of terms but no reason was apparently seen to define "fair annual return" to mean something other than it would appear to mean. As a matter of fact if "fair annual return" was intended to mean something new and different and something less than "fair market value" there would have been an absolute necessity to define it.

(Govt. Brief, filed Nov. 10, 1980, at 7).

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While the Board has found no administrative or judicial rulings expressly equating "fair annual return" and "fair market value" in the context of the Bureau's leasing or permitting of Indian lands,⁴ the terms have been used interchangeably over the years by the Bureau of Indian Affairs as well as in noted treatises on the Secretary's leasing authority. See, e.g., Chambers and Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061 (May 1974).⁵

⁴ Nor, of course, have we found any rulings distinguishing the two.

⁵ The treatise cited is primarily devoted to why and how the Secretary of the Interior may look to factors other than economic return to Indians in exercising his various leasing approval powers. While its primary emphasis is on the role the Secretary should play in the long-term leasing of tribal business leases, the article recognizes that with respect to short-term leasing or permitting of allotted lands, the Bureau's concern has been and possibly should continue to be insuring that the allottee receives "fair annual rental" or "fair market value" for his land. Pertinent excerpts are quoted below:

"The approval power as presently exercised requires that the Secretary scrutinize only the financial fairness of the transaction—a 'fair market value' approach. The Secretary's regulations provide as the chief prerequisite for approval that the lease shall be for 'the present fair annual rental'" (at 1076).

"A virtue of the limited 'fair market value' approach is that it implies some acknowledgment by the Secretary that it is inappropriate for him to promulgate land use policies for Indian country. By stating in advance that he will approve any lease that provides a fair annual rental for the real estate, the Secretary is agreeing to ratify any determination a tribal lessor or allottee makes as to the social effects of a lease" (at 1033).

"We favor a combination of approaches—the 'free market' approach for short-term leases of tribal lands and a more 'preservative' approach for long-term leases, with retention of financial review for all leases of allotted lands." *Ibid.*

Judge Burrowes recognized that characterizing "fair annual return" as something less than "fair market value" penalizes the Indian landowner. His recommended decision states:

At the outset, I must state my disgust and dismay at the regulations herein which force on the Bureau of Indian Affairs (hereinafter, BIA) the position of having to balance the interests of the competing land owners and livestock operators.

If the land owners are to receive only a "fair annual return," rather than "fair market value," then the land owners are in fact being forced to subsidize the cattlemen. If the objective of the regulation is to be met, it should be done by a method that does not force one group of individuals to subsidize another group, nor through a method that forces the "bad guy" BIA employee into such an untenable position.

(Recommended Decision at 2).

In the absence of any persuasive authority that the term "fair annual return" as used in 25 CFR Part 151 is not the same as "fair market value," the Board does not understand why the Administrative Law Judge was constrained to treat these terms differently, leading inevitably to a degree of subsidization of ranchers by the landowners. In the Board's view, of varying possible interpretations which can be given to regulations, an interpretation which places the rulemaker in an "untenable position" ought to be avoided, not adopted.

Counsel for the Bureau correctly states, in our opinion, that the rec-

ommended decision misconstrues 25 CFR Part 151 in such a way "as to diminish the trust responsibility of the United States to the Indian landowners by the creation of a so-called trust responsibility to the cattle operator" (Govt. Brief, filed Nov. 10, 1980, at 3).

The general provisions of 25 CFR 151.3(b) are quoted and relied upon in the recommended decision. We concur with the Bureau that the language of sec. 151.3(b), which recites as one of the objectives of 25 CFR Part 151 the need to "promote use of the range resource by Indians to enable them to earn a living, in whole or in part, through the grazing of their own livestock" must, by necessity, refer to some other method than the reduction of fees due the Indian landowner for the use of his land.

The objective of sec. 151.3(b) may be met in a number of ways under the regulations without depriving landowners of fair annual return or fair market value for their land. *See*, for example, 25 CFR 151.5 (establishment of range units for more effective utilization of the range resources); 25 CFR 151.10 (allocation of range units to Indian corporations, Indian associations, and adult tribal members); and 25 CFR 151.11(a)(5) (Indian preference to adult tribal members, Indian corporations, and Indian associations in meeting high bids under competitive sales for grazing privileges).

The Secretary's trust responsibility to Indian landowners to insure protection of their economic interest

through the permitting of Indian lands for grazing was specifically addressed in *Coomes v. Adkinson*, 414 F. Supp. 975, 992 (D.S.D. 1976). The court stated:

The B.I.A. officers are not landowners with free choice in dealing with this land, but rather are servants of the Indian people. The Secretary's failure, through B.I.A. subordinates, to recognize and give serious consideration in their written decisions to the stated economic interest of the Indian landowners constitutes a serious breach of the Secretary's fiduciary duties.

Establishing Fair Market Value

From its own review of the evidence adduced at the hearing of July 24, 1980, the Board is satisfied that the Bureau's increase of the minimum grazing rental on the Fort Berthold Reservation to \$57 per year per animal unit for the period Nov. 1, 1979, to Oct. 31, 1980, was reasonable.

A starting point for evaluating the reasonableness of the \$57 fee is the recommendation of Judge Burrows that a reasonable rate, albeit below "fair market value," would be \$52 per year.

The basis for the \$57 rate set by the Bureau predominantly rests on the independent market survey performed by Darrel Rasmusson. (*See* Tr. at 38; Recommended Decision at 3.) Although Mr. Quackenbush, the Fort Berthold range conservationist who endorsed the survey's findings, testified to the consideration of other factors in addition to the report in proposing the foregoing rate, these other factors appear to have served merely as an informal check on the

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validity of the data contained in the survey.⁶

Although the evidentiary hearing commenced with a presentation by the Government as to how the Bureau set the disputed rental rate, the burden of proof in this appeal is on appellant to show that the Bureau's action was unreasonable. *Cf. Hazel Hawk Visser v. Area Director, Portland Area Office*, 7 IBIA 22 (1978).

Appellant sought to invalidate the independent study in three major ways: (1) By contending that the survey improperly looked to fair market value instead of fair annual return; (2) by various challenges to the "comparable tracts" considered in the report; and (3) by the opinion testimony of its own expert witness, Mr. Vern Englehorn. We have already disposed of the first argument by holding that fair annual return signifies the same thing as fair market value under the provisions of 25 CFR Part 151. We turn to appellant's other primary contentions.⁷

⁶ For example, Mr. Quackenbush stated that he considered the following: The effects of inflation on the grazing market; knowledge acquired from conversations with various farmers and ranchers; and personal knowledge derived from observation of his father's cattle operation in Canada. Appellant managed to show deficiencies in each of the foregoing considerations, however.

⁷ A fourth line of attack on the increased rental was attempted by appellant through the testimony of various members of the association. The Board has reviewed this testimony and concludes that it amounts to self-serving proclamations that the increased rental was unjustified. For reasons set forth in this opinion and from consideration of the record as a whole, the Board does not agree that the increase was unjustified.

[2] Appellant submits that the independent study should have excluded most, if not all, "comparable tracts" located off the reservation. Of the 37 comparables examined, only 9 were located on the reservation. The survey does reflect a lesser average value for on-reservation tracts as compared with off-reservation tracts.⁸

The Board does not agree that off-reservation transactions have little bearing on the fair market value of grazing privileges on the reservation. It is obvious to us that a cattle operator who has a choice of obtaining the use of grazing lands on or near the reservation will consider, among other things, the respective cost of obtaining such rights. Higher off-reservation fees could and apparently have led to higher on-reservation fees. There is no evidence of record to contradict this premise.

In a dispute over a lease effected under the provisions of 25 CFR Part 131, this Board rejected a recommended decision of an Administrative Law Judge who eliminated comparables from a market appraisal which were of generally higher values. *Byrd v. Commis-*

⁸ The average for the nine on-reservation comparables was found to be \$4.50 per AUM and the median \$4.29. For the 28 off-reservation transactions, the average was \$6.14 and the median \$5.89. Combining the two areas, the average was \$5.78 and the median \$5.62. The average of the latter two figures is \$5.70 from which a 10-month "annual" rate of \$57 was suggested. See Recommended Decision at 4.

sioner of Indian Affairs, 7 IBIA 142, 145 (1979), *appeal pending sub nom. Byrd v. Andrus*, C 79-229 (E.D. Wash., filed June 21, 1979). We stated:

In comparing and reviewing the appraisals we disagree with Judge Clarke's removal from consideration of comparables Nos. 50 and 54, two of the comparables used by Swanson in arriving at the fair rental value. It appears that the foregoing comparables were dismissed merely because they were of greater value than the other comparables. We do not agree that only tracts of identical or lesser value should be used as comparables in an appraisal.⁹

Consistent with the above, we do not think off-reservation comparables should be excluded from an appraisal of grazing transactions in this case merely because they have a higher average value.

Appellant challenges the use of off-reservation comparables in the independent survey because they are generally lease transactions as opposed to grazing privileges obtained by permit. According to appellant, reservation permit transactions are less costly than lease transactions because "permits can be revoked at any time, a grazing permit gives no interest in the land, lenders more readily provide funds to operators who have an interest in the grazing lands, [and] reservation grazing lands are less well improved, there being less fencing and

less ponds and dams, and remoteness from markets" (Appellant's Posthearing Brief at 6-7).

The Department's rules define a grazing permit as a "revocable privilege granted in writing limited to entering on and utilizing forage by domestic livestock on a specified tract of land." 25 CFR 151.1(k). The revocability of the privilege is strictly regulated, however. It may not be revoked until after due notice and only on the following grounds: Termination of the trust status of the land; violation of terms; allocation to Indian use; or allocation for grazing exempt from permit pursuant to 25 CFR 151.8. The latter two revocations may be accomplished only after 180 days written notice. *See* 25 CFR 151.15 (b) and (c).¹⁰

Through its own expert witness, Mr. Vern Englehorn, appellant has sought to discredit the independent

⁹ The *Byrd* decision is of additional significance wherein it shows that the Bureau of Indian Affairs regards the term "fair annual rental," as found in 25 CFR Part 131, to be synonymous with "fair market value."

¹⁰ The Government argues that a grazing permit under Part 151 is usually more certain in duration than a lease under Part 131: "In actuality because Indian preference is implemented in the allocation and bid preference systems provided in obtaining grazing permits, which do not exist in obtaining farm and pasture leases, there is much longer considered use of Indian lands by the same permittees than the same lessees" (Govt. Brief, filed Nov. 10, 1980, at 9). The administrative record is insufficient to support a finding or conclusion on this allegation one way or the other. We would observe, however, that while the stability of grazing permits held by non-Indians on Indian land is affected by the provision of 25 CFR 151.15(c) which permits cancellation or modification of permits for conversion to Indian use, Indian permittees, such as in the case at bar, are apparently on better footing than non-Indian permittees. This would surely be true if the phrase "allocation to Indian use" is not intended to mean "Indian landowner use."

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survey prepared for the Bureau by distinguishing many of the "comparable tracts" included in the survey. In apparent acceptance of Mr. Englehorn's testimony and narrative report, the Administrative Law Judge held in the recommended decision that 10 of the 37 tracts surveyed are not comparable.¹¹ Specific reasons were not given by Judge Burrowes for the elimination of any of these tracts. The recommended decision states in general, however, that comparable tracts possessed of improvements, hay land, or performance promises from the lessor should not be considered unless the value of such factors is removed to arrive at straight grazing value (Recommended Decision at 4).

Neither Judge Burrowes nor appellant's expert witness attempted to factor out such "extra" values in their assessment of the comparable tracts relied upon by the Bureau.¹²

¹¹ The tracts found unacceptable by the Administrative Law Judge are: 17, 21, 25, 28, 29, 30, 32, 33, 34, and 37, all of which are located off the reservation.

¹² In addition, appellant's expert witness offered no opinion as to the reasonableness of the fees set by the Bureau. In light of this fact, the Government has moved that his entire testimony be stricken (Govt. Brief, filed Nov. 10, 1980, at 14). The foregoing motion is without merit. It is clear that the purpose of the testimony given by appellant's expert witness was to show that the Bureau's fee increase was unreasonable and that it was based on invalid data. Had the Board accepted this opinion an appropriate order would be to set aside the decision and remand the case to the Bureau for a new appraisal to establish fair rental value. *Cf. Junction Oil Co., Inc.*, 21 IBLA 78 (1975).

Instead, the comparables allegedly overvalued because of improvements or other factors were completely removed from consideration. Among other things, this approach overlooks the fact that lands permitted for grazing on the reservation have also received improvements and possible lessor-management assistance. For example, Quintin Sulzle, an area range conservationist with the BIA's Aberdeen Area Office, testified that the Bureau has invested \$160,000 in various range improvements on the Fort Berthold reservation (Tr. 130).

In collecting data which would give an indication of the fair market value of grazing privileges in the Fort Berthold area, the Bureau's independent appraiser sought to provide a complete picture of the market, as the Government's brief summarizes:

There is testimony about how certain highs and lows were eliminated from the report because in the appraiser's trained judgment, the information was unreliable. (Tr. p. 8 L. 7 to 8). Data was tested and reconfirmed (Tr. p. 25 L. 1 to 31). Data that reflected some compulsion and was not "arms-length" was tested for family or relative involvement (Tr. p. 29 L. 8 to 13). Other information was eliminated by the expert because it didn't make sense based on his financial judgment (Tr. p. 8-9 L. 20-4). As much data as possible was selected within the appropriate geographic distribution to obtain a "common basis." (Tr. p. 9 L. 5, p. 10, L. 2).

(Govt. Brief, filed Nov. 10, 1980, at 15).

[3] The extensive data gathered by the independent appraiser was used by the Bureau to arrive at a fair market value for grazing privileges on the reservation. The Bureau arrived at a figure which it considered reasonable. In our review of that determination, the Board's requirement is to overturn the decision only if it is found to be unreasonable. It is possible that we could set a different rate from the evidence adduced as could anyone else. However, as long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for this body to substitute its judgment for the agency's.¹³

Our holding in this case is that the rental increase ordered by the Area Director was not unreasonable, contrary to law, or unsupported by substantial evidence. The Area Director's decision is therefore affirmed.

This decision is final for the Department.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

FRANKLIN ARNESS
Administrative Judge

¹³ In this regard, Departmental regulations preclude the Board of Indian Appeals from exercising discretionary authority delegated by the Secretary to the Commissioner of Indian Affairs, except as otherwise allowed by the Commissioner on a case-by-case basis. See 46 FR 7334, 7337 (Jan. 23, 1981).

APPEAL OF DAKOTA TITLES & RECORDS, A JOINT VENTURE

IBCA-1420-1-81

Decided *February 24, 1981*

Bureau of Indian Affairs.

Dismissed.

Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Jurisdiction

A protest of award by an unsuccessful bidder is dismissed where the Board finds that it has no jurisdiction over bid protest under either the disputes clause or the Contract Disputes Act of 1978.

APPEARANCES: David C. Humphrey, Attorney at Law, Yankton, South Dakota, for Appellant; Roger W. Thomas, Department Counsel, Aberdeen, South Dakota, for the Government.

OPINION BY CHIEF
ADMINISTRATIVE JUDGE
McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal on the ground that the Board is without jurisdiction over the subject matter of the appeal. The appellant has filed an opposition to the granting of the Government's motion to dismiss asserting that "the Defendant and Appellee has, by its own application of the procedures available, did select and apply those procedures in the Solicitation, Award, and Appeal process surrounding RFP Nos. A-00147 and A-00149 re-

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spectively" ("Resistance to Motion to Dismiss," p. 2). In the complaint filed in these proceedings, the appellant undertakes to show that the contract covered by its protest was awarded contrary to the evaluation procedures set forth in the solicitation request. It also alleges prejudice by reason of the contracting officer having advised the appellant of its right to protest the award made by taking an appeal to this Board. Included among the prayers for relief in the complaint is "5) That the Contract be awarded to the Plaintiff" (Complaint, p. 8).

Nowhere does the appellant address the question of what authority this Board has to resolve protests of award. Jurisdiction over protests of award has always been considered to lie with the Comptroller General. On many occasions in the past this Board has held that the jurisdiction conferred by the disputes clause only extends to resolution of disputes between the parties to the contract under which the appeal was taken or their lawful successors or assignees. *See*, for example, *MacDonald Construction Co.*, IBCA-572-5-66 (Mar. 17, 1967), 67-1 BCA par. 6,202; *Divide Constructors, Inc., Subcontractor to Granite Construction Co.*, IBCA-1134-12-76 (Mar. 29, 1977), 84 I.D. 119, 77-1 BCA par. 12,430; and *Zurn Engineers*, IBCA-1176-12-77 (July 20, 1978), 85 I.D. 279, 78-2 BCA par. 13,335.

While the jurisdiction of the Board has been greatly enlarged by reason of the enactment of the Con-

tract Disputes Act of 1978 (P.L. 95-563, 92 Stat. 2383, 41 U.S.C. § 601 *et seq.* (Supp. II 1978)), the Act has been interpreted as not extending the jurisdiction of boards of contract appeals to protests of award. Addressing this question in the recent case of *James L. Jones*, PSBCA No. 778 (Feb. 28, 1980), 80-1 BCA par. 14,292, the Postal Service Board of Contract Appeals stated at 70,373:

The facts clearly establish that Appellant's appeal pertains to the formation of a contract and not an existing contract to which it is a party. This Board in *Edwin T. Noyes, III*, PSBCA 652, July 12, 1979, and subsequent decisions has consistently held that the Board does not have jurisdiction over claims filed by disappointed bidders against the award of contracts.

The appellant has alleged that it has been wronged by reason of the actions taken by the Government in awarding a contract to another bidder. It has not shown that it has any standing to bring its protest of award to this Board for resolution. Absent jurisdiction over the subject matter, this Board is without authority to provide relief even if the appellant were to prove its case. For the reasons stated and in reliance upon the authorities cited, the appeal is dismissed as beyond the purview of our jurisdiction.

WILLIAM F. MCGRAW

Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH

Administrative Judge

APPEAL OF FRANKLIN INSTRUMENT CO., INC.**IBCA-1270-6-79**Decided *February 26, 1981*Contract No. 14-08-0001-16295,
Geological Survey

Denied.

1. Contracts: Performance or Default: Excusable Delays

Where a prime contractor's delayed performance of its contractual obligations was caused by its sole source subcontractor's failure to perform, the prime contractor assumed the risk of such nonperformance by its subcontractor, and the prime contractor's delayed performance was not an excusable cause of delay cognizable under the default clause.

2. Contracts: Performance or Default: Waiver and Estoppel

Where the Government's conduct constituted encouragement to a contractor to proceed with performance of the contract work after the delivery date had passed, and where such a contractor incurred performance costs in reliance thereon, the Government has waived the delivery schedule.

3. Contracts: Disputes and Remedies: Termination for Default: Generally

Where the contractor delivered contract items which failed to substantially conform with the contract specifications, and where the contracting officer terminated the contractor's right to proceed with performance of the contract work because of the contractor's non-conforming delivery, the Government's termination for default was proper.

APPEARANCES: James M. Marsh, Esq., La Brum & Doak, Philadelphia,

Pennsylvania, for Appellant; Ross W. Dembling, Esq., Department Counsel, Washington, D.C., for the Government.

**OPINION BY
ADMINISTRATIVE JUDGE
DOANE****INTERIOR BOARD OF
CONTRACT APPEALS*****Factual and Procedural
Background Statement***

This appeal is concerned with whether the contracting officer properly terminated for default a firm fixed price indefinite quantity supply contract.

Appellant, Franklin Instrument Co., Inc., entered into contract No. 14-08-0001-16295 with the U.S. Department of the Interior, Geological Survey, on July 14, 1978. The contract, executed on Standard Forms 30 and 32, was subject to the Government's issuance of delivery orders from the date of the contract award. It called for the delivery of minute and hour timers with quartz crystal controlled movement within 120 days after the date of the Government's delivery order. The Geological Survey uses the timers to program its digital recorders to collect hydrologic data for various governmental agencies.

In the instant case, the contracting officer partially terminated appellant's right to proceed for default for the stated reasons that appellant: (1) failed to make delivery within the period of performance of the contract and delivery order No. ER-66320; (2)

failed to make acceptable progress in the performance of the contract; and (3) failed to respond to the Government's letter of Apr. 19, 1979, within 10 days after receipt of such letter. However, the contracting officer's primary reason for terminating appellant's right to proceed was based on appellant's failure to deliver the contract items in accordance with the contract specifications.

Appellant alleged in its complaint that the Government had waived the original delivery schedule and that the delays were chargeable to the Government. Appellant also alleged that the Government's improper termination of its contract, together with the Government's refusal to accept completed items, had caused appellant to incur substantial damages. In its prayer for relief, appellant asked the Board to vacate the termination for default and to reinstate its contract. At the prehearing conference, however, appellant asked the Board to convert the termination for default into a termination for the convenience of the Government.

The Issues

1. Was appellant in default of its contract?
2. Did appellant experience any excusable cause for delay of its contractual performance beyond the original delivery date?
3. Did the Government's actions after the delivery date constitute a waiver of the delivery schedule?
4. Even if the Government

waived the original delivery date, did the Government still have the right to terminate appellant's right to proceed with performance if appellant failed to deliver contract items in accordance with the contract specifications?

5. Did the Government's acceptance of all units delivered by appellant deny appellant both the right and opportunity to correct any alleged deficiencies?

Discussion

A. EXCUSABLE DELAY.

It is undisputed in this appeal that at the time the contracting officer terminated appellant's right to proceed for default, appellant had not yet delivered 532 timers as required by delivery order No. ER-66320. Appellant argues, however, that the purported termination was unlawful because its lack of deliveries was caused by the failure of a Government designated sole source supplier to deliver essential components. The Government rebuts this argument and argues that appellant's delayed performance was not excusable.

The Armed Forces Board of Contract Appeals (ASBCA) considered the issue of whether a contractor's failure to deliver was excusable if its sole source supplier failed to perform in the appeal of *Aero-kits, Inc.*, ASBCA No. 12324 (Mar. 11, 1968), 68-1 BCA par. 6917, *motion for reconsideration denied*, 68-2 BCA par. 7088. In that case, at page 31,996, the Board explained the contractual obligations of a

Government contractor involved in a sole source procurement as follows:

Appellant contracted with the Government to furnish all of the designated kit parts, some of which were sole source, others unrestricted source. Appellant's price included a charge for procuring sole source items just as for procuring unrestricted source items. Appellant's obligation to the Government to supply the sole source items was no different from its obligation to supply the remaining items. The limitation on the appellant's ability to select its suppliers because of the sole source designations was an inherent condition of the contract. Appellant agreed to this limitation when it entered into the contract; it was not imposed by the Government after the contract was made. The latter would present a wholly different problem. In making this type of contract appellant was well aware that a sole source procurement might cause greater difficulties than an unrestricted source procurement. Appellant clearly assumed the risk that non-performance by a sole source supplier entails. There is no basis on which appellant can now be relieved of the contractual obligation which it assumed.

[1] In the instant appeal, it is clear that appellant, Franklin Instrument Co., Inc., contracted with the Government to furnish 1,035 quartz crystals timers, all of which required a sole source Cannon connector. It is also clear that the limitation on appellant's ability to select its suppliers because of this sole source designation was an "inherent condition" of this contract; that appellant agreed to such a limitation when it entered into this contract with the Government; and that appellant "assumed the risk" that nonperformance might entail. Therefore, as in *Aerokits*, there is

no basis on which appellant can now be relieved of the contractual obligation which it assumed (AF Tab. 7, Art. 13, par. 4.2).

B. WAIVER OF THE DELIVERY SCHEDULE.

Appellant argues that the purported termination was unlawful because the Government had waived the delivery schedule. It is well settled that where the Government waives the delivery schedule, a contractor's delivery after such date is, in effect, timely. The Government argues, however, that appellant failed to deliver the supplies in a timely fashion and that the Government did not waive the delivery date.

The ASBCA was confronted with the issue of whether the Government had waived the delivery schedule in the appeal of *General Products Corp.*, ASBCA No. 16658 (Aug. 7, 1972), 72-2 BCA par. 9629. In this appeal, at page 44,981, the Board held, *inter alia*, that

waiver of the delivery schedule by acts or conduct of the Government representatives ordinarily requires at least two basic elements, (1) conduct on the part of the Government which is reasonably believed by the delinquent contractor to constitute encouragement to proceed with performance of the contract after the delivery date has passed, and (2) inurrence of performance costs by the delinquent contractor in reliance thereon.

[2] On these facts it is obvious that the Government "encouraged" appellant to proceed with performance of this contract after the delivery date had passed, since after such date the Government not only sent

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appellant approximately 200 Cannon connectors with which to manufacture the timers, but the contracting officer also indicated that he would accept appellant's late deliveries (Tr. 187, 188). It is also obvious that appellant incurred performance costs in reliance on such encouragement (Appellant's Exhs. 5, 6, and 7). Since appellant has proved the elements of waiver are present, it follows that the Government has waived the delivery schedule. Therefore, the contracting officer's termination cannot be upheld on the basis that appellant failed to deliver within the period of performance of the contract and the delivery order since the Government had waived the delivery date.

C. GOVERNMENT ACCEPTANCE AND DENIAL OF THE CONTRACTOR'S RIGHT TO CORRECT THE DEFECTS.

Appellant argues that the purported termination was unlawful because the Government had accepted all units delivered by appellant and had denied it any opportunity to correct any alleged deficiencies in those units or in the 532 remaining unshipped units. Appellant states that the Uniform Commercial Code (U.C.C.) has been applied to Federal Government contract disputes for many years. We agree that the U.C.C. has been applied to such disputes. See, for example: *Federal Pacific Electric Co.*, IBCA No. 334 (Oct. 23, 1964), 1964 BCA 4494. As legal support for its

argument, appellant cites U.C.C. § 2-508 entitled "Cure by Seller of Improper Tender or Delivery; Replacement" which reads as follows:

(1) Where any tender or delivery by the seller is *rejected* because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer *rejects* a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender. [Italics supplied.]

A perusal of this section of the Code reveals that it applies only where the buyer has "rejected" the seller's tender or delivery. However, under these facts, the Government did not "reject" the timers. Instead, the evidence in the record reveals that the Government "accepted" such units in spite of their defects (Tr. 172). Furthermore, appellant must agree with the Board's position since it has couched its argument in terms of the Government's acceptance, rather than the Government's rejection, of the 503 delivered units. Since this section clearly requires that the buyer first "reject" the seller's tender or delivery, and since appellant failed to prove that the Government rejected the delivered units, it is clear that U.C.C. § 2-508 does not apply.

Appellant also argues that it was denied an opportunity to correct the alleged deficiencies in the 532 remaining unshipped units, even

though time for performance had not yet expired, apparently because of the Government's waiver of the delivery date. As was earlier stated in this opinion, the Government contends that appellant's right to proceed was terminated primarily because appellant failed to deliver timers in accordance with the contract specifications. The ASBCA was faced with a similar problem in the appeal of *Phil Rich Fan Manufacturing Co., Inc.*, ASBCA No. 12770 (Jan. 29, 1971), 71-1 BCA par. 8694. In this appeal, at page 40,387, the ASBCA held, *inter alia*, that:

When the Government waives the due date and then waits until the contractor delivers the supplies, the *Lumen* or *DeVito* type of decision is not likely to be relevant. The problem is more akin to that in *Radiation Technology, Inc., v. U.S.* [11 CCF par. 80,702], 177 Ct. Cl. 227, 366 F.2d 1003 (1966). Because of the due date waiver the delivery is, in effect, timely, in the way it would have been if made at the end of the original delivery schedule. But the Government may then make a summary termination for default if the supplies are nonconforming.

We think that this was the situation here. It is clear that the Government "waived" the original delivery date. It is also clear that appellant delivered nonconforming supplies (Tr. 172). Thus, the Government could have made a summary termination for default since the supplies were nonconforming.

We also think that the instant appeal is akin to *Radiation Technology, supra*. There, the Court of Claims of the United States was

confronted with the question of the propriety of the Government's termination of a contract without granting the plaintiff an opportunity to repair the defective scaler-timer high voltage systems. In that case, the contracting officer had terminated appellant's right to proceed because of its failure "to deliver the systems in accordance with the specifications" under subparagraph (a)(i) of the default clause. The court concluded, at page 232, that the Government had an absolute right to terminate for non-delivery and stated in relevant part that

[u]nder the view which we espouse, the contractor is entitled to a reasonable period in which to cure a nonconformity *provided that the supplies shipped are in substantial conformity with contract specifications.*

In order to meet this requirement, it is incumbent at the outset that the contractor demonstrate that he had reasonable grounds to believe that his delivery would conform to contract requirements. Shipment alone is not an adequate badge of proof. Further, the right to cure assumes that the defects complained of are minor in nature and extent and are susceptible to correction within a reasonable time. Where extensive repair or readjustment is necessary in order to produce a fully operable product, substantial performance cannot be found and summary termination would be warranted. Other relevant considerations bearing upon the question of compliance involve the usability of the items, the nature of the product involved (whether it involves complex precision instruments as opposed to a route production item), and the urgency of the Government's demand. The greater such urgency the greater the requirement that performance approach the over all level of strict conformity [Italics supplied.]

[3] Under these circumstances, appellant failed to show that the timers "substantially conformed" with the contract specification. First, the record is devoid of any evidence that appellant had "reasonable grounds to believe" that its delivery would conform to the contract requirements. Nor is there any evidence that the defects complained of by the Government are minor in nature and extent (Government's Answer, par. 15; AF Tab 4(B), Tab 6(A); Tr. 114, 118, 121-23, 128-30, 133, 149, 150, 153-54, 159, 190-91, 195, 209, 210). The evidence in the record clearly reveals that the timers were "unusable" because of the defects and unreliability (Tr. 123, 133, 159); that extensive readjustment by the Government was necessary in order to produce a fully operable timer (Tr. 129, 153, 195, 210); and that the Government "urgently needed" the timers (Tr. 125). Thus, appellant was not entitled to a reasonable period of time in which to cure any nonconformities since the timers did not "substantially conform" with the performance requirements of the contract. Since appellant had no "right to cure" the nonconformities, and since the timers did not "substantially conform" with the contract requirements, the Government not only had the right to summarily terminate appellant's contract, but it also follows that the Government had the right to terminate such a contract after issuance of its second show cause letter.

Findings of Facts and Conclusions of Law

Based upon the foregoing discussion of the evidence, we make the following findings of fact and conclusions of law:

1. Delivery order No. ER-66320, issued on Sept. 25, 1978, required appellant to deliver the timers within 120 days after the date of the said order (AF Tab 7).

2. Delivery was required to be made on or before Jan. 23, 1979 (AF Tab 7).

3. Appellant did not deliver on said date, and the contracting officer issued a show cause letter (AF Tab 4(C)).

4. The reasons set forth in appellant's letter, dated Feb. 12, 1979, do not constitute an excusable cause of delay cognizable under the default clause of the contract (*Aerokits, Inc., supra*).

5. The Government waived the original delivery schedule since: (a) it encouraged appellant to proceed with performance after the delivery date; (b) it indicated that it would accept appellant's late deliveries; and (c) appellant incurred performance costs in reliance on such encouragement (*General Products Corp., ASBCA No. 16658 (Aug. 7, 1972), 72-2 BCA par. 9629; Tr. 187, 188; Appellant's Exh. 5, 6, 7*).

6. The contracting officer issued a second show letter on Apr. 19, 1979, and set forth several reasons for the timers' failure to comply with the

contract requirements (AF Tab 4(B)).

7. The timers that appellant subsequently delivered did not substantially conform to the contract specification (Tr. 114, 118, 121-23, 128-30, 133, 149, 150, 153-54, 159, 190-91, 195, 209, 210; AF Tab 4(B), Tab 6(A); Government's Answer, par. 15).

8. The contracting officer properly terminated appellant's right to proceed with performance for default because appellant failed to deliver the timers in accordance with the contract specification (see citation in findings of fact No. 7).

Decision

We find that where a prime contractor's delayed performance is caused by its sole source subcontractor's failure to perform, the prime contractor's delayed performance is not excusable. Thus, the Board denies appellant's claim for relief based upon excusable delay.

We also find that the Government waived the original delivery date and that appellant's deliveries

after that date were, in effect, timely. Thus, the Government improperly terminated appellant's right to proceed based upon untimely deliveries.

We also find that appellant was not entitled to a right to cure the timers' nonconformities since appellant delivered timers which failed substantially to conform with the contract requirements. Thus, the Board finds that the contracting officer properly terminated appellant's right to proceed with performance for default because appellant failed to deliver the timers in accordance with the contract specifications.

Finally, since we agree with the Government that appellant failed to deliver contract items in accordance with the contract specifications, the Board hereby denies the instant appeal.

DAVID DOANE

Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD

Administrative Judge

**INDIAN COUNTRY STATUS OF
MISSISSIPPI CHOCTAW SCHOOL
LANDS ***

M-36933

January 19, 1981

Indians: Criminal Jurisdiction

Six parcels of Bureau of Indian Affairs school land adjoining land held in trust for the Mississippi Band of Choctaw Indians are Indian country within the meaning of 18 U.S.C. § 1151(b) (1976).

*OPINION BY OFFICE
OF THE SOLICITOR*

TO: ASSISTANT SECRETARY—INDIAN
AFFAIRS

FROM: SOLICITOR

SUBJECT: INDIAN COUNTRY STATUS
OF MISSISSIPPI CHOCTAW SCHOOL
LANDS

Pursuant to a request from counsel for the Mississippi Band of Choctaw Indian, this office has reviewed the question whether six parcels of BIA school land which adjoin lands held in trust for the band¹ are dependent Indian communities and therefore Indian country within the meaning of 18 U.S.C. § 1151(b). For the reasons discussed below, we conclude that the school lands are dependent Indian communities.

The school lands were purchased under authority of several appropriations acts, beginning with the

Act of May 25, 1918, 40 Stat. 561, 573, which appropriated funds, in terms similar or identical to those of the 1918 act, "for [the] education [of full-blood Choctaw Indians of Mississippi] by establishing and maintaining day schools including the purchase of land and construction of necessary buildings." Act of May 25, 1918, *supra*. These lands were not among the lands declared to be in trust for the Mississippi Choctaw Indians by the Act of June 21, 1939, 53 Stat. 851.² The legislative history of the 1939 act indicates that the lands intended to be declared in trust were those lands purchased under other provisions of the above-referenced appropriations acts. Those provisions authorized expenditures "for the purchase of lands, including improvements thereon, not exceeding eighty acres for any one family, for the use and occupancy of [full-blood Choctaw Indians of Mississippi], to be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States * * *." (The Act of May 25, 1918, 40 Stat. 561, 573, is

² The questions whether these Indian school lands may, notwithstanding the absence of a formal declaration of trust, be properly classified as a part of the Choctaw Indian Reservation under other principles of law, or whether the Mississippi Choctaws may have claim to a beneficial interest in or use rights to these school lands, is not addressed in this memorandum, and no opinion on those questions is expressed herein. See Acting Solicitor's Memorandum, July 9, 1940 (whether or not lands purchased by the United States for Indian schools and hospitals constitute an "Indian Reservation"), 1 *Op Sol. on Indian Affairs* 964 (U.S.D.I. 1979).

*Not in chronological order.

¹The six school land parcels are located in the Mississippi Choctaw communities of Pearl River, Bogue Chitto, Conehatta, Tucker, Red Water, and Standing Pine.

quoted. The provisions of other appropriations acts are similar.) *See* S. Rep. 108, 76th Cong., 1st Sess. (1939); H.R. Rep. 194, 76th Cong., 1st Sess. (1939).

Moreover, the school lands were omitted from the 1944 proclamation, 9 Fed. Reg. 14907, which described the lands held in trust under authority of the 1939 act and those taken in trust under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, and which, further, proclaimed an Indian reservation.³

In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court held that the Mississippi Choctaw trust lands are Indian country because they are an Indian reservation within the meaning of 18 U.S.C. § 1151(a).⁴ However, it is doubtful that the reservation holding in *John* may be said to encompass the school lands, because the immediate bases for the Court's conclusion were the 1939 act and the 1944 proclamation, (*See* 437 U.S. at 649), neither of which included the school lands.

Other considerations relating to the history and present uses of the school lands, however, indicate that

the lands may properly be considered, dependent Indian communities. Recent federal court decisions indicate that no one factor is determinative of whether a particular area is a dependent Indian community but, rather, that various factors must be taken and considered together. *United States v. Martine*, 442 F. 2d 1022 (10th Cir. 1971); *United States v. Mound*, 477 F. Supp. 156 (D.S.Dak. 1979). Factors considered relevant by the Tenth Circuit Court of Appeals in *Martine* were "the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes, and to the federal government, and the established practice of government agencies toward the area." 442 F. 2d at 1023. The district court in *Mound* made similar factual inquiries.

It is evident that the school lands have historically been integral parts of the Choctaw communities. Prior to the institution of appropriations for the Mississippi Choctaws in 1918, the Choctaws had grouped themselves into natural communities, with respect to six of the seven presently existing communities.⁵ The seventh, Bogue Homa, was apparently not a pre-existing community but was formed through efforts of the BIA to gather to-

³ The memorandum of the Solicitor transmitting the proclamation to the Assistant Secretary, after noting that complete title to the school lands was in the United States, stated that they could not, under existing law, be brought within the scope of the proclamation. Solicitor's Memorandum, Nov. 29, 1944.

⁴ The Court, accordingly, found it unnecessary to reach the question whether they are a dependent Indian community under 18 U.S.C. § 1151(b). 437 U.S. at 648, n. 17.

⁵ *See Indian Office Handbook of Information: Mississippi Choctaw Reservation*, September 1935 (hereafter cited *Handbook*) at 10, 24; Memorandum of the Commissioner of Indian Affairs to the Secretary of the Interior about the Pearl River Indian Community, Apr. 21, 1965 (hereafter cited Commissioner's Memorandum) at 7, 9, 15 and Exhibit A thereto at 2.

SCHOOL LANDS

January 19, 1981

gether scattered tenant farmers in Jones County, Mississippi.⁶

The lands purchased for school purposes were chosen for their locations within the already existing communities, and the lands purchased for resale to Choctaw Indians were also selected for their location within the communities and their proximity to the school sites.⁷ BIA documents often refer to the communities as the "day school communities."⁸ These and other sources indicate that the schools were expected to serve and have served general community purposes in addition to their primary educational function. The 1935 *Handbook*, citing an earlier report, states, with reference to the schools, "[T]he object [was] to establish a center of education for the children and to make the Day School a center for developing the small farms and providing limited education for the adults." *Handbook* at 7. Quoting a 1935 verbal report of the Director of Education, the *Handbook* states, at page 24, "We are building the entire school program around the local community needs, whether they be economic, social, health, sanitation, health conditions in the home, food, nutrition, or care of babies."

⁶ *Id.* The Bogue Homa school is now closed and is not further considered in this memorandum. In 1975, the Bogue Homa land was placed in trust for the Mississippi Band of Choctaw Indians. See 41 Fed. Reg. 10114 (1976).

⁷ Commissioner's Memorandum at 8, 15.

⁸ *Handbook* at 10, 24, 40; Commissioner's Memorandum at 9.

A Comprehensive Plan prepared for the Mississippi Band of Choctaw Indians by a private firm in 1974 attests to the continued central role of the schools within the communities. For instance, at page 46, the Plan states, "The focal point of Community life in Bogue Chitto, as in all seven communities, is the Bureau of Indian Affairs Schools * * *. The school has historically been the community meeting place, due to the youth residing there and attending class, and due to the last [sic] of any other community focus as well." At page 76, it states, "The Choctaws do have a strong sense of community, * * * and accordingly hold to the idea of 'identity preservation' in development strategies. The community school is traditionally the force of community life, and, unless an alternative community center is provided, should be maintained as such."

Information supplied by the Mississippi Choctaw Agency covering the period of 1970-1979 shows that, in 1979, Indian families resided on each of the six school parcels, ranging from one family each at Tucker and Standing Pine to fourteen families at Pearl River. There have been Indian families residing on most of the parcels throughout the 10-year period. There were also 152 dormitory residents at Pear River and 10 dormitory residents at Bogue Chitto in 1979. Another dormitory at Conehatta was closed in 1974. It housed 27 students in its last year.

Moreover, the Choctaw Court of Indian Offenses has since its establishment in 1968 regularly exercised jurisdiction over civil and criminal matters involving Mississippi Choctaws arising from incidents taking place on the school lands. Likewise, BIA law enforcement officers patrol these areas and make arrests as warranted. (Most arrests occur at the Pearl River school site. Only rarely are arrests made at the other school sites.)

Since the late 1960's, the Mississippi Choctaws through their tribal government have operated a large number of community educational programs from facilities located on the school lands and have in several instances constructed tribal facilities on these lands with BIA concurrence.⁹ Perhaps most significant in terms of illustrating tribal use of these school lands and facilities, has been the Band's joint operation with BIA of grades K-3 in all six of the BIA day schools pursuant to a HEW Followthrough contract begun in 1969. That program served 410 students during the 1979-1980 school year.¹⁰

A further example of Choctaw community use of the school lands is the annual Choctaw Indian Fair. For each of the past 31 years, the Band has conducted its fair on the Pearl River School site. This fair is an annual celebration of the Choctaw culture which has yearly since

1950 brought thousands of tourists to the Choctaw Reservation.¹¹

Two arguments might be raised against a conclusion that the school lands are dependent Indian communities. The first is that the lands were purchased for institutional purposes and not for the use and occupancy of the Choctaws. The second is that the number of permanent residents on the school lands, in some instances at least, may be insufficient to constitute "communities."

With respect to the first argument, we note that, while the lands were purchased for school purposes, they were purchased for the education, specifically, of the Mississippi Choctaws and hence for their specific benefit. Moreover, while perhaps originally intended to serve only an educational function of the BIA, *i.e.*, the delivery of educational services to the Mississippi Choctaws, they have in fact for many years been "used" by the Choctaws for general community and educational purposes, with the Band in recent years taking on an increasing degree of policy and operational control over the use of these lands and facilities, consistent with the present federal policy of tribal self-determination and Indian control of education. *See, e.g.*, 25 U.S.C. § 450a; 25 U.S.C. § 2010.

The situation of the Choctaw school lands is thus clearly distinguishable from that of a BIA school unattached to any Indian reservation and used for education of In-

⁹ *E.g.*, the tribal arts and crafts building and an administration building for the tribal Headstart program, both at Pearl River.

¹⁰ Information supplied by counsel for the Band.

¹¹ *Id.*

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dian children in general, rather than children of a particular tribe. That was the situation addressed in an Acting Solicitor's memorandum of July 9, 1940, which held that the Phoenix Indian School was not Indian country.¹²

With respect to the small number of permanent residents on some of the parcels, we note that no court has yet directly addressed the scope of the term "community" as an element of "dependent Indian community" or determined whether a dependent Indian community must itself be a self-contained community or simply a part of a larger community. A *relationship* between the community and an Indian tribe has, however, been considered an element of an area's Indian country status. *Martine* at 1023, *Mound* at 159. In our view, where there are, as here, some permanent Indian residents and where tribal members regularly use the lands for general community purposes, the relation of the school lands to the larger Indian community is sufficiently integral and vital to render them dependent Indian communities.

In our view, when all the factors concerning the school lands are considered together, it becomes evident that they may properly be consid-

ered dependent Indian communities. Of particular importance are the following elements:

(1) The existence of the Choctaw communities, at approximately their present locations, prior to institution of federal services and purchase of the school lands in their midst.

(2) The fact that the lands, although purchased for educational purposes and held in fee, were intended for the specific benefit of the Choctaw communities.

(3) The present location of the land parcels immediately adjacent to Choctaw trust lands.

(4) The historical role of the schools as focal points of Choctaw community life and their regular use by the Mississippi Choctaw tribal government for operation of tribal educational and other programs.

(5) The residence of Indian families on a relatively permanent basis on the lands.

(6) The established practice of the BIA, the Band, and the Choctaw Court of Indian Offenses to regard the school lands as part of the Choctaw communities and as within BIA jurisdiction for law enforcement purposes.

Taking the sum of these factors, we conclude that the school lands are dependent Indian communities and therefore Indian country.

CLYDE O. MARTZ

Solicitor

¹² Acting Solicitor's Memorandum, July 9, 1940, *supra*, n. 2. One state court has held, however, that just such an off-reservation boarding school, on land not used or occupied by any Indian tribe, is a dependent Indian community. *C.M.G. v. Oklahoma*, 594 P.2d 798 (Okla. Cr. 1979), *cert. denied*, 444 U.S. 992 (1979).

INDIAN TRIBAL STATUS UNDER
THE BALD EAGLE PROTECTION
ACT *

M-36934

February 26, 1981

Bald Eagle Protection Act—Indian
Tribes: Federal Recognition

Only those groups which have received Federal acknowledgement of their Indian tribal status constitute Indian Tribes, for purposes of sec. 2 of the Bald Eagle Protection Act.

OPINION BY OFFICE OF THE
SOLICITOR

TO: ASSISTANT SECRETARY, FISH &
WILDLIFE AND PARKS
ASSISTANT SECRETARY, INDIAN
AFFAIRS
ALL REGIONAL AND FIELD
SOLICITORS

FROM: DEPUTY SOLICITOR
SUBJECT: INDIAN TRIBAL STATUS
UNDER THE BALD EAGLE PROTEC-
TION ACT

My opinion has been requested on the criteria to be applied in determining whether a group constitutes an Indian tribe whose members are eligible to possess bald eagle feathers for religious purposes under sec. 2 of the Bald Eagle Protection Act, 16 U.S.C. § 668a. In particular, Mr. William M. Tayac has sought a permit to acquire eagle feathers under the Act on grounds that he is a member of the Piscataway Indian Tribe, Maryland, and that he requires these feathers to participate in tribal religious ceremonies. There is no

group known as the "Piscataway Indian Tribe" which has been acknowledged as maintaining a government-to-government relationship with the United States. A list of acknowledged Indian tribes maintaining government-to-government relations with the United States is published annually in the *Federal Register*. See e.g., 44 FR 7235 (1979) and 45 FR 27828 (1980).

For the reasons which follow, I conclude that only those groups which are included in the annual list of Indian tribes published in the *Federal Register* (or in supplements thereto) constitute Indian tribes for purposes of qualifying for the exemption in sec. 2 of the Bald Eagle Protection Act, 16 U.S.C. § 668a.

The Bald Eagle Protection Act, 16 U.S.C. §§ 668–668d, includes broad prohibitions against the taking, possession, sale, or other uses of the bald or golden eagle or any parts thereof. Sec. 2 of the Act, however, creates a number of limited exceptions to the prohibitions of the Act; it reads in pertinent part as follows:

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof * * * *for the religious purposes of Indian tribes* * * * [the Secretary] may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe. [Italics added.]

The regulations governing the application procedures and issuance criteria for permits for religious

*Not in chronological order.

PROTECTION ACT

February 26, 1981

purposes are codified as 50 CFR § 22.22. Sec. 22.22(a) (5) of the regulations requires that an application for feathers be accompanied by "a certification from the Bureau of Indian Affairs that the applicant is an Indian."

The issue to be determined is whether the Piscataways exist as an "Indian tribe" within the scope of the Bald Eagle Act and whether members of this alleged tribe are entitled to eagle feathers.

An "Indian tribe" constitutes far more than a group or voluntary association of individuals who share a common Indian ancestry. In order to constitute a tribe as opposed to an ethnic association, a group must have continuously exercised a degree of political control over its members. Thus, in the leading case of *Montoya v. United States*, 180 U.S. 261, 266 (1901), the Supreme Court defined "[Indian] tribe" as follows:

By a "tribe" we understand a body of Indians of the same or a similar race, *united in a community under one leadership or government* and inhabiting a particular though sometimes ill-defined territory * * *. [Italics added.]

Many cases have followed *Montoya* in recognizing that a group of individuals of common Indian descent must continuously exercise at least some attributes of sovereignty in order to constitute a tribe, *e.g.*, *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979), *cert. denied* 444

U.S. 866 (1979); *United States v. Washington*, 476 F. Supp. 1101 (W. D. Wa., 1979). The necessity of the continuous exercise of sovereignty to tribal status has also been recognized by previous opinions of the Solicitor of this Department; *e.g.* *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 724 (opinion of Feb. 8, 1937), 774 (opinion of July 29, 1937), and by the leading commentator on federal Indian law, Felix Cohen. *Handbook of Federal Indian Law* 268-272 (1942).

Whether a particular group constitutes an Indian tribe has generally been held to be a matter for the determination of Congress or of the Executive branch. *United States v. Holliday*, 70 U.S. (3 Wall) 407, 419 (1865); *United States v. Sandoval*, 231 U.S. 28, 46 (1913). In some cases and under certain limited circumstances determination of the tribal status of a group has been made judicially. *Mashpee Tribe v. New Seabury Corp.*, *supra*, *United States v. Washington*, *supra*. Delineation of the circumstances in which this determination has been made judicially is beyond the scope of this opinion. As the authorities cited above show, however, acknowledgment by Congress, the Executive branch or in some instances by the courts that a particular group exists as an Indian tribe rests upon a determination that the group constitutes a political rather than simply a racial entity. *See generally*

Morton v. Mancari, 417 U.S. 536, 551-555 (1974).

Neither Congress, the Executive branch, nor the judiciary has ever acknowledged that the Piscataways exist as an Indian tribe. This lack of acknowledgment means that the Piscataways are not now considered to be and are not now treated as existing as an Indian tribe by the federal government.

The Fish and Wildlife Service's own regulations implementing the Indian tribal exemption of sec. 2 of the Bald Eagle Protection Act require that applicants for eagle feathers secure a certification from the BIA of their status as Indians. 50 CFR § 22.22(a)(5). Clearly, the BIA is in no position factually or legally to certify the Indian status of a member of a group with which the BIA does not deal as an Indian tribe.

By regulations set forth in 25 CFR Part 54, this Department has established a procedure under which groups claiming to be Indian tribes can secure a determination of their tribal status. The Department promulgated these regulations so that the claims of the many groups seeking tribal status could be determined in an orderly and rational manner by a body with expertise in making such determinations: the Federal Acknowledgment Project (FAP). Pursuant to the regulations, groups seeking tribal status are required as an initial matter to file a documented petition with the FAP which shows that the group

meets the specified criteria entitling it to tribal status. 25 CFR § 54.7. The Piscataways have not yet submitted a documented petition to the FAP, and they cannot secure a determination of their claim to tribal status without complying with the procedures set forth in 25 CFR Part 54.

The carefully prescribed acknowledgment process of 25 CFR Part 54 cannot be circumvented by an attempt to secure feathers "for the religious purposes of Indian tribes" under sec. 2 of the Bald Eagle Protection Act, 16 U.S.C. § 668a. A group is eligible for the benefits and services available to Indian tribes only after it has secured federal acknowledgment as an Indian tribe under 25 CFR Part 54. These benefits and services include eligibility for eagle feather permits. It is my opinion that only those groups which have been federally acknowledged as Indian tribes are entitled to eagle feathers under the Bald Eagle Act.

This opinion was prepared by the Division of Indian Affairs of the Office of the Solicitor, Acting Associate Solicitor, Hans Walker, Jr., Scott Keep, Fran Ayer, and Anita Vogt of the Division participated in the preparation of this opinion. The principal author was Robin A. Friedman.

FREDERICK N. FERGUSON
Deputy Solicitor

W. KEITH HOWARD

53 IBLA 92

Decided *March 2, 1981*

Appeal from decisions of New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offers NM-38076 and NM-38081.

Affirmed.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Drawings

43 CFR 3102.6-1 sets forth the statements and evidence required when an attorney-in-fact or agent signs a simultaneous oil and gas lease drawing entry card on behalf of the applicant. Where an offer is signed and completed by a father acting as agent for his son, and where the father advises the son as to the selection of the parcel, the applicant cannot be considered "qualified" and the offer to lease drawn with first priority accepted, unless the statements required by 43 CFR 3102.6-1 have been filed with the drawing entry card.

2. Notice: Generally—Regulations: Generally—Statutes

All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

APPEARANCES: W. Keith Howard,
pro se.

OPINION BY
ADMINISTRATIVE JUDGE
LEWIS

INTERIOR BOARD
OF LANDS APPEALS

W. Keith Howard appeals from decisions of the New Mexico State Office, Bureau of Land Management (BLM), dated Feb. 1 and Feb. 7, 1980, rejecting his oil and gas lease offers NM-38076 and NM-38081.

The record shows that the simultaneously filed drawing entry cards (DEC's) of W. Keith Howard were drawn first by the New Mexico State Office, BLM, in a drawing held Aug. 7, 1979, to determine the priority for awarding oil and gas leases covering parcel Nos. NM-1065 and NM-1074. The DEC's were signed manually with the signatures reading "W. Keith Howard."

On Aug. 30, 1979, BLM issued its decisions requiring appellant to submit additional evidence by answering questions surrounding the circumstances of his offers. By answering the questions, appellant informed BLM that his father, Charles H. Howard, had filled out the blanks on appellant's DEC's; that appellant's father had signed the cards for appellant and had been given authority to sign on appellant's behalf as his agent; that his father had signed the cards acting as his agent, in appellant's absence, with his consent and instruction; that no one furnished him with information or assisted him in filling out the cards; that there was no agreement between him and his father.

BLM issued its decisions on Feb. 1 and Feb. 7, 1980, which read in pertinent part:

By decision dated August 30, 1979, we requested additional information from Warren K. Howard. The information was received September 17, 1979, and Warren K. Howard states that he did not personally sign the entry card. He states Charles H. Howard signed it on his behalf. Since Charles H. Howard signed on behalf of Warren K. Howard, compliance with 43 CFR 3102.6-1 is mandatory. Our records do not show that Charles H. Howard filed evidence of his authority to sign on behalf of Warren K. Howard as required by 43 CFR 3102.6-1 (a) (1). Furthermore, the statements required by 43 CFR 3102.6-1 (a) (2) did not accompany the offer. See attached Circular 2357.

In his statement of reasons appellant contends that his father was given "full legal authority" to sign appellant's name on the DEC's. He contends that no fraud or breach of the regulations was intended and that the technical breach arose from the fact that he was unable to memorize 24 pages of Circular 2357. Appellant adds that only a law school graduate would be able to interpret 43 CFR 3102.6-1 and enter the simultaneous oil and gas lease drawings.

By order of Nov. 28, 1980, the Board requested additional information. In his response appellant stated that he did not personally select the parcels listed on the DEC's and that he was advised by his father.

[1] The DEC's which appellant filed in the Aug. 7, 1979, drawing contain instructions which, *inter*

alia, provide that "compliance *must* also be made with the provisions of 43 CFR 3102." This regulation defines the qualifications of lessees, and 43 CFR 3102.6-1 more specifically sets forth the statements and evidence required when an attorney-in-fact or agent signs an offer on behalf of the applicant. That regulation, 43 CFR 3102.6-1, provides in part that:

(2) If the offer is signed by an attorney-in-fact or agent, it shall be accompanied by separate statements over the signatures of the attorney-in-fact or agent and the offeror stating whether or not there is any agreement or understanding between them or with any other person, either oral or written, by which the attorney in fact or agent or such other person has received or is to receive any interest in the lease when issued, including royalty interest or interest in any operating agreement under the lease, giving full details of the agreement or understanding if it is a verbal one.

If an offer is signed by an agent or attorney-in-fact, it is well settled that the applicant cannot be considered "qualified," and the offer to lease drawn with first priority cannot be accepted, unless the statements required by 43 CFR 3102.6-1 have been filed with the drawing entry card. *Rebecca J. Waters*, 28 IBLA 381 (1977); *Southern Union Production Co.*, 22 IBLA 379 (1975); *Husky Oil Co.*, A-30440 (Oct. 27, 1965).

The issue before us is whether the offeror's father acted as an "agent" within the meaning of the regulation by completing and signing the DEC's for his son, or whether the

father was functioning merely as the son's amanuensis.

We find that he was acting as his son's agent within the meaning of 43 CFR 3102.6-1(a)(2). In answering the Board's questions, appellant revealed that he did not personally select the parcels in question and that his father advised him. From these facts it is evident that the father exercised discretion in this matter. Where a person exercises discretion in selecting the land and filing the offer on behalf of the offeror, that person is acting as the offeror's agent, and the separate statements required by 43 CFR 3102.6-1(a)(2) must be filed, failing which the offer must be rejected. See *Lorenz K. Ayers*, 50 IBLA 240 (1980); *D. E. Pack (On Reconsideration)*, 38 IBLA 23, 85 I.D. 408 (1978), *aff'd in part, rev'd in part*,¹ *sub nom. Stewart Capital Corp. v. Andrus*, Civ. No. C-79-123K (D. Wyo. Apr. 24, 1980) and *Runnells v. Andrus*, Civ. No. C 77-0268 (D.C.D. Utah, Feb. 19, 1980); *Ray H. Thames*, 31 IBLA 167 (1977), *aff'd sub nom. McDonald v. Andrus*, Civ. No. S 77-0333(c) (D.S.D. Miss. Jan. 29, 1980); *Robert C. Leary*, 27 IBLA 296 (1976). Only in the event that the role of the father was limited to that of a

mere scrivener, or amanuensis, would the necessity for the compliance with the regulation be avoided.² See *Rebecca J. Waters, supra*.

It is unfortunate that appellant was confused by the regulations. Such confusion, however, cannot excuse appellant's failure to file the required documents. All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. 44 U.S.C. §§ 1507, 1510 (1976); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Dale E. Jenkins*, 52 IBLA 9 (1981); *John J. O'Loughlin*, 50 IBLA 50 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

ANNE POINDEXTER LEWIS
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

JAMES L. BURSKI
Administrative Judge

¹ The Board's decision was affirmed by the District Courts in Mississippi, Utah, and Wyoming as to its interpretation of what the regulation required, and reversed by the District Courts in Wyoming and Utah only as to its retroactive application of the interpretation.

² Under revised regulation 43 CFR 3112.2-1(b), published on May 23, 1980, 45 FR 35156 and 35164, effective June 16, 1980, applications signed by anyone other than the applicant must be rendered in such a manner so as to reveal the name of the applicant, the name of the signatory, and their respective relationship.

PEABODY COAL CO., INC.

3 IB SMA 32

Decided *March 3, 1981*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Sept. 30, 1980, summary decision of Administrative Law Judge Frederick A. Miller, in Docket Nos. IN 0-37-R and IN 0-38-R, vacating Notices of Violation No. 80-3-11-16 and No. 80-3-11-17 on the ground that OSM failed to answer Peabody Coal Company's application for review of these notices within the time prescribed in 43 CFR 4.1165.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

An Administrative Law Judge has discretion to determine appropriate action to correct the late filing of an answer in a proceeding to review a notice of violation; however, vacation of the notice of violation is not appropriate action when the applicant has shown no prejudice resulting from a late answer.

APPEARANCES: Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, and Susan A. Shands, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

**OPINION BY THE BOARD
OF SURFACE MINING AND
RECLAMATION APPEALS**

This appeal was brought by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Sept. 30, 1980, summary decision of the Hearings Division which vacated Notices of Violation No. 80-3-11-16 and No. 80-3-11-17. The Administrative Law Judge determined that the language of 43 CFR 4.1165(a), providing that "[w]here an application for review is filed by a permittee, OSM * * * shall file an answer within 20 days of service of a copy of such application," is mandatory, and held that the notices of violation issued to Peabody Coal Co. (Peabody) must be vacated because OSM failed to answer Peabody's applications for review of the notices within the time specified in that regulation. We reverse the summary decision and remand this case for further proceedings.

*Factual and Procedural
Background*

On July 3, 1980, Peabody filed applications for review of Notices of Violation No. 80-3-11-16 and No. 80-3-11-17 pursuant to 43 CFR 4.1160-4.1164.¹ OSM was served

¹The notices of violation were issued pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 504, 30 U.S.C. § 1271 (Supp. II 1978) and the Department's regulations at 30 CFR Part 722. Peabody was charged with violating 30 CFR 710.11(a)(2)(i) which provides: "A person conducting coal mining operations shall have a permit if required by the State in which he is mining and shall comply with State laws and regulations that are not inconsistent with the Act and this chapter."

with these applications on July 7, 1980, and answered them on Aug. 4, 1980, a week after the time prescribed in 43 CFR 4.1165(a).

Peabody moved for summary vacation of the notices of violation on Sept. 22, 1980, arguing that the language of 43 CFR 4.1165 is mandatory and imposes a jurisdictional constraint. The Administrative Law Judge granted Peabody's motion. OSM timely appealed and submitted a brief. Peabody did not reply.

Discussion

The Board recently rejected treating the language of 43 CFR 4.1165 as mandatory. *William Francis Rice*, 3 IBSMA 17, 88 I.D. 269 (1981); *see also Lake Coal Co., Inc.*, 3 IBSMA 9, 88 I.D. 266 (1981). In *Rice* it was acknowledged that OSM's answer may be important to focusing the issues and, thus, a tardy answer may disadvantage the applicant or inconvenience the Administrative Law Judge. 3 IBSMA at 22, 88 I.D. at 272. In accordance with that decision, however, action in response to such a circumstance "must address the prejudice shown and may not, except in extreme circumstances, include vacating a notice of violation or cessation order. *See Badger Coal Co.*, 2 IBSMA 147, 87 I.D. 319 (1980)." 3 IBSMA at 22, 88 I.D. at 272.

[1] Peabody showed no prejudice resulting from OSM's 1-week delay in answering the applications for review. Indeed, Peabody allowed 45 days to lapse prior to filing its mo-

tions to vacate the notices of violation.² Thus, in accordance with the decisions above, we hold that it was improper to vacate the notices of violation under the circumstances of this case.

For the foregoing reasons the summary decisions below are reversed and the case is remanded for further proceedings.

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

ALLEN DUNCAN

53 IBLA 101

Decided March 4, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease offer W-70179.

Appeal dismissed.

1. Attorneys—Practice Before the Department: Persons Qualified to Practice

Qualifications to practice before the Department of the Interior are prescribed by regulations. Where an appeal is brought by a corporation that does not appear to fall within any of the categories of persons authorized to practice, the appeal is subject to dismissal.

² It would not be inappropriate to question the timeliness of Peabody's motions, even had they included allegations of prejudice caused by OSM's delay. *See* 43 CFR 4.1112(c), which provides that "[f]ailure to make a timely motion * * * may be construed as a waiver of objection."

APPEARANCES: Richard A. Williams, of Commonwealth Management Corp., Dallas, Texas, for appellant.

*OPINION BY
ADMINISTRATIVE JUDGE
LEWIS*

*INTERIOR BOARD OF
LAND APPEALS*

Allen Duncan has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 8, 1980, rejecting his noncompetitive oil and gas lease offer W-70179. The offer was rejected because appellant failed to include his zip code in his address on the drawing entry card (DEC).

[1] The appeal is brought by Commonwealth Management Corp., of Dallas, Texas, on behalf of the appellant, who authorized the corporation to represent him in this matter. This is violative of the regulations governing practice before the Department, codified under 43 CFR Part 1.

It cannot be disputed that the appearance of the corporation before us in a representative capacity constitutes "practice" as that term is defined in 43 CFR 1.2. It is not alleged that the corporation is a professional association of attorneys licensed to practice before any of the states or any possession or territory of the United States. 43 CFR 1.3(b)(1) and (2). Nor do any of the special provisions of 43 CFR 1.3(b)(3) apply. Moreover, 43 CFR 4.3 and 43 CFR 1812.1-1 require that representatives of

parties in proceedings before appeals boards of the Office of Hearings and Appeals must be qualified under 43 CFR Part 1. These regulations were promulgated pursuant to statute, 43 U.S.C. § 1464 (1976), and have the force and effect of law. *Rodway v. U.S. Department of Agriculture*, 514 F. 2d 809 (D.C. Cir. 1975); *G.S.A. v. Benson*, 415 F. 2d 878 (9th Cir. 1969); *Whatt-off v. United States*, 355 F. 2d 473 (8th Cir. 1966); *A. N. Deringer, Inc. v. United States*, 447 F. Supp. 451 (Cust. Ct. 1978).

The fact that appellant authorized the corporation to represent him in this appeal does not alter the situation. This Board has repeatedly held that an appeal filed for an appellant by an attorney-in-fact who is not qualified to practice before the Department under 43 CFR 1.3 is subject to summary dismissal. *Haruyuki Yamane*, 19 IBLA 320 (1975); *Thomas P. Lang*, 14 IBLA 20 (1973); *Henry H. Ledger*, 13 IBLA 356 (1973).

The authority of the Secretary to promulgate these regulations was judicially recognized as early as 70 years ago. In *Phillips v. Ballinger*, 37 App. D.C. (1911), the Court held that the right to appear before the Department of the Interior is not an inherent right, but a privilege granted by law, and subject to such limitations and conditions as are necessary for the protection both of the Department and the public.

In *Haruyuki Yamane*, *supra*, this Board dismissed appeals filed by one who was not authorized to prac-

tice on behalf of several oil and gas lease applicants. In affirming the Board's decision, *sub nom. Burglin v. Secretary of the Interior*, Civ. No. A 75-133 (D. Alaska, Jan. 7, 1977), the Court said:

[N]or is the regulation arbitrary or capricious or otherwise in contravention of plaintiffs' Constitutional rights. Parties in interest are expressly permitted to practice before the Department on their own behalf, or to have any qualified person so designated under the regulation appear for them. Plaintiffs have failed to show that their Constitutional rights of due process were in any way violated. The Secretary's motion for summary judgment is granted.

The District Court's decision was subsequently affirmed by the Court of Appeals in *Burglin v. Secretary of the Interior*, No. 77-1655 (9th Cir. Aug. 18, 1978), saying, *inter alia*, "The appellants' attack on the Department of the Interior's regulations prescribing standards for those who practice before its administrative bodies are [*sic*] similarly without merit. See *Federal Communications Commission v. Schreiber*, 381 U.S. 279, 290-91 (1965)."

For a more extensive analysis of the regulations and cases relating to practice before the Department, see cases collected in *United States v. John Gayanich*, 36 IBLA 111 (1978).

In an almost identical case to the one at bar, *W. Duane Kennedy*, 24 IBLA 152 (1976), a corporate leasing service attempted to appeal the rejection of one of its client's offers. The Board held that the cor-

poration was not qualified to practice before us and had no standing to appeal in its own right in light of the offeror's declaration that he was the sole party in interest. In the present circumstances Commonwealth Management Corporation has also failed to make a necessary showing that it is qualified to practice before the Department.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

ANNE POINDEXTER LEWIS

Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

EDWARD W. STUEBING

Administrative Judge

BARBARA J. NIERNBERGER,

THOMAS H. CONNELLY

53 IBLA 112

Decided March 4, 1981

Appeal from decision of Colorado State Office, Bureau of Land Management, rejecting oil and gas lease offer C-27901 and denying approval of assignment of interest in this lease.

Set aside and remanded.

1. Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: First-Qualified Applicant—Oil and Gas

Leases: Noncompetitive Leases—Oil and Gas Leases: Unit and Cooperative Agreements

A noncompetitive oil and gas lease may only be issued to the first qualified applicant therefor. An extension of time may be granted to supply necessary evidence of joinder in a unit agreement prior to lease issuance and a lease offer will not be rejected in favor of a junior offeror where an extension is timely requested and the requested evidence is provided in good faith and without unreasonable delay thereafter.

APPEARANCES: Maurice T. Reidy, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

INTERIOR BOARD OF LAND APPEALS

Barbara J. Niernberger and Thomas H. Connelly appeal from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated Jan. 16, 1980, rejecting Niernberger's offer to lease C-27901, because she failed to furnish a joinder or attempted joinder within the time required. BLM also rejected Niernberger's assignment of her interest in the lease to Connelly.

Barbara Niernberger's simultaneously filed drawing entry card (DEC) received first priority for parcel CO-196 in a drawing held on Mar. 22, 1979. On Mar. 27, 1979, Niernberger executed an assignment of her interest in the lease to Connelly, which assignment was filed with BLM on Apr. 10, 1979.

In assignee Connelly's request for approval of assignment dated Apr. 10, 1979, he signed and thus agreed to be bound by the following statement: "ASSIGNEE AGREES to be bound by the terms and provisions of the lease described here, provided the assignment is approved by the Authorized Officer of the Bureau of Land Management."

BLM issued a decision on Apr. 23, 1979, stating that the land within the offer is within the Fireplace Rock Unit Area. BLM stated that under 43 CFR 3100.6-1 the offeror is required to file evidence with the BLM office that an agreement has been entered into with the unit operator, Anadarko Production Co. (Anadarko), for the development and operation of the lands within the unit area pursuant to the terms and provisions of the approved unit agreement, or file a statement giving satisfactory reasons for failure to enter into such agreement. BLM allowed Niernberger 30 days from receipt of the decision in which to file the required information.

On Apr. 27, 1979, Connelly sent a letter to Anadarko requesting Anadarko "to send me the necessary papers in order that I may put this lease in the Fireplace Rock Unit." This letter was filed with BLM on Apr. 30, 1979. On May 21, 1979, Connelly filed with BLM evidence of attempted joinder to the unit. On this date he also requested a 60-day extension for approval of the joinder. On July 10, 1979, BLM requested further information from Niernberger which she submitted on

March 4, 1981

July 24, 1979. On Aug. 22, 1979, Niernberger filed evidence of attempted joinder. The final joinder instruments, which required the approval of the working interest owners, were accepted by Geological Survey on Dec. 11, 1979.

BLM issued its decision dated Jan. 16, 1980, rejecting the lease offer. There it stated in part:

On May 21, 1979, evidence of attempted joinder to the unit was furnished by Thomas H. Connelly. However, no evidence of joinder or attempted joinder by the offeror was received until August 22, 1979. Thomas H. Connally [*sic*] has no interest in the land, as an assignment cannot be approved before a lease issues.

The April 23, 1979 decision is considered final and the offer of Barbara J. Niernberger is rejected. The time allowed for appeal of that decision has expired. Regulation 43 CFR 1821.2-2 provides that when a document is required to be filed within a specified period of time, the filing of the document after the expiration of that period cannot be accepted if the right of a third party has intervened. The drawing entry card receiving next priority for parcel CO-196 must now be considered for lease issuance.

Since Barbara J. Niernberger will receive no interest in the land, the assignment to Thomas H. Connelly is of no effect and approval of the assignment is hereby denied. Advance rental will be authorized for refund to Thomas H. Connelly.

In their statement of reasons, appellants contend that the Government recognized that the assignment had been filed because it sent a copy of the Apr. 23, 1980, decision to the assignee; that Connelly met all the requirements listed in the decision of April 30 within the 30-day period; that no action was taken on

Connelly's request for an extension of time; that appellants' efforts, under the direction of the unit operator and its agent constituted an "attempted joinder" in accordance with the decision of Apr. 23, 1980; that the unit operator, having been informed that Connelly was assignee, did not request a joinder from Niernberger; that no action was taken by BLM until after all parties required to execute the joinder had been approved by Geological Survey; that the Government should not be allowed to rely upon its own unclear decision of Apr. 23, 1979, to effect a final rejection as of Jan. 16, 1980, without even acting on the request for extension and with all requirements having been satisfied prior to the decision of Jan. 16, 1980.

[1] Departmental regulation 43 CFR 3106.3-4 provides that a transfer of an offer may be approved as incident to the assignment of the lease. The regulation states:

§ 3106.3-4 Transfer of offer.

A transfer of the whole interest in all or any part of the offer may be approved as an incident to the transfer, by assignment or otherwise, of the whole interest in all or any part of the lease. A transfer of an undivided fractional interest in the whole offer may be approved as an incident to the transfer of an undivided fractional interest in the whole lease. An application for approval of a transfer of an offer must include a statement that the transferee agrees to be bound by the offer to the extent that it is transferred and must be signed by the transferee. In other instances transfers of an offer will not be approved prior to the issuance of a lease for the lands or deposits covered by the said transfers.

The case file shows the transferee did sign the application for approval of the transfer, as required by the regulation and he did agree to be bound by the terms and provisions of the lease. Although the form utilized by the offeror and the assignee for submission of their assignment to BLM for approval is entitled "ASSIGNMENT AFFECTING RECORD TITLE TO OIL AND GAS LEASE" and appears to be appropriate for assignments of leases already issued, there is no apparent reason why the same form should not suffice for approval of assignment of a lease offer. The express agreement of the assignee to be bound by the terms of the lease necessarily constitutes an adoption by the assignee of the terms of the assignor's lease offer. BLM offers no explanation why, despite the wording of the regulation which contemplates approval of assignments of offers prior to lease issuance, such approval was not granted in this case. In any event, BLM recognized Connelly's interest as an assignee and referred to him as such when it sent him a copy of its decision of Apr. 23, 1979. He then complied with the requirements of that decision in a timely fashion. It appears from the record that the offeror believed that the actions of the assignee in providing BLM with evidence of his joinder in the unit agreement constituted compliance with the decision of Apr. 23, 1979 (copies of which had been sent to both the offeror and the assignee), requiring evidence of joinder. The

record fails to disclose any effort by BLM to notify the offeror that this was not the case until the decision of Jan. 16, 1980, rejecting the lease offer.

The decision below is in error to the extent it rejected the lease offer on the ground that the offeror's evidence of joinder was filed after the deadline. A noncompetitive oil and gas lease may be issued only to the first qualified applicant. 30 U.S.C. § 226(c) (1976); *Cotton Petroleum Corp.*, 38 IBLA 271 (1978). However, there is no suggestion here that appellant Niernberger's lease offer was defective so as to require disqualification of the offer. Good faith delay in compliance with the regulation and decision regarding evidence of joinder or attempted joinder in the unit may be distinguished from noncompliance with the regulations regarding such matters as proper form of lease offers, evidence of qualifications, and timely payment of rental and filing fees. A violation of the latter has the effect of disqualifying the offer from receiving priority, and the intervening rights of the offeror receiving next priority preclude allowing time for cure of the defect. *Cf. Donald E. Jordan*, 35 IBLA 290 (1978) (failure to file rental within 15-day deadline established by regulation); *Cotton Petroleum Corp.*, *supra* (lease offer not accompanied by evidence of authority of agent to sign).

Accordingly, in light of the good faith effort of appellants Niernberger and Connelly to provide the re-

quested evidence of joinder, which has now been supplied, the request for extension of the deadline made by Connelly, and the apparent acquiescence of BLM in extending the deadline for providing the evidence, it was improper to hold that the intervening rights of a third party preclude acceptance of the evidence and require rejection of the lease offer. The extension of time requested by Connelly, whom BLM knew to be the assignee of offeror's interest and whom BLM treated as the offeror's representative in this matter, was sufficient to preclude rejection of the offeror's evidence on the ground it was not filed within the 30-day deadline.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for action consistent with the decision herein.

ANNE POINDEXTER LEWIS

Administrative Judge

I CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

ADMINISTRATIVE JUDGE STUEB- ING CONCURRING:

While in full accordance with the majority opinion, I think it important to express my analysis of 43 CFR 3106.3-4, which is a significant element contributing to my view of the case.

As noted in the majority opinion, the regulation stated:

§ 3106.3-4 Transfer of offer.

A transfer of the whole interest in all or any part of the offer may be approved as an incident to the transfer, by assignment or otherwise, of the whole interest in all or any part of the lease. A transfer of an undivided fractional interest in the whole offer may be approved as an incident to the transfer of an undivided fractional interest in the whole lease. An application for approval of a transfer of an offer must include a statement that the transferee agrees to be bound by the offer to the extent that it is transferred and must be signed by the transferee. In other instances transfers of an offer will not be approved prior to the issuance of a lease for the lands or deposits covered by the said transfers.

Note that the regulation states, "A transfer of the whole interest in all * * * of the *offer* may be approved as an incident to the transfer, by assignment * * * of the whole interest in all * * * of the [potential] *lease*." (Italics added.) Since this contemplates approval of the transfer of the *offer*, no *lease* could then exist. So the only rational way to read this sentence of the regulation is to imply the modifier "potential" before the word "lease." The regulation also states, "An application for approval of a transfer of an *offer* must include a statement that the transferee agrees to be bound by the offer * * *." (Italics added.) The meaning of this is obscure. An *offer* is not binding. It should read "the *lease*," referring, as the first sentence of the regulation must, to the lease that will issue in response to the offer.

BLM had the executed assignment, signed by the assignee, and stating in the text of this *BLM printed form* that he agreed to be bound by the *lease*. To conform this statement on the BLM assignment form with the regulation, the assignees would have had to cross out the word "lease" and write in the word "offer." That would have made no sense, because an offer is not binding on anyone, pending its acceptance, which in BLM practice is signified only by the execution of the *lease* on behalf of the United States. *Mobil Oil Corp.*, 35 IBLA 375, 85 I.D. 225 (1978); *Raymond N. Joeckel*, 29 IBLA 170 (1977).

The last sentence of the regulation is also ambiguous. What "other instances" are there where the transfer of the offer will not be approved prior to the issuance of the lease, and what are the "instances" where it *will be*?

I conclude that BLM should accept oil and gas lease offer C-27901 of Niernberger and grant approval of assignment of her interest in the lease to Connelly for the following reasons: There was substantial compliance with the requirement of the decision by the assignee, who acted in good faith; the action of the assignee was subsequently ratified by the offeror; the apparent purpose and spirit of the regulation was satisfied by the assignee's signed agreement to be bound by the terms of the *lease*; and, finally, the ambiguity of the regulation must be resolved in the appellant's favor in accordance with the rule in *Bill J.*

Maddox, 34 IBLA 278 (1978); *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971); *A. M. Shaffer*, 73 I.D. 293 (1966).

EDWARD W. STUEBING
Administrative Judge

NELBRO PACKING CO.

5 ANCAB 174

Decided *March 9, 1981.*

Appeal from Decision of the Alaska State Office, Bureau of Land Management AA-6680-A.

Reversed in part and remanded.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Where a decision by the BLM involves the effect of the Alaska Native Claims Settlement Act upon an interest, or pending application for an interest derived under the public land laws, including the general mining law and mineral leasing acts, any appeal from such decision shall be directed to the Alaska Native Claims Appeal Board. Where the decision by the BLM involves the validity of an interest, or pending application for an interest, asserted under the public land laws, including the general mining law and mineral leasing acts, any appeal from such decision shall be directed to the Interior Board of Land Appeals.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

A right-of-way under 43 U.S.C. § 959 (1976), issued before conveyance under ANCSA of the underlying land, would be a valid existing right protected under § 14(g) of the Act.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Applications

Where conveyance of land to a Native corporation under ANCSA would effectively deny a pending application for a right-of-way across such land, the applicant is entitled to a decision expressly granting or denying the right-of-way and stating the reasons therefor.

APPEARANCES: E. Michele Moquin, Esq., Jones, Grey and Bayley, and Edward G. Burton, Esq., Burr, Pease, and Kurtz, Inc., for appellant; David C. Crosby, Esq., Wickwire, Lewis, Goldmark and Schorr, and Robert S. Spitzfaden, Esq., Smith and Gruening, for Appellee Paug-Vik, Inc., Ltd.; Bruce Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Thomas Gingras, Esq., for Bristol Bay Native Corp.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The Appellant, Nelbro Packing Co., seeks a right-of-way for a water pipeline over land approved for conveyance to Paug-Vik, Inc., Ltd., a Native corporation organized pursuant to ANCSA for the Village of Naknek. The pipeline carries water from a lake to a cannery.

Nelbro Packing Co. applied to the Bureau of Land Management for a right-of-way 17 years ago, in 1963, and has used the water pipeline continuously in its cannery operation pending action on the right-of-way application. No final

action on the right-of-way application has been taken. Intervening events have included obtaining field reports and appraisals by the Bureau of Land Management for the purpose of setting an annual rental, a 1967 Native protest, and Paug-Vik, Inc., Ltd.'s selection, pursuant to ANCSA, of the underlying lands.

The Bureau of Land Management in 1980 issued a Decision to Issue Conveyance approving the affected lands for conveyance to Paug-Vik, Inc., Ltd., without either reserving the right-of-way sought by the appellant, or denying the appellant's right-of-way application.

The Board on appeal reverses and remands to the Bureau of Land Management for adjudication of the appellant's right-of-way application.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Chronology

In 1963, the Appellant, Nelbro Packing Co., (Nelbro), filed application A-060591 for a right-of-way pursuant to 43 U.S.C. § 959 (1976), which provided in pertinent part:

The Secretary of the Interior is authorized * * * to permit the use of rights of way through the public lands * * * for canals, * * * pipes and pipelines, * * * or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, * * * or the supplying of water for domestic, public, or any other beneficial uses * * * *provided* * * * That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, and over any public land, reservations or park.

(These provisions were repealed by § 706(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 (note) (1976). FLPMA in 43 U.S.C. § 1761(a) (1976) contains the following provision for rights-of-ways:

The Secretary, with respect to the public lands and, the Secretary of Agriculture, with respect to lands within the National Forest System * * * are authorized to grant, issue, or renew rights-of-way * * * for—

(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the * * * transportation, or distribution of water;

Application A-060591 was for a right-of-way extending from an existing right-of-way, already granted to Nelbro (A-031271), to Monsen Lake, which is Nelbro's main water source for their fish processing facility at Naknek.

The land involved in this appeal is a parcel underlying one end of Nelbro's application A-060591.

In 1964, at the Bureau of Land Management's (BLM's) request,

Nelbro amended their application making it subject to certain regulatory terms and conditions.

BLM, in a letter of January of 1967, advised Nelbro's engineer, "The Nelbro Packing Company right-of-way application Anchorage serial number 060591 is awaiting an appraisal. * * * We hope to be able to grant the right-of-way soon." In April, Native Protest AA-872 was filed by Bristol Bay, Kodiak, and Alaska Peninsula Native associations. The protest opposed disposal of lands which included the tract underlying the right-of-way sought by Nelbro.

In February and March of 1968, Nelbro again wrote to BLM to inquire about the status of their application. BLM again responded that they were waiting for an appraisal in order to set the annual rental for the right-of-way.

In May of 1968, Nelbro submitted to BLM a copy of Alaska DL Form 238, Declaration of Water Appropriation, filed with the State pursuant to the Alaska Water Use Act (§ 1 Ch 50 SLA 1966, AS 46.15.010-46.15.270 (1980)).

In a letter of Oct. 16, 1968, responding to Nelbro's inquiry, BLM explained that lands in Nelbro's application were within Native Protest AA-872 and the right-of-way could not be granted until the protest was resolved or the Natives granted a release. BLM stated that they were awaiting a field report and appraisal and would "contact the Native groups to attempt to secure a release from them so that the right-of-way may be granted."

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In January of 1969, BLM advised Nelbro that the status of the application had not changed, except that in addition to the protest, the Bureau of Indian Affairs had applied to withdraw all unreserved lands for the protection of Native rights, so that BLM could not act on the right-of-way application until final action on the withdrawal.

A formal land freeze was imposed in 1969, preventing land dispositions pending settlement of Native claims. (P.L.O. No. 4582, 34 FR 1025 (Jan. 12, 1969).) Enactment of ANCSA in 1971 ended the land freeze, but also resulted in withdrawal of the disputed land for selection by the village of Naknek.

In May of 1976, BLM advised Nelbro that Native protests were cancelled by enactment of ANCSA but that Naknek Village (Paug-Vik) had selected the land underlying the disputed right-of-way. Therefore, pursuant to regulations in 43 CFR 2650.1(a)(2)(i), Native comments on Nelbro's application were required to be considered.

Meanwhile, in related proceedings, Paug-Vik opposed Nelbro's application to the Alaska Department of Natural Resources for a permit for water use, and Nelbro defended its application.

In December of 1976, BLM advised Nelbro that they must submit a certificate of water use from the State.

In January of 1977, Paug-Vik wrote to BLM objecting to Nelbro's right-of-way application. Paug-Vik asserted that Nelbro's appropriation of water from the lake had caused a

decline in water level, detracting from the scenic and recreational value of the lake and threatening destruction of spawning grounds. Nelbro's water appropriation permit was approved by the Department of Natural Resources in November. In August of 1977, BLM made a field examination.

In March of 1978, the District Manager, Anchorage District Office, BLM, concurred in a report made for the purpose of determining if the right-of-way should be granted which recommended issuance of the right-of-way to Nelbro, as follows:

The subject lands have been used by Nelbro for many years to transport water from Monsen Lake to their cannery. Although Nelbro did not have legal authority to do this, their actions were prompted by the fact that Allen Nelson Pump Lake proved to be inadequate for their needs. In order to keep the cannery operating at full capacity, it was determined necessary to tap the water source at Monsen Lake.

The operation of the cannery is economically important to both the local and the State economy. The company pays a substantial amount of money out in the form of taxes, licenses, fees and payroll to workers and fishermen. Over half of those on the payroll are residents of Alaska and many are from the immediate Naknek area itself.

Paug-Vik, Inc. strongly opposes the right-of-way and the appropriation of water from Monsen Lake. Their objections are based on the claimed environmental impacts caused by the draw-down on the lake and they also question the State's authority to adjudicate water rights on native lands. The appropriation of water from Monsen Lake has affected the lake's resource values but the re-

sulting impacts have been negligible (see EAR). The issue concerning the State's authority to adjudicate water rights on native lands is very important to the State of Alaska. That State has issued a decision, to grant a permit to Nelbro for the appropriation of water from Monsen Lake. This permit will give Nelbro the right to appropriate water until the subject right-of-way case is resolved, and if the case is resolved in Nelbro's favor, then a certificate of appropriation will be issued to the company.

Evidence was submitted at the fact-finding hearing on October 14, 1977, concerning the appropriation of water from Monsen Lake that Paug-Vik at one time proposed to sell water to canneries in the area. Nelbro has indicated they will not buy water from Paug-Vik nor do they wish to purchase the right-of-way from Paug-Vik.

There are no existing land use conflicts concerning the proposed right-of-way. It appears that the present use of the subject land is the highest and best use.

In view of the above conclusions, it is recommended that the subject right-of-way be granted, as provided in 43 CFR 2873 subject to the terms and conditions in 43 CFR 2801.1-3 and 2801.1-5 and the attached stipulations. It is further recommended that the right-of-way be renewable and the granted width be ten feet on each side of the centerline.

BLM Land Report, Feb. 16, 1978. No action was taken on this recommendation.

In August of 1978, the State issued a water use permit to Nelbro.

On May 15, 1980, BLM issued the decision here appealed, approving lands for conveyance to Paug-Vik without reserving the right-of-way sought by Nelbro and without issuing a formal decision denying Nelbro's application.

It should be noted that Nelbro and Paug-Vik are litigating several related matters in the courts: a quiet title action involving the entire right-of-way claimed by Nelbro pursuant to 43 U.S.C. § 661, (*Nelbro v. United States, et al.*, Civil No. A80-188, District of Alaska) and an action contesting issuance of a water use permit and certificate of appropriation to Nelbro by the State (*Paug-Vik v. Leresche*, Anchorage Superior Court No. 3AN-78-5846). Nothing in the record indicates that the issues in litigation are identical to, or controlling on, the issues in this appeal.

Decision

Nelbro asks that BLM be required to render a formal decision on its right-of-way application, A-060591, and that the Board direct BLM to grant the right-of-way. Nelbro argues that BLM is required to give notice of any decision on an application, and that the decision must be based on a reasoned conclusion.

In support of requiring BLM to grant the application, Nelbro argues, first, that its compliance with all requirements compels BLM, in their exercise of discretion, to grant the right-of-way. In fact, Nelbro argues, BLM's conduct indicates that they have already exercised their discretion by indicating to Nelbro that the right-of-way application was informally approved, and refusal to grant the right-of-way now would be an impermissible change of position.

Second, Nelbro contends that BLM is estopped to deny the application because of its representation to Nelbro, because of its prejudicial delay in granting what Nelbro refers to as "formal" approval, and because of Nelbro's expenses incurred in perfecting water rights to Monsen Lake. Nelbro asserts that BLM's actions constitute affirmative misconduct such as to invoke estoppel against the government.

Paug-Vik agrees that BLM's decision, if upheld, would effectively deny Nelbro's pending application. However, Paug-Vik argues that, since Nelbro has a right of appeal from BLM's decision, which it has exercised here, it is not prejudiced. Paug-Vik asserts that the Secretary is under no obligation to act on an application within a specified time, particularly when the application impacts pending Native protests or claims.

Paug-Vik asserts that BLM properly exercised its discretion in rejecting Nelbro's application, in view of Congressional and Secretarial policy on economic exploitation of Native-selected lands prior to conveyance.

Paug-Vik denies Nelbro's contention that BLM is estopped to deny the right-of-way application. Paug-Vik asserts that BLM never made representations, or took an inconsistent position on Nelbro's application, that could invoke estoppel. Paug-Vik further contends that, even if the elements of estoppel were present, estoppel cannot be in-

voked against the government without affirmative misconduct by government officials, and no action of BLM constituted affirmative misconduct.

Bristol Bay Native Corp., (Bristol Bay) concurs with Paug-Vik.

BLM takes the position that Nelbro has no valid existing rights protected under ANCSA because the mere filing of an application creates no such right; an application within the Secretary's discretion to grant confers no right; and, even if granted, a right-of-way under 43 U.S.C. § 959 (1976) is revocable and on its face cannot be held to confer any right or easement.

BLM has moved to transfer this appeal to the Interior Board of Land Appeals (IBLA), because the issue raised by Nelbro is whether BLM can be required to issue a right-of-way under 43 U.S.C. § 959, and this is a matter within IBLA's jurisdiction.

Nelbro concurs with the motion, in that the substantive right they claim would have been the subject of an appeal to IBLA if BLM had issued a separate decision.

Paug-Vik and Bristol Bay oppose the motion.

It must be noted at the outset that this appeal raises issues which are not within the jurisdiction of this Board.

Regulations in 43 CFR 4.1(b) (5) outline the Board's jurisdiction;

Alaska Native Claims Appeal Board. The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact

or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act (85 Stat. 688), and orders and conducts hearings as necessary; except the Board shall not consider appeals relating to enrollment of Alaska Natives; and with respect to appeals from Departmental decisions on village eligibility under Section 11(b) of the Act, decisions of the Board shall be submitted to the Secretary for his personal approval before becoming final.

The jurisdiction of the IBLA is set forth in 43 CFR 4.1(b) (3) :

Board of Land Appeals. The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources and the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf.

Appellants from land selection decisions under ANCSA frequently assert valid existing rights and interests which are in conflict with conveyances under ANCSA, and seek protection for such interests under the Act. Such asserted rights are frequently derived from decisions of Departmental officials on the disposition of public lands and resources under the public land laws. The status of such an interest as a protected right under ANCSA may depend upon a determination of that interest's status or validity under the public land laws.

Thus, an appeal from a conveyance under ANCSA may raise issues within the jurisdiction of both Boards. Accordingly, this Board's procedural regulations provide for

Appeals Boards of the Department to certify issues on appeal to each other for determination. (43 CFR 4.901(c) (1979).)

[1] Where a decision by the BLM involves the effect of the Alaska Native Claims Settlement Act upon an interest, or pending application for an interest, derived under the public land laws, including the general mining law and mineral leasing acts, any appeal from such decision shall be directed to the Alaska Native Claims Appeal Board. Where the decision by the BLM involves the validity of an interest, or pending application for an interest, asserted under the public land laws, including the general mining law and mineral leasing acts, any appeal from such decision shall be directed to IBLA.

The Appellant, Nelbro Packing Co., claims to be entitled to a right-of-way, predating enactment of ANCSA, for its water pipeline under public land law (43 U.S.C. § 959, and FLPMA, *supra*). They also claim that such right-of-way would be entitled to protection under ANCSA. The former claim is clearly within the jurisdiction of IBLA; the latter is clearly within the jurisdiction of this Board. The Board will rule on the latter claim and will then address the former claim from a procedural standpoint.

[2] The Board finds that a right-of-way under 43 U.S.C. § 959, issued before conveyance under ANCSA of the underlying land, would be a valid existing right pro-

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tected under § 14(g) of the Act, which provides in pertinent part:

Where, prior to patent of any land or minerals under this chapter, a * * * permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the * * * right-of-way, or easement, and the right of the * * * permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

43 U.S.C. § 1613(g) (1976).

The Board recognizes that such an interest is revocable by the Secretary in his discretion, and does not, within the terms of 43 U.S.C. § 959, constitute "any right or easement, or interest in, to, or over any public land, * * *." However, such an interest would be, at the least, a permit granted by the Secretary under a Federal statute and, as such, would be protected by § 14(g) until actually revoked.

Nelbro's claim of entitlement to the right-of-way raises both procedural and substantive questions. The first procedural issue raised is whether or not BLM is required to provide Nelbro with a formal decision on their right-of-way application A-060591 before conveying the underlying land to Paug-Vik in such a manner as to preclude ever granting the right-of-way to Nelbro.

[3] The Board finds that BLM must issue such a decision. Where conveyance of land to a Native corporation under ANCSA would effectively deny a pending application for a right-of-way across such

land, the applicant is entitled to a decision expressly granting or denying the right-of-way and stating the reasons therefore.

It is questionable whether Nelbro's application under 43 U.S.C. § 959 is entitled to due process, since granting of the application is discretionary with the Secretary and that statute recites on its face that such a grant would not constitute an interest in land. In any case, as Paug-Vik points out, Nelbro is presently participating as appellant in the Departmental appeal process, and cannot be found to have been deprived of that right.

Nelbro has cited *Ashbacher Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945) for the proposition that BLM could not impliedly deny their application for a right-of-way by approving the underlying lands for conveyance to Paug-Vik, without reserving the right-of-way and without issuing a formal decision rejecting Nelbro's application.

The Board notes that the facts in *Ashbacher* are distinguishable from those of the present appeal in that *Ashbacher* involved a statutory right of hearing, which had "as a practical matter been substantially nullified" by the grant of the competing application. (*Ashbacher Radio Corp. v. Federal Communications Commission, supra*, at 327, 334 (1945).)

However, the Board concludes that as a matter of elementary fair dealing between a Federal agency and citizens, a principle similar to

that expressed in *Ashbacher* must be applied. BLM's discretion to grant or deny rights-of-way is not completely unbridled or quixotic, but must be exercised in a fair and reasonable manner. To deny an applicant the opportunity to know the reasons for an implied denial of his application, after action on the application has been delayed 17 years, borders on the arbitrary and capricious.

The circumstances underlying this appeal are not unlike those where a person tenders a bid at a competitive oil and gas lease sale and BLM simply rejects the bid as "inadequate" and does not issue a decision supportable on a rational basis. In those and similar cases, IBLA has remanded to BLM for readjudication. In the case of *Charles E. Hinkle, Chevron, U.S.A., Inc.*, 40 IBLA 250 (1979), the Board found that while it had repeatedly upheld the authority of the Secretary to reject oil and gas bids for inadequacy of the bonus offered, such rejection must have a reasonable basis in fact. *Gerald S. Ostrowski*, 34 IBLA 254 (1978); *Frances J. Richmond*, 29 IBLA 137 (1977); *Yates Petroleum Corp.*, 27 IBLA 224 (1976); *H & W Oil Co., Inc.*, 22 IBLA 313, 315 (1975).

Further, the Board held that [w]here high bids which are not clearly spurious or irresponsible are rejected solely on the basis of a statement by an official that the bids are inadequate and no rational or substantial basis for that conclusion appears in the case records, the decision will be set aside and the cases remanded for compilation of a proper record and readjudication of the acceptability of the bids. *Frances J. Rich-*

mond, supra, at 304; *Ojai Oil Co.*, 39 IBLA 173 (1979); *Arkla Exploration Co.*, 25 IBLA 220 (1976).

40 IBLA at 253.

While the Board does not attempt here to reconcile the various similarities and differences between oil and gas bid rejection situations and those raised in this case, it nevertheless concludes that the same basic tenets of fairness required in the oil and gas cases should apply in the facts of this case.

Accordingly, the Board will remand this appeal to BLM for issuance of a formal decision on application A-060591. This procedure is consistent with the Board's ruling in *Appeal of the State of Alaska*, 1 ANCAB 281, 83 I.D. 685 (1976) [VLS 75-8], in which the Board, at BLM's request, remanded an appeal to BLM for adjudication of a Native corporation's land selection under ANCSA, which had been the basis for rejection of a selection by the State of Alaska.

Substantive issues relating to Nelbro's entitlement to the claimed right-of-way, including the question of whether BLM is now estopped to deny the right-of-way, are within the jurisdiction of IBLA.

The Board notes that pursuant to provisions for interim administration in ANCSA and implementing regulations (43 U.S.C. § 1621(i) (1976); 43 CFR 2650.1(a) (1979)) withdrawal of the disputed land for selection by Paug-Vik does not in itself prevent BLM, in the exercise of its discretion, from granting the right-of-way sought by Nelbro.

March 12, 1981

BLM's motion to transfer this appeal directly to the Interior Board of Land Appeals is denied.

The Board's order of segregation dated Feb. 9, 1980, was in error and is hereby vacated. It is in general the Board's policy to segregate those lands affected by an appeal so that the remainder of the lands proposed for conveyance, and not affected by the appeal, may be conveyed. However, it appears to be difficult to describe adequately the land underlying Nelbro's right-of-way applictiaion in order to segregate that land and convey the remainder of the 30-acre tract proposed for conveyance. Paug-Vik has not requested segregation in this appeal. Accordingly, the Board will not attempt to segregate the land affected by this appeal.

The Board remands to BLM for a decision on application A-060591.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF McCUTCHEON-
PETERSON (JV)

IBCA-1392-9-80

Decided March 12, 1981

1. Contracts: Construction and Operation:
Differing Site Conditions

(Changed Conditions) — Contracts:
Construction and Operation: Changed
Conditions (Differing Site Conditions)

A Government motion for summary judgment is granted and a claim for differing site conditions (based upon damages to the jobsite caused by runoff from a severe rainstorm) is denied where the Board finds that if all of appellant's factual allegations are accepted as true neither the differing site conditions clause nor any other clause in the contract provides a basis for granting the appellant relief for the claim asserted.

2. Rules of Practice: Appeals: Hearings—Rules of Practice: Appeals:
Motions

A Government motion for summary judgment is granted and an appellant's request for a hearing is denied in a case where if all of appellant's factual allegations are accepted as true, there would still be no basis for granting the appellant relief for the claim asserted. The Board finds that to hold a hearing in such circumstances would not secure the just and inexpensive determination of the appeal without unnecessary delay.

APPEARANCES: Dan J. Peterson, McCutcheon-Peterson (JV), Arcadia, California, for Appellant; Gerald A. Wesley, Department Counsel, Boulder City, Nevada, for the Government.

OPINION BY CHIEF
ADMINISTRATIVE JUDGE
McGRAW

INTERIOR BOARD OF
CONTRACT APPEALS

The Government has filed a motion for summary judgement on the claim covered by the instant appeal on the ground that no genuine triable issue of material fact exists

March 12, 1981

BLM's motion to transfer this appeal directly to the Interior Board of Land Appeals is denied.

The Board's order of segregation dated Feb. 9, 1980, was in error and is hereby vacated. It is in general the Board's policy to segregate those lands affected by an appeal so that the remainder of the lands proposed for conveyance, and not affected by the appeal, may be conveyed. However, it appears to be difficult to describe adequately the land underlying Nelbro's right-of-way applictiaion in order to segregate that land and convey the remainder of the 30-acre tract proposed for conveyance. Paug-Vik has not requested segregation in this appeal. Accordingly, the Board will not attempt to segregate the land affected by this appeal.

The Board remands to BLM for a decision on application A-060591.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF McCUTCHEON-
PETERSON (JV)

IBCA-1392-9-80

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APPEARANCES: Dan J. Peterson, McCutcheon-Peterson (JV), Arcadia, California, for Appellant; Gerald A. Wesley, Department Counsel, Boulder City, Nevada, for the Government.

OPINION BY CHIEF
ADMINISTRATIVE JUDGE
McGRAW

INTERIOR BOARD OF
CONTRACT APPEALS

The Government has filed a motion for summary judgement on the claim covered by the instant appeal on the ground that no genuine triable issue of material fact exists

with respect to the alleged differing site conditions attributed to a severe rainstorm creating unusual weather conditions at the worksite. After asserting that for the purposes of the motion it may be assumed to be true that the damages claimed were caused by an unusually severe rainstorm, the Government states: "3. As a matter of law, abnormal weather, such as that alleged by Appellant, is not a changed condition within the meaning of clause 4 of the General Provisions" (Motion for Summary Judgment, p. 1). In support of this position the Government has submitted a memorandum of law in which are cited decisions of this Board considered to be controlling with respect to the issues presented by this appeal.

By order dated Dec. 5, 1980, the appellant was given 30 days from the date of receipt of the order to file an opposition to the Government's motions for summary judgment. Several attempts by the Board to serve a copy of the order upon the appellant by certified mail, return receipt requested, were unsuccessful. In a letter to the Board under date of Jan. 8, 1981, however, the appellant states:

We take exception to Mr. Wesley's request not to have a hearing on its Motion. We do wish to have an oral hearing in this matter with oral argument.

It is respectfully requested that Mr. Wesley's request be denied and that a hearing be arranged as soon as possible in this matter.^[1]

¹ This is the first and only communication from the appellant to the Board since the filing of the notice of appeal under date of Sept. 9, 1980.

Summary Findings of Fact

1. Contract No. 9-07-30-C0483 was entered into between the contractor and the Bureau of Reclamation² under date of Aug. 20, 1979, in the estimated amount of \$6,642,-350. The contract calls for relocating and lining of main canal, Station 0+00 to Station 353+43.37 in accordance with the specifications No. 30-C0483 (Appeal File Exhibit No. 3).³

2. The contract work was to be completed within 600 calendar days from the date of receipt of the notice to proceed. As the notice to proceed was received by the contractor on Sept. 18, 1979, the date initially established for completion of the contract work was May 10, 1981. By "Findings of Fact" dated Mar. 26, 1980,⁴ the contractor was granted a time extension of 28 calendar days by reason of unusually severe weather in the form of excessive precipitation between Dec. 20, 1979, and Mar. 2, 1980 (AF 2c and 4).

3. The contract was prepared on standard forms for construction contracts and included the General Provisions appearing in Standard Form 23-A (Apr. 1975 ed.) and those contained in Supplement to General Provisions. Particularly germane to the questions presented

² The Bureau of Reclamation issued the specifications and is administering the contract on behalf of the Bureau of Indian Affairs. The Bureau of Reclamation has been renamed the Water and Power Resources Service (Government Answer, pp. 1, 2).

³ Hereafter simply AF followed by the exhibit number.

⁴ No appeal was taken from this "Finding of Fact."

March 12, 1981

are the following General Provisions from Standard Form 23-A:

4. DIFFERING SITE CONDITIONS

(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

(c) No claims by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.^[5]

* * * * *

12. PERMITS AND RESPONSIBILITIES

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible

for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public and the property of others. He shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.^[6]

4. By letter dated Feb. 20, 1980, the contractor submitted a claim under Clause 4, Differing Site Conditions, in the estimated amount of \$250,000. With respect to the claim the contractor asserts that on February 19 or 20, a severe rainstorm had occurred 20 to 50 miles east of the project and that the water runoff from this storm had severely damaged the canal work by breaking the contractor's protective ditches and by flooding the excavated canal. The damage to the work was attributed to unknown physical conditions of an unusual nature which differed materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract (AF 2a).

5. In the letter of June 30, 1980, the contractor asserts that the detailed cost breakdown submitted shows that the damages sustained by reason of the Feb. 19, 1980, storm were in the amount of \$287,348.60. Citing Clause 6 of the General Pro-

⁵ See also Clause 4A, Administration of the Differing Site Conditions Clause (Supplement to General Provisions, Standard Form 23-A, Apr. 1975 ed.).

⁶ The Supplement to General Provisions (n. 5, *supra*), adds the following language at the end of Clause 12: "Upon completion of the contract, or final acceptance of any completed unit thereof, the work shall be delivered complete and undamaged."

visions, the letter states: "I certify that the claim is made in good faith, that the supporting data is accurate and complete to the best of my knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which McCutcheon-Peterson believes the Government is liable" (AF 2g).

6. In denying the differing site conditions claim the contracting officer stated (i) that it has been consistently held that neither of the two categories of changed conditions comprehends storms, floods, or other forms of abnormal weather, and (ii) that it is well settled that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such loss to the Government, the contractor is obligated to repair the damage at its own expense. Immediately thereafter he found: "13. The work damaged had neither been completed nor accepted by the Government at the time the damage was sustained, and there is no clause in the contract shifting the risk of such loss to the Government" (AF 2).⁷

7. In the notice of appeal dated Sept. 9, 1980, the appellant states:

[T]he clause "Differing Site Conditions" found in Paragraph 4 of the General Provisions (SF 23-A) is being interpreted

incorrectly and that the severe storm which affected the project site caused an increase in the Contractor's cost in the amount of \$287,348.60 due to the conditions of the site as a result of said storm.

The percentage of precipitation—354% over average for February, 1980 certainly created a jobsite of an unusual condition and an equitable adjustment should be made and the contract modified in writing.

(AF 1).⁸

Discussion

The appellant states that precipitation in February of 1980 was 354 percent above the average over a 70-year period. The contracting officer has found that to be the case (n. 8, *supra*). The appellant asserts that the severe storm which affected the project site resulted in an increase in the contractor's cost in the amount of \$287,348.60 (Finding 7). The Government says that for the purposes of the motion for summary judgment, it may be assumed that all the damages claimed by the appellant were caused by an unusually severe rainstorm. The contracting officer found that the work damaged had neither been completed nor accepted by the Government at the time the damage was sustained and that there is no clause in the contract shifting the risk of loss to the Government (text accompanying n. 7, *supra*). The contractor has not disputed the findings

⁷ The "Findings of Fact" also states: "15. Based on the rationale of this decision, the Contracting Officer has not addressed in the decision the questions of the severity of the storm or whether the damages have been adequately described and documented" (AF 2).

⁸ The "Findings of Fact" of Mar. 26, 1980 (AF 2c), shows that in the general vicinity of the jobsite in February of 1980, precipitation was 354 percent above the average over a 70-year period from 1894 through 1963 (AF 2c) ("Findings of Fact" by the contracting officer, p. 2).

March 12, 1981

and the record before us clearly supports the findings so made.⁹

Except for the request for a hearing by the appellant, the issues raised by the instant appeal are indistinguishable in principle from those confronting the Board in *The Holloway Companies*, IBCA-1182-3-78 (Feb. 11, 1980), 87 I.D. 56, 80-1 BCA par. 14,264. There the Board noted that no issues of fact was presented and that the only issue of law involved was whether a construction contractor was entitled to an equitable adjustment under the Differing Site Conditions clause for the additional costs allegedly incurred as a result of the adverse weather conditions, after which it stated (87 I.D. 58-59, 80-1 BCA at 70,264):

[T]he law is well settled: that a contractor may not recover increased costs which result from adverse weather conditions, absent a contract provision which allows it; and, that weather conditions, whether normal or unusually severe, do not constitute a differing site condition under Clause 4 of the General Provisions of the standard construction contract.

⁹ The Permits and Responsibilities clause (quoted in the text, *supra*) clearly makes the contractor responsible for the work until it has been completed and accepted. Construing a substantially similar clause in *Charles T. Parker Construction Co.*, IBCA-335 (Jan. 29, 1964), 71 I.D. 6, 10, 1964 BCA par. 4017 at 19,792-793, the Board stated: "It is well settled by the courts and by opinions of this Board that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such a loss to the Government, the contractor is obligated to repair the damage at its own expense" (footnotes omitted).

In *Holloway*, the Board noted that in *Arundel Corp. v. United States*, 103 Ct. Cl. 688 (1945), *cert. denied*, 326 U.S. 752 (1945), the Court of Claims had held that the action of a hurricane was not a changed condition within the meaning of Article 4 of the contract. In the recent case of *Turnkey Enterprises, Inc. v. United States*, — Ct. Cl. — (1979), 597 F.2d 750 (involving the lack of surface and subsurface flow in a river resulting from inadequate rainfall in the river's watershed), the Court of Claims found that the plaintiff had failed to establish either a "Category One" or a "Category Two" changed condition. Citing and quoting from *Arundel*, *supra*, in support of the decision reached, the Court states (579 F.2d 754):

[T]he flow of the river and rainfall are so intertwined as to make it impossible to separate the river conditions from the weather. The record demonstrates clearly that weather was the dominant factor which actually determined the nature of river conditions during the period in issue. Weather, as indicated previously, is not a risk which is shifted to defendant via the changed conditions clause. *Hardeman-Monier-Hutcherson v. United States*, 458 F.2d 1364, 1370-71, 198 Ct. Cl. 472, 485-86 (1972).

In this case the appellant has requested an oral hearing on its appeal with oral argument. It has not undertaken to show or even to say what useful purpose would be served by holding a hearing. If it were to prove its central allegation that the damages for which claim has been made were attributable to a rain-

storm occurring on or about Feb. 19, 1980, it would still have failed to show that the conditions at the job-site as a result of such rainstorm constituted differing site conditions within the meaning of the Differing Site Conditions clause.

Although its discretionary authority to refuse to grant hearings has been exercised in only a comparatively few number of cases, the Board has denied requests for a hearing in a variety of circumstances. For example, it has done so where jurisdiction over a particular claim was patently lacking¹⁰ or where there was no genuine dispute as to material facts.¹¹

The rules of practice applicable to the instant appeal¹² vest the Board with a considerable amount of discretion. Rule 4.105 (dismissal for lack of jurisdiction) states in es-

pecially pertinent part: "[T]he Board has authority to raise at any time and on its own motion the issue of its jurisdiction to conduct a proceeding and *may* afford the parties an opportunity to be heard thereon." (*Italics added.*) The general guidelines presently governing appeals before this Board state under Rule 4.100(e) (4): "These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay." Virtually identical language appearing in an earlier version of our rules has been interpreted as providing the Board with authority to grant summary judgment.¹³

Decision

[1, 2] The Government's motion for summary judgment squarely raises the question of whether the Differing Site Conditions clause of the standard form of construction contract provides any basis for re-

¹⁰ *American Cement Corp.*, IBCA-496-5-65 and IBCA-578-7-66 (Sept. 21, 1966), 73 I.D. 266, 273-78, 66-2 BCA par. 5849 at 27, 154-157 (claim for loss of commercial business dismissed without a hearing), *aff'd on reconsideration*, 74 I.D. 15, 18-27, 66-2 BCA par. 6065 at 23,065-073.

¹¹ See *Desert Sun Engineering Corp.*, IBCA-725-8-68 (Dec. 31, 1968), 75 I.D. 424, 432, 69-1 BCA par. 7431 at 34,512 in which in connection with its refusal to approve the Government's request for a hearing, the Board stated: "[I]f every finding made by the contracting officer, and every conclusion or allegation made either by the contracting officer or the Department Counsel were to be substantiated at an oral hearing, the Government nonetheless would fail before the Board, because the Government is improperly attempting to collect both actual and illiquidated damages" (footnote omitted); see also *Lloyd E. Tull, Inc.*, IBCA-574-6-66 (Feb. 15, 1967), 67-1 BCA par. 6137 (contractor's claim denied without granting the requested hearing where the Board found that there were no material facts in dispute).

¹² Interim Rules of Practice before the Interior Board of Contract Appeals.

¹³ See *Zurn Engineers*, IBCA-1176-12-77 (July 20, 1978), 85 I.D. 279, 287, n.24, 78-2 BCA par. 13,335 at 65,192; and *Armstrong & Armstrong, Inc.*, IBCA-1061-3-75 and IBCA-1072-7-75 (Apr. 7, 1976), 83 I.D. 148, 157, n.28, 76-1 BCA par. 11,826 at 56,464.

See also *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 22645 (Oct. 22, 1979), 79-2 BCA par. 14,147, in which the Board stated at page 69,627:

"Our jurisdiction to entertain summary judgment motions is no longer in doubt. Such motions here acquired a deserved respectability in our practice (in appropriate cases, of course) that they may not have enjoyed in earlier years. *E.g.*, *Lockheed Shipbuilding & Construction Co.*, ASBCA No. 18460, 77-1 BCA par. 12,458 at 60,380 (and authorities cited); *SenColMar Industries, Inc.*, ASBCA Nos. 15339, 16277, 16477, 73-2 BCA par. 10,086."

March 16, 1981

lief to a contractor who sustains serious damage to the contract work prior to completion and acceptance as a result of a severe rainstorm. The appellant has not alleged and there is nothing in the record to suggest that any action the Government took or failed to take contributed in any way to the damages to the jobsite for which claim has been made. There is no provision in the contract contravening the Permits and Responsibilities clause which expressly makes the contractor responsible for work performed until completion and acceptance of the entire construction work.

While the appellant has requested a hearing, it has not undertaken to show or even allege that any facts are in dispute for which the testimony of witnesses might be of material assistance to the Board in its role of fact-finder. Assumed to be true by the Government for the purposes of the motion is that the damages claimed were caused by an unusually severe rainstorm. The Board finds that to convene and hold a hearing in such circumstances would not secure a just and inexpensive determination of the appeal without unnecessary delay.

If all of appellant's allegations are accepted as true, neither the Differing Site Conditions clause nor any other clause contained in the contract provide a basis for granting the appellant relief with respect to the claim asserted.¹⁴ For the rea-

¹⁴ Although the instant contract is subject to the provisions of the Contract Disputes

sons stated and in reliance upon the authorities cited, the appellant's request for a hearing is denied, the Government's motion for summary judgment is granted, and the appeal is accordingly denied.

WILLIAM F. MCGRAW,
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

**TOPTIKI COAL CORP.
(ON RECONSIDERATION)**

3 IBSMA 40

Decided March 16, 1981

Reconsideration of the decision of July 28, 1980, in Toptiki Coal Corp., 2 IBSMA 173, 87 I.D. 331 (1980), reversing the decision of Administrative Law Judge Tom M. Allen (Docket Nos. NX 9-69-R and NX 9-43-P) which vacated a notice of violation issued to Toptiki Coal Corp. for allegedly placing spoil on the downslope of its permit area in violation of 30 CFR 716.2(a).

Act of 1978 (P.L. 95-563, 92 Stat. 2383, 41 U.S.C.A. § 601-613 (West Supp. 1980)), our greatly enlarged jurisdiction under the Act is of no benefit to the appellant in the circumstances present here. This is so because the decisions of the boards in this area reflect the rule enunciated in such cases as *Arundel Corp. v. United States*, 103 Ct. Cl. 688 (1945), *cert. denied*, 326 U.S. 752 (1945), and recently confirmed as still the rule by the Court of Claims in *Turnkey Enterprises, Inc. v. United States*, _____ Ct. Cl. _____ (1979), 597 F.2d 750.

Decision of Hearings Division affirmed as modified; notice of violation vacated.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Downslope—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Downslope." The downslope in a multiple seam mining operation is the portion of the permit area below the actual and projected outcrop of the lowest seam being mined.

APPEARANCES: Randolph L. Jones, Jr., Esq., and Joseph W. Craft III, Esq., MAPCO, Inc., Tulsa, Oklahoma, and Richard McMillan, Jr., Esq., and David R. Case, Esq., Crowell and Moring, Washington, D.C., for Toptiki Coal Corporation; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

**OPINION BY THE INTERIOR
BOARD OF SURFACE MINING
AND RECLAMATION
APPEALS**

Toptiki Coal Corp. (Toptiki) has petitioned the Board to reconsider its decision in *Toptiki Coal Corp.*, 2 IBSMA 173, 87 I.D. 331 (1980). The Board granted reconsideration on Sept. 10, 1980; the parties have filed briefs; and oral argument was held on Dec. 5, 1980. In its earlier decision, the Board held that downslope is the area below the projected

outcrop of the lowest coalbed (seam) on a mountain being mined rather than the area below the projected outcrop of the lowest coal seam under permit, as was held by the Administrative Law Judge. In accordance with its holding, the Board reversed the decision of the Administrative Law Judge and reinstated the notice of violation issued to Toptiki by the Office of Surface Mining Reclamation and Enforcement (OSM) for allowing spoil on the downslope portion of its permit area.

In our original decision we concluded that of the four seams within Toptiki's permit area, the lowest being mined at the time of inspection was the next-to-highest. In making that determination we directed our attention solely to the fact that there was no mining directly below the mining on that seam. A re-examination of the record discloses that conclusion to have been correct. It also reveals, however, that mining of the next-to-lowest seam was occurring at two places some 600 feet apart on either side of the site of the violation alleged by OSM.

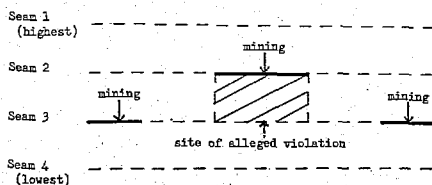
The Board is thus presented with the question whether the term "downslope," as defined in 30 CFR 710.5 and as used in 30 CFR 716.2 (a), means the entire area directly below any portion of the lowest seam being mined in a particular section of a mountain, or only so much of that area that is below the projected outcrop of the lowest

seam being mined within the entire permit area.¹

[1] Toptiki argues that the former interpretation is broader than is necessary to serve the purpose of the regulation prohibiting spoil on the downslope, namely, to protect natural areas that would otherwise not be disturbed by mining operations because they are below the projected outcrop of the lowest coal seam being mined. We agree both with Toptiki's statement of the purpose of the subject regulation and with the interpretation of the regulatory definition of "downslope" that it asserts on that basis. We hold, therefore, that "downslope" means only the portion of the permit area below the actual and projected outcrop of the lowest seam being mined² and that, under the facts of this case, Toptiki did not place spoil on the downslope portion of its permit area.

Our decision is changed in accordance with the above. The decision of the Administrative Law Judge is

¹ The following cross section depicts the placement of spoil alleged to be in violation of 30 CFR 716.2(a). Note, it is not drawn to scale.



² Unless the entire projected length of a lower seam is coextensive with or longer than the higher one, there could be situations where the downslope suddenly shifts from a lower to a higher plane.

affirmed and the notice of violation is vacated, not, however, because the area of the alleged violation was above the projected outcrop of the lowest seam permitted to be mined, as was held below, but rather because it was above the projected outcrop of the lowest seam actually being mined.³

MELVIN J. MIRKIN
Administrative Judge
NEWTON FRISHBERG
Administrative Judge

LYNN KEITH

53 IBLA 192

Decided March 17, 1981

Appeal from the decision of the Montana State Office, Bureau of Land Management, declaring 87 mining claims abandoned and void. M MC 47859.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Recordation

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining

³ This does not mean that Toptiki is immune to any regulatory mechanism governing the disposal or maintenance of spoil. Likewise, it remains subject to all applicable post-mining reclamation requirements, no matter how much more difficult those may become due to the spoil handling techniques Toptiki has voluntarily chosen.

claim located before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining Claims: Abandonment

The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

3. Administrative Procedure: Adjudication — Evidence: Generally — Evidence: Presumptions—Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Abandonment

Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and in fact did so, in enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a

claimant intended not to abandon his claim may not be considered in such cases.

4. Administrative Authority: Generally—Constitutional Law: Generally—Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Recordation

Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

5. Estoppel—Federal Employees and Officers: Authority to Bind Government

Reliance on incomplete information provided by Federal employees cannot create any rights not authorized by law.

APPEARANCES: Lynn Keith, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

By its decision dated Oct. 14, 1980, the Montana State Office, Bureau of Land Management (BLM), notified Lynn Keith and Art Neils that their 87 lode mining claims,¹ location notices for which previously had been recorded with

¹ The claims are listed by name, serial number, and date of location in BLM's decision of Oct. 14, 1980, to which reference is here made.

BLM, were deemed to be abandoned and void because of the failure of the claimants to file with BLM either affidavits of assessment work performed or notices of intention to hold the claims. As all of the claims had been located prior to Oct. 21, 1976, either such affidavits or notices of intent were required to be submitted to BLM on or before Oct. 22, 1979, as provided by statute and regulation. 43 U.S.C. § 1744 (1976) ; 43 CFR 3833.2-1(a). On Oct. 28, 1980, BLM issued an amended decision to correct an error in the original so as to show that location notices for each of the claims had been recorded on Oct. 22, 1979, rather than on the date mentioned in the original decision.

Lynn Keith has appealed² from BLM's finding that the claims must be deemed abandoned and void. Appellant does not deny that no affidavits of the performance of assessment work or notices of intention to hold these claims were filed. Instead, appellant contends that the regulations are arbitrary, capricious, unconstitutional, inequitable, unreasonable, preemptive, and subject to continuously revised interpretations which are applied retroactively. Appellant also argues that the regulations are not being used by BLM for the purpose intended by the statute, but to burden claimants with unnecessary obligations. Moreover, appellant says, BLM failed to adequately inform the public of the new requirements in that the notices dis-

tributed by BLM provided incomplete information. As an example, appellant has submitted an information "flyer" or "broadside" which BLM prepared and distributed to explain where, when, and how location certificates must be recorded. This publication makes no reference to the need to file evidence of assessment work or notices of intention to hold claims.

Although appellant's arguments in support of these various contentions are well presented and clearly understood, they do not establish a basis for reversal of BLM's decision.

[1] Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file notice of intention to hold the claim, or evidence of the performance of annual assessment work on the claim, in the proper BLM office on or before Oct. 22, 1979, and prior to December 31 of each year thereafter. This requirement is mandatory, not discretionary, and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner, and renders the claim void. *James V. Brady*, 51 IBLA 361 (1980).

[2] The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See *Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management*, Civ. No.

² Art Neils, the other party in interest, did not appeal.

78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. *Thomas F. Byron*, 52 IBLA 49 (1981).

[3] Appellant also argues that the intention not to abandon these claims was apparent, saying, in essence, that the act of filing the certificates of location for record in BLM and the payment of recording fees on the last day on which notices of intention to hold, or evidence of assessment work could be submitted, clearly indicated that the claims were not abandoned. At common law, evidence of the abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he in fact did so. *Farrell v. Lockhart*, 210 U.S. 142 (1908); 1 Am. Jur. 2d, *Abandoned Property* §§ 13, 16 (1962). Almost any evidence tending to show to the contrary would be admissible. Here, however, in enacted legislation, the Congress has specifically placed the burden on the claimant to show that the claim has *not* been abandoned by complying with the requirements of the Act, and any failure of compliance produces a *conclusive* presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered.

[4] Appellant's challenge of the statute and regulations cannot be sustained here. Essentially, the regulations merely mirror the statute and, to the extent that they have been considered by the courts, they have been upheld. *See Topaz Beryllium Co. v. United States*, 479 F. Supp. 309 (D. Utah 1979) (*appeal pending*); *Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management*, *supra*. In any event, it has frequently been held that an appeals board of this Department has no authority to declare a duly promulgated regulation invalid. *Exxon Co., U.S.A.*, 45 IBLA 313 (1980); *cf. Garland Coal and Mining Co.*, 52 IBLA 60 (1981). Nor may such a regulation be waived by the Department. *Marvin E. Brown*, 52 IBLA 44 (1981), and cases therein cited. With reference to the statute, this Board adheres to its earlier holdings that the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an act of Congress is constitutional. *Alex Pinkham*, 52 IBLA 149 (1981), and cases therein cited. Jurisdiction of such an issue is reserved exclusively to the judicial branch.

[5] Appellant asserts that the failure to file the required documents is attributable to inadequate and incomplete information supplied in BLM publications and orally by BLM personnel. However, all persons dealing with the Government are presumed to have knowledge of relevant statutes and

duly promulgated regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Edward W. Kramer*, 51 IBLA 294 (1980). Therefore, reliance upon erroneous or incomplete information provided by BLM employees cannot relieve the owner of a mining claim of an obligation imposed by statute, or create rights not authorized by law, or relieve the claimant of the consequences imposed by the statute for failure to comply with its requirements. *Parker v. United States*, 461 F. 2d 806 (Ct. Cl. 1972); *Montilla v. United States*, 457 F. 2d 978 (Ct. Cl. 1972); *Atlantic Richfield Co. v. Hickel*, 432 F. 2d 587 (10th Cir. 1970); *Northwest Citizens for Wilderness Mining Co., Inc.*, 33 IBLA 317 (1978). In the absence of a showing of affirmative misconduct by a responsible Federal employee, an estoppel will not lie against the Government because of reliance on erroneous or inadequate information given. *United States v. Ruby Co.*, 588 F. 2d 697 (9th Cir. 1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from, as supplemented, is affirmed.

EDWARD W. STUEBING

Administrative Judge

WE CONCUR:

JAMES L. BURSKI

Administrative Judge

C. RANDALL GRANT, JR.

Acting Administrative Judge

UNITED STATES v. DONALD E.
FLYNN AND HEIRS OF HENRY
OROCK, DECEASED

53 IBLA 208

Decided March 18, 1981

Appeal from a decision of Administrative Law Judge E. Kendall Clarke rejecting the Native allotment application of Henry Orock, AA-5841, to the extent that it conflicts with the trade and manufacturing site application of Donald Flynn, AA-4545, and approving the Flynn application.

Affirmed as modified.

1. Alaska: Native Allotments

An Alaskan Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others, and not merely intermittent use. While qualifying use must be substantially continuous, there is no requirement that the 5-year use be in a consecutive 5-year period.

2. Alaska: Native Allotments —
Alaska: Possessory Rights

The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native. In a similar fashion, all possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy. Such lands then

become open to the initiation of rights by others.

3. Alaska: Native Allotments—Rules of Practice: Government Contests

The provisions of 25 U.S.C. § 194 (1976) relating to the placing of the burden of proof do not apply where the Government contests the qualifications of an allotment applicant. An allotment applicant in such a situation is the proponent of the rule and must show his or her entitlement to the land sought.

Lucy S. Ahvakana, 3 IBLA 341 (1971), and Wilbur Martin, Sr., A-25862 (May 31, 1950), overruled to extent inconsistent.

APPEARANCES: Joel Bolger, Esq., and David B. Snyder, Esq., Alaska Legal Services Corporation, for the heirs of Henry Orock; Charles Cranston, Esq., Cranston, Waters, Dahl & Jarrell, Anchorage, Alaska, for Donald E. Flynn.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

The heirs of Henry Orock appeal from the decision of Administrative Law Judge E. Kendall Clarke rejecting the Native allotment application of Henry Orock, AA-5841, to the extent that it conflicts with the trade and manufacturing site application of Donald E. Flynn, AA-4545, and approving Flynn's application.

On Dec. 4, 1968, Donald Flynn filed a notice of location for a trade and manufacturing site near the

Dog Salmon River. Henry Orock filed a Native allotment application on Dec. 22, 1969, for lands which conflicted as to 35 acres with Flynn's site. Orock claimed use since 1945. Following Flynn's filing an application to purchase in January 1972, BLM issued a complaint alleging that Flynn had attempted to appropriate occupied and improved lands claimed by an Alaska Native. That complaint was dismissed on Oct. 27, 1976, and BLM prepared to issue a patent to Flynn. The heirs of Orock filed a complaint with the United States District Court for the District of Alaska seeking to enjoin BLM from issuing a patent to Flynn and requesting that a patent to the disputed lands be issued to them under the Native Allotment Act. By order dated Dec. 17, 1976, the District Court directed that the Department of the Interior hold a hearing covering all conflicting issues between BLM and the two applications. The hearing was held in King Salmon, Alaska, on Oct. 21 and 22, 1977.

Judge Clarke's decision provides a detailed summary of the testimony and evidence adduced at the hearing, and we set forth here:

Gerald Yeiter, a BLM realty specialist and trespass investigator, was called as a witness for the Government. (Tr. 6). He testified he conducted a field investigation of the disputed land on June 11, 1973. A helicopter flight was made over the entire 160 acre allotment. During the flight, Mr. Yeiter saw a small cabin, which was later determined to belong to Donald Flynn, on the site. (Tr. 8). The site is situated on a butte in an area that is very good for hunting and fishing. (Tr. 9).

March 18, 1981

An earlier field report concerning Henry Orock's native allotment (Ex. 9) prepared by William E. Ireland and Mr. Yeiter recommended that the allotment be rejected. (Tr. 11). The report concluded that the applicant, Orock, had abandoned use of his allotment several years prior to the field examination. (Ex. 9). A supplemental investigation on January 20, 1975 and report dated April 2, 1975 was made by Mr. Yeiter. He concluded that "it is likely a cabin could have been there, however, possibly too deteriorated to be recognized." In addition he determined, "If a cabin was there as alleged, it had definitely been abandoned since 1961." (Tr. 13, Ex. 10). Another supplemental report dated February 14, 1977 prepared by Mr. Yeiter reaffirmed his earlier recommendations. (Tr. 14, Ex. 11). In particular the report states:

"It is the investigator's opinion that a cabin was constructed in 1942 as Moses Taongnok has stated. The roof had caved in, in 1952 as stated by Tom Riley. Further, that due to age, the cottonwood logs were in an aggressive state of decay and the applicant left the area in 1952 not to return, with no further use of the land. The site plus one other which is located approximately four miles up river were abandoned and only utilized in a temporary manner. That the applicant (according to his brother-in-law, Nick Meticgoruk) stated that Orock left Pilot Point in December 1959 because of ill health not to return. It appears to this investigator from the best evidence submitted by Orock in the land in question had been segregated by Flynn's use and occupancy since 1965, which was four years prior to Orock's filing an application for an allotment. . . . Further from the best evidence supplied to this investigator by Henry Orock (sic) heirs there was no real proof that Orock ever occupied and used the land in question as required."

On cross-examination by counsel for Henry Orock, Mr. Yeiter stated in investigating a Native Allotment Application

he would attempt to talk to all the people who may have knowledge concerning an applicant's allotment. (Tr. 17). However, he only contacted the people on the Pilot Point and Ugashik village councils during his investigation in 1973. (Tr. 18). The allotment is 11.2 air miles from Pilot Point. (Tr. 18). Mr. Yeiter also had reservations about the BLM's decision to grant 125 acres of land adjacent to the disputed area to the Heirs of Henry Orock. (Tr. 19). When asked what "abandonment" meant to him, Mr. Yeiter explained, ". . . [I]f I went down to the Dog Salmon River, and decided to leave my job and go trapping for a couple months, and cut me a log cabin, and just take off and leave and never return." (Tr. 20).

During a third visit to the allotment, Mr. Yeiter did discover some old logs behind Flynn's cabin. (Tr. 22). He stated these logs could have been overlooked earlier since they were covered with moss and vegetation. (Tr. 23). The logs were ten feet away from Flynn's cabin. Another site was discovered upriver approximately four miles east of the allotment. (Tr. 21). A cabin found on this site is still recognizable. (Ex. 11).

On further questioning by counsel for Mr. Flynn, Mr. Yeiter asserted he has a forestry background that would allow him to determine the age of cottonwood trees. (Tr. 172). A sample of a cottonwood log that was found lying near Flynn's cabin was taken on October 8, 1976. (Ex. H). Mr. Yeiter estimated the log to be over twenty years old and possibly up to thirty years old (Tr. 175). Likewise, he determined the log had been on the ground for that amount of time also. (Tr. 176). In his opinion, the logs have been part of a disintegrating cabin for about twenty years.

A field examination report dated October 18, 1976, prepared by Carl F. Ehelebe, a BLM natural resource specialist, confirmed the discovery of deteriorating cottonwood logs that had been part of a small cabin 10 feet away from Flynn's cabin. (Flynn Ex. I). The report con-

cluded it had taken many years for the cottonwood logs to disintegrate into the condition that it was found in. Although the logs could have possibly been part of a cabin that Henry Orock contended was on the allotment, the report opined that the logs are highly unlikely to be the remains of any structure that was alleged to have been standing in 1964. Moreover, since the degree of deterioration is so advanced, it is also unlikely that the logs were part of a cabin that was built in 1947. The logs found were 20 to 30 years old.

Another field examination report also dated October 18, 1976, involving the Dog Salmon River area was introduced into evidence. (Flynn Ex. J.). This report also acknowledged there were several cottonwood logs found behind Flynn's cabin. The report stated "[T]he logs were all in an advanced state of decomposition, suggesting that the structure has been collapsed for 10 or more years." Although rusted cans, glass fragments and pieces of decayed roofing paper were found, no personal belongings were uncovered. In addition, this report disclosed there is another structure of more recent construction four miles upstream from Flynn's cabin site. This structure had collapsed at least several years prior to its discovery by the field examiner.

Arthur Condardy, Sr., was called as a witness on behalf of Henry Orock. He has resided in the Pilot Point-Ugashik area for the past fifty years. (Tr. 26). In addition, he has known Henry Orock since he was a "kid." He visited Orock at the cabin on the Dog Salmon River in the late forties and early fifties. The visits were made during the winter when Orock was trapping. The cabin was made out of logs. (Tr. 27). Mr. Condardy estimated Orock trapped near the vicinity of the cabin for 10 years. Orock also hunted for caribou up near the cabin. (Tr. 28). Mr. Condardy testified Orock moved to Anchorage in 1968 or 1969. However, Orock made trips back to the cabin during trapping season. (Tr. 29).

On cross-examination, Mr. Condardy admitted he had stated Orock left for

Anchorage in the early 1960's in an affidavit made October 8, 1976. (Ex. A, Tr. 31). The affidavit also stated that Mr. Condardy last saw the cabin standing on the allotment in 1952 or 1953. (Tr. 31). In addition, he asserted Orock would not leave his rifle at the site but would take it with him in the dogsled. (Tr. 33). He has never seen Orock on the allotment after 1960, although Orock was back at Pilot Point constantly during the 1960's. (Tr. 34).

Valentine Supsook, a former resident of Pilot Point, also is acquainted with Henry Orock. He has visited and stayed at Henry Orock's cabin near the Dog Salmon River in the 1950's. (Tr. 40). According to Mr. Supsook, Orock allowed other residents of Pilot Point use of the cabin. Mr. Orock also owned a house in Pilot Point. (Tr. 42). When Mr. Orock became ill, he stopped going up to the cabin. (Tr. 43).

On cross-examination, Mr. Supsook testified the area near Orock's cabin is a customary hunting ground for all of the people in the Pilot Point area. (Tr. 45). However, it is customary that no one goes near another person's trapline. Orock's traplines could have extended for more than five miles. (Tr. 46).

Mary Beth Toms, one of Henry Orock's daughters, testified she recalled her father going trapping in 1956. (Tr. 52). Furthermore, she believes her father went trapping in 1959. (Tr. 53). Mr. Orock would go back and forth to Pilot Point from Anchorage during the 1960's. (Tr. 55). At times he was forced to stay in Anchorage because of his failing health. (Tr. 56). Ms. Toms contended her father always wanted to go back to his land on the Dog Salmon River. (Tr. 56).

Moses R. Taongnok, from Ugashik, testified he helped Henry Orock build his cabin out of cottonwood on the Dog Salmon River. (Tr. 63). When Mr. Taongnok visited the allotment in the 1960's, he found that Mr. Flynn had built a cabin right over the area where Mr. Orock had built his. (Tr. 67). The last time Mr. Taongnok went trapping with Mr. Orock at the allotment was in the 1960's. (Tr.

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70). Mr. Taongnok has a cabin eight miles downriver from the disputed site. (Tr. 71).

Mr. Taongnok admitted on cross-examination he did not see Mr. Flynn tear down Mr. Orock's cabin. (Tr. 76). An affidavit signed by Mr. Taongnok indicated he had helped Mr. Orock build the cabin in 1942. Furthermore, Mr. Taongnok stated he did not know when Mr. Orock last used the cabin or land. (Flynn, Ex. B). However, Mr. Taongnok denied that the affidavit accurately states his testimony. He testified he does not know when he last saw the cabin. (Tr. 81).

Martha Lonsdale, another one of Henry Orock's daughters, also testified that her father built a cabin on the Dog Salmon River. (Tr. 84). After Ms. Lonsdale had moved to Anchorage, Mr. Orock would visit her annually. Mr. Orock moved to Anchorage from Pilot Point in 1967. (Tr. 87). Ms. Lonsdale has no knowledge as to whether her father went back to his land on the Dog Salmon River after 1963. (Tr. 88). However, a letter dated November 14, 1965, signed by Henry Orock, stated he was going back to Pilot Point the next day. (Orock Ex. K). She visited the cabin in 1970. (Tr. 92).

During her visit to the allotment in 1970, Ms. Lonsdale discovered that a new cabin had been built near the site of Orock's old cabin. The only evidence of the old cabin were logs that were stacked three or four logs high. (Tr. 94). She also found nets and traps stacked against these old logs. According to Ms. Lonsdale, the traps were old. An old rifle was found hanging on the door of the new cabin. (Tr. 95). She took the rifle in belief that it had belonged to her father. She also returned to the site every year until 1976. In 1971, she found that the remaining portions of the old cabin had been removed and a snowmobile shelter built on that site. (Tr. 96). However some of the old logs still were on the ground near the new cabin. Some of the logs were stacked behind the new cabin. (Tr. 97).

On cross-examination, Ms. Lonsdale maintained the old logs were stacked

two and a half feet high when she visited the allotment in 1970. (Tr. 100). She discovered the new cabin had two rooms. The floor in one of the rooms in Flynn's cabin appeared to have been compacted as if someone had walked on it for years. (Tr. 101). She also contended that the new cabin was built over part of the site of the old cabin. (Tr. 103, Ex. D).

Nick Meticgoruk, who has known Henry Orock for many years, testified he visited the Dog Salmon River cabin site and took photographs of it sometime in the 1950's or later. (Tr. 108, Orock Ex. C, D and E). He did not visit Orock at the cabin site after he took those photos. (Tr. 112). Mr. Meticgoruk is a resident of Pilot Point. He stated that Mr. Orock trapped for furs every year. (Tr. 113). A photograph of Mr. Orock standing in front of a log cabin was introduced into the record. (Ex. C). He also contended that a rifle found during the 1970 inspection he made with Ms. Lonsdale belonged to Henry Orock. (Tr. 114, Orock Ex. N 1-6). In addition, he confirmed Ms. Lonsdale's [*sic*] contention that the Flynn cabin was built on top of Orock's old cabin. (Tr. 115).

An affidavit signed by Nick Meticgoruk indicated that the photos of the Orock cabin, (Orock Ex. C), were taken in 1949. (Flynn Ex. E). On cross-examination, Mr. Meticgoruk conceded that he took the photos in 1949 (Tr. 120). He also stated that Mr. Orock did not go back to Pilot Point after 1959. (Tr. 121).

Another one of Henry Orock's daughters, Jane Stephenson, was called as a witness. She stated Mr. Orock went trapping near the Dog Salmon River in 1957. (Tr. 126). She also testified that Mr. Orock was forced to go to Anchorage because of his failing health. (Tr. 127). According to Ms. Stephenson, Mr. Orock always intended to go back to the cabin on the Dog Salmon River. (Tr. 128).

Orin D. Sebert was called on behalf of Mr. Flynn. Mr. Sebert is a pilot for Peninsula Airways which is headquartered in Pilot Point and King Salmon. (Tr. 134). He has been flying out of Pilot

Point since 1954. In addition, he has resided in Pilot Point since 1949. He flew Mr. Flynn into the Dog Salmon River area on August 8, 1965. (Tr. 136). However, Mr. Sebert did not go up to the cabin site at that time. From the landing site, he could not see the cabin site. (Tr. 137). During a later visit he went up to the cabin. He could not recall observing any remnants of an old cabin near Flynn's cabin. (Tr. 137). Significantly, Mr. Sebert was aware that there was a cabin at the disputed allotment earlier. But, the cabin was no longer there when he took Mr. Flynn there. The old cabin was used up to 1959. (Tr. 138).

Mr. Sebert announced that other people from the Pilot Point area trapped near the Flynn cabin. He contended four or five other people he knew did. (Tr. 139). Although he lacks any records concerning air travel in 1960, he believed Mr. Orock did not go back to the Dog Salmon River after 1960. (Tr. 140). On the other hand, Mr. Sebert acknowledged that Mr. Orock made visits back to Pilot Point during the 1960's. (Tr. 41). Moreover, Mr. Sebert denies that Mr. Flynn had ever asked him about the prior use of the disputed land in question. (Tr. 142). But upon further questioning, Mr. Sebert changed his testimony and stated, "I think he did, yes." (Tr. 142).

Robert W. Gruber stated he flew Don Flynn into the Dog Salmon River area in June, 1965. During a thirty minute inspection of the area at that time, he did not discover a cabin or any remnants of one. (Tr. 146). However, the inspection was a general one of the area. If the remains of a cabin were hidden under the trees, he would not have seen them. (Tr. 151).

Robert Piatt, a former assistant hunting guide for Mr. Flynn, stated he worked at the Dog Salmon cabin site in 1966. He saw an outline of an old cabin behind Flynn's cabin. The outline was covered with vegetation. (Tr. 153). During the three years that Mr. Piatt was at Flynn's cabin, he saw no one else come up to the area and use it. (Tr. 155). However, he never was at the cabin during the winter

months. (Tr. 156). Additionally, he never uncovered any nets or traps near the old cabin. (Tr. 157). Likewise, he never found any part of Flynn's cabin to be constructed from any old cottonwood logs. (Tr. 158).

Roger B. Briggs, a fisherman, from Ugashik, Alaska, testified he visited Flynn's cabin in the fall of 1965. (Tr. 161). At that time the cabin was nearly completed. He was at the site for three hours. However, he did not find any signs of any old cabin. He also insisted that Mr. Flynn's cabin was constructed out of plywood and no part of it used any cottonwood logs. (Tr. 162). He does not know Mr. Orock. (Tr. 163).

Donald Flynn, a guide and commercial fisherman from Homer, Alaska, stated he began conducting guided hunting expeditions in the Dog Salmon River area in 1965. (Tr. 188). Mr. Flynn declared:

"In the—in the summer and fall of '65. I think the first trip was done with Bob Gruber, when I definitely had in mind to find a site for my cabin. We circled the Dog Salmon River area. And I had already established that that was an area that I would like. We were looking for a place where we could land safely for a plane operation, and where we could build a dry camp above the swamp. There's quite a bit of swamp in that area. So we stopped at what is now the—my established camp, where there is a rock ridge that juts out into the river, with tree protection and good possibility of building a permanent area." (Tr. 189).

When asked if he was interested to know if there were any other claims to the site he initially occupied in 1965, Mr. Flynn responded:

"As a guide, I naturally was, because first of all, guides don't encroach upon each other. And secondly, I wouldn't build a camp in a large area where there were possibilities of building other camps, if I knew there would become a conflict later." (Tr. 190).

Mr. Flynn contends he asked Orin Sebert in 1965 if there had been any prior occupancy or use of the disputed land. Mr. Sebert indicated there were no pre-

vious occupants but stated other people had trapped there. (Tr. 190). Because Mr. Flynn had no knowledge that anyone also had been on the cabin site and because there was no visible construction of any cabin or other dwelling, he decided to build his cabin there. (Tr. 191). The area was in a complete natural state at that time. Grass had grown to two to three feet in height. (Tr. 192).

In August of 1965, Mr. Flynn began constructing a plywood cabin on the disputed land. (Tr. 192). While building his cabin, Mr. Flynn discovered some old logs ten feet behind his cabin site. (Tr. 193). Ten to twenty logs were scattered on the ground. He also found an old rusted rifle near his cabin. (Tr. 196).

Mr. Flynn denies that any part of his cabin was built with any of the old logs found near his cabin. (Tr. 199). However, he admitted it is possible that he did use some of the old logs to build a ramp to run his snow mobile through. (Tr. 200). The floor of Flynn's cabin is all plywood. (Tr. 203). Mr. Flynn had never heard of Mr. Orock until he found a native allotment tag on one of his monument stakes in 1971. (Tr. 206).

When Mr. Flynn filed his location notice on December 4, 1968, he was unaware of any native allotment claim to the disputed land. (Tr. 206). He also filed an application to purchase a Trade and Manufacturing Site which corrected the inaccurate description of his earlier location notice. (Tr. 207, Ex. 3). The area has been used in conjunction with Mr. Flynn's hunting operations. (Tr. 207). However, several trappers have been using Flynn's cabin during the winter months. (Tr. 208). Several traps were found near Flynn's cabin several times. (Tr. 208). He also is aware that the area has been used for trapping in the past. In 1973, there appeared to be evidence of someone using a net to fish in the river. (Tr. 212).

Mr. Flynn believes there are no other available sites to conduct his hunting trips outside of the site he currently claims. (Tr. 213). He denied ever tearing

down any cabin or destroying any signs of one. (Tr. 214).

On cross-examination, Mr. Flynn stated he talked to Moses Taongnok about the disputed land once but he did not consult with any other person from the area. (Tr. 223). When Mr. Flynn completed the 1972 application for a Trade and Manufacturing Site, he thought the questions on the form related back to his earlier 1968 location notice. (Tr. 227). In particular, he thought that the question asking if the disputed land had any other claims to it referred to the events arising in 1968 and not subsequently. (Tr. 227).

In rebuttal, Alec Gretchen, an air taxi operator from Pilot Point was called in behalf of the heirs of Henry Orock. (Tr. 230). Mr. Gretchen has known Henry Orock for a long period of time. In 1948, Mr. Gretchen flew Orock up to the Dog Salmon River to trap and hunt. Mr. Orock did not have a cabin there at that time. (Tr. 231). Over a span of ten years, Mr. Gretchen took Orock up to the Dog Salmon River a dozen times. Mr. Gretchen learned there was a cabin there in the mid-1960's. (Tr. 232). He saw a cabin there but cannot recall when. The last time Mr. Gretchen saw Orock was in 1970 at Pilot Point. (Tr. 234). Mr. Gretchen denies Mr. Flynn ever asked him about Mr. Orock. (Tr. 235).

Moses Taongnok contended that bears had gotten into Orock's cabin and had torn down several of the walls. (Tr. 238). Subsequently, he examined the cabin in 1964. It was still standing then. (Tr. 241). However, in an earlier affidavit, Mr. Taongnok admitted he did not know whether he inspected the allotment in 1964. (Flynn Ex. B).

The deposition of Robert L. Haynes was introduced into the record in behalf of Donald Flynn. Mr. Haynes is a commercial fisherman from Homer, Alaska. (Depo. 2). He has known Mr. Flynn since 1968. (Depo. 3). In July of 1970, he accompanied Mr. Flynn on a visit to the cabin site on the Dog Salmon River. (Depo. 5). Mr. Haynes found a two-room plywood cabin there but found no other

cabin. However, he did find several rotted old cottonwood logs on the ground next to Flynn's cabin. The logs possibly could have been part of a corner of an old cabin. (Depo. 7). He estimated the logs were ten years old. (Depo. 8).

Over the next three years, Mr. Haynes was Mr. Flynn's assistant guide. During this time, Mr. Haynes made annual trips to the cabin site. (Depo. 10). The cabin remained in the same condition during that time. (Depo. 10). Significantly, Mr. Haynes has never heard of any claims to the disputed land by Mr. Orock. (Depo. 12).

On cross examination, Mr. Haynes deposed he had initially heard about the conflicting claim to the land in 1975. (Depo. 15). Mr. Flynn had mentioned that there appeared to be signs of an old fallen down cabin on the Dog Salmon site. In addition, Mr. Flynn choose [*sic*] the Dog Salmon site because it was the first good shelter near available timber under a rock cliff. (Depo. 20). Mr. Haynes declared he did not find any hunting or trapping equipment near the old logs. (Depo. 25).

In his decision, Judge Clarke made various rulings. First, he applied the Federal common law of "abandonment" and held that the record did not establish that Orock intended to abandon his claims (Decision at 12-13). Second, he held that the heirs of Orock had failed to submit satisfactory proof of a substantial continuous use and occupancy of the land for a period of 5 years. Judge Clarke stated:

Although the record is replete with testimony alleging Orock has trapped in the Dog Salmon area since 1948, there is no clear and credible evidence that Orock trapped and used the allotment site for a 5-year period. I find the testimony of Nick Meticgoruk vague and imprecise. Even though he contends Orock trapped every year, he fails to indicate where and

when Orock did so. Arthur Condardy merely estimated that Orock trapped in the vicinity for ten years during the late 1940's and early 1950's. (Tr. 28). He gave no specific dates when he saw Orock use the cabin or trapped near it. The most favorable view of Orock's evidence reveals use only for a period of four years from 1956-1959. (Tr. 52, 59, 126). Consequently, this period of use will not support a finding of substantial continuous use and occupancy of the allotment for a period of five year. 43 CFR § 2561.2(a). (Decision at 13).

Third, Judge Clarke held that appellants had failed to prove that Orock ever had "substantial actual possession and use of a cabin" near the site of Flynn's cabin. Noting that this Board had held in a number of prior cases that a long period of nonuse vitiates the effectiveness of any prior use, the Judge held that, as the record disclosed no use of the cabin after 1960, this period of nonuse would vitiate any prior qualifying use (Decision at 14). Judge Clarke accordingly found that no preference right had been vested in appellant with respect to the land embraced by the trade and manufacturing site application.

With respect to Flynn's trade and manufacturing site, Judge Clarke expressly found that Flynn had no knowledge of any prior occupancy when he initiated the claim and found, therefore, that his trade and manufacturing site should be approved (Decision at 14-15).

In their statement of reasons, appellants argue that Orock did satisfy the use and occupancy requirements of the Native Allotment Act

of 1906, *as amended*, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18a, Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)). Appellants assert first that the requirement that 5 years' use and occupancy be shown applies only to land within a national forest. We have previously rejected that argument. *Jack Gosuk*, 22 IBLA 392 (1975); *Heldina Etluska*, 21 IBLA 292 (1975). Appellants then contend, nevertheless, that the 5-year requirement has been met. They argue that Judge Clarke did not correctly apply the standards for use and occupancy found in 43 CFR 2561.0-5(a) and urge that a more favorable application of the regulation be made. They invoke the "often repeated canon of construction that Federal statutes relating to Indian Affairs should be liberally construed to give maximum benefit to Indians." In addition, they assert that 25 U.S.C. § 194 (1976) requires that the burden of proof be placed on Flynn to establish that Orock did not occupy the land for the required 5 years.

[1] The first question which we must examine is whether appellants showed that Orock had used the land in such a manner and for a sufficient period of time so as to establish use, qualifying under the Native Allotment Act, *supra*.

Judge Clarke's decision was premised on a finding that appellants had not clearly established a continuous 5-year period of use and

occupancy by Orock. Appellants object specifically to this finding. Our review of the record supports appellants' contention that Judge Clarke erred in his ruling on this question.

In the first place, this Board has never ruled that all 5 years of the use and occupancy contemplated by the regulations *must be* consecutive. Indeed, such a construction could lead to the rejection of an application where a Native had lived on the land 16 out of 20 years, but had been required, for various reasons, to be absent every fifth year. The concept of "substantially continuous" use is one seen best at extreme points. Thus, no one would contend that a use of 2 years followed by the passage of 10 years of no use and then followed by a 3-year period of use would constitute substantially continuous use. On the other hand, our first hypothetical of 16 years' use in a 20-year period does evince such substantially continuous use. No one would really contend that this latter situation merely established "intermittent" use.

Moreover, there was more than sufficient testimony to establish that 5 years' consecutive use had, in fact, occurred. There was uncontradicted testimony that Orock trapped in the area for over 10 years (Tr. 26-27, 40-42, 232). Given the existence of a cabin on the site (a matter to which we will turn *infra*) it seems safe to assume that Orock would have made use of the same during the period in which he was trapping.

As to whether or not Orock's cabin was actually located within the land embraced by Flynn's trade and manufacturing site application, we must agree with appellants that the evidence is overwhelming that Orock's cabin was located at one time within the boundaries of Flynn's site. In actuality, however, Judge Clarke's decision was not premised on a view that the situs of Orock's cabin was someplace other than Flynn's site; rather, his ruling was clearly predicated on his belief that the subsequent nonuse of the site vitiated the prior use.

[2] Examination of the question of what period of nonuse is sufficient to render nugatory prior qualifying use requires a detailed analysis of both the history of the Native Allotment Act and subsequent Departmental proceedings. At the outset we note that all parties apparently proceeded upon the assumption that upon completion of 5 years' use and occupancy a preference right would vest in the Native occupant. This is *not* correct, as we will explain more fully below. Initially, however, it is crucial to distinguish between two separate types of uses which gave rise to different types of Native rights.

The first source of Native rights arose from sec. 8 of the Act of May 17, 1884, 23 Stat. 26, which provided that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them."¹

¹ Of similar purport was sec. 27 of the Act of June 6, 1900, 31 Stat. 321, 330.

This provision accorded no permanent rights in the lands to the Natives, being only designed to protect their occupancy until such time as Congress should act further on the question of title to such lands.² See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955). Moreover, the right of occupancy was deemed to provide no rights as against the United States. See *United States v. Atlantic Richfield Co.*, *supra* at 1029-31; *Alaska Commercial Co.*, 39 L.D. 597 (1911). See also *Edwardsen v. Morton*, 369 F. Supp. 1359, 1370 (D.D.C. 1973).

In order to more fully protect the rights of Alaska Natives, Congress adopted the Act of May 17, 1906, 34 Stat. 197, originally 43 U.S.C. §§ 270-1 to 270-3 (1970), generally referred to as the Native Allotment Act. That Act provided, in essence, for the allotment of up to 160 acres of land and granted a preference right as to such lands as were actu-

² Sec. 8 of the Act of May 17, 1884, *supra*, was construed to apply only to lands occupied as of the date of that Act, and was not applicable to lands subsequently occupied. See *Heckman v. Sutter*, 119 F. 83 (9th Cir. 1902); *contra*, *Young v. Goldsteen*, 97 F. 303, 308 (D. Alaska 1899) (All persons had a right to expect protection from Congress if they were first to go upon the public domain and occupy and improve the same, even though they went there after May 17, 1884.)

However, as various public land laws were made applicable to Alaska, most notably the Act of Mar. 3, 1891, which provided for trade and manufacturing sites, these Acts expressly excepted lands then occupied by Natives. See sec. 14, Act of Mar. 3, 1891, 26 Stat. 1095, 1100. Thus, most entries under the public land laws required that the land not be used or occupied by Natives as of the time of the entry or application. See *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1014-15 (D. Alaska 1977), *aff'd*, 612 F.2d 1133 (9th Cir. 1980).

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ally occupied by the Native.³ Thus, under the original Act, occupancy was only required in order to gain a preference right. *See generally Acquisition of Title to Public Lands in the Territory of Alaska*, 50 L.D. 27, 48-49 (1923). By Departmental decision, however, allotments within national forests could only be granted where they were based on occupancy prior to the establishment of the forest or alternatively, where the land was classified by the Secretary of Agriculture, under 43 U.S.C. § 270-2 (1970), as agricultural. *See Shields v. United States*, No. A 77-66 Civil (D. Alaska, Jan. 9, 1981); *Louis P. Simpson*, 20 IBLA 387 (1975); *Yakutat and Southern Railway v. Harry*, 48 L.D. 362 (1921). As early as 1935, however, the Department required 5 years' use and occupancy prior to the issuance of any allotment certificate. *See Allotments of Public Lands in Alaska to Indians and Eskimos*, 55 I.D. 282, 285 (1935). By the Act of Aug. 2, 1956, 70 Stat. 954, Congress amended the Native Allotment Act to expressly require 5 years' use and occupancy as a prerequisite to the grant of any allotment, thereby ratifying the earlier Departmental regulations. *See Medina Flynn*, 23 IBLA 288

(1976); *Heldina Eluska*, *supra*, at 294 (1975); *Terza Hopson*, 3 IBLA 134, 144 n.5 (1971).

There are certain critical differences between these two separate sources of Native rights. Thus, the rights of occupancy protected under the Act of May 17, 1884, *supra*, and subsequent such Acts, extended to lands used communally, as well as individually, and was possessed of no gross acreage restriction. The right to an allotment, however, was limited by regulation since 1935 and by statute since 1956, to lands use by an individual Native by himself or in conjunction with his dependents and was limited to a total of 160 acres.⁴ What was not different, however, was the nature of the use involved. Though phrased in differing parlance, the type of appropriation contemplated under both statutes was the same. Thus, permissive Native occupation under the various Acts was required to be "notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the apparent extent thereof must be reasonably apparent." *United States v. 10.95 Acres of Land in Juneau*, 75 F. Supp. 841, 844 (D. Alaska 1948).

³ The General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-349 (1976), was originally deemed not to apply to Alaska since the native inhabitants were not officially classified as "Indians" until the Indian Reorganization Act of 1934, Act of June 18, 1934, 48 Stat. 984, 988, 25 U.S.C. § 479 (1976). *See, e.g., John Brady*, 19 L.D. 323 (1894). *But see Nagle v. United States*, 191 F. 141 (9th Cir. 1911); *Status of Alaskan Natives*, 53 I.D. 593 (1932).

⁴ Initially, the Department also required that the allotment be of one contiguous tract of land. *See Solicitor's Opinion*, M-36352 (June 27, 1956). This holding was subsequently reversed in *Allotment of Land to Alaska Natives*, 71 I.D. 340 (1964), on the basis that it failed to take into consideration the seasonality of use customary to the Native way of life.

See also *United States v. State of Alaska*, 201 F. Supp. 796 (D. Alaska 1962); *Kittie Cleogeruh*, 28 L.D. 427 (1899); *A. S. Wadleigh*, 13 L.D. 120 (1891).

In the area of Native allotments, while it has been recognized that occupancy or use must only be "substantially continuous" (See *Frank St. Clair*, 52 L.D. 597 (1929), on petition, 53 I.D. 194 (1930)), such occupancy or use must, at a minimum, be "potentially" exclusive. See 43 CFR 2561.0-5 (a). In *Herbert H. Hilscher*, 67 I.D. 410 (1960), the Department was faced with both the question of "occupancy" sufficient to establish a preference right under the Native Allotment Act and the existence of "occupancy" sufficient to serve as a bar to the initiation of rights by non-Natives. Appellants have focused on the following sentence in that decision. "In the instant case, the preference right for an allotment resulting from occupancy on a portion of this tract by Mrs. Smith's [the Native allotment applicant] family was presumably extinguished when, sometime between 1938 and 1944, the family left the tract *with the intention of permanently residing elsewhere.*" (Italics supplied.) *Id.* at 415. Appellants argue that *Hilscher* stands for the proposition that an allotment can be abandoned only under traditional common law principles which require an "intent" to abandon. Read in its entirety, however, *Hilscher* does not support the argument appellants advance.

The *Hilscher* case involved con-

flicting applications: The first was filed by Herbert H. Hilscher on June 1, 1954, for a soldiers' additional homestead entry, and the second was filed by Maria M. Smith on May 24, 1956, seeking a Native allotment of the same land. Hilscher contended that at the time he had made application for the land he had examined the land and found no traces of present or recent habitation on any portion and no evidence of occupancy or use, though there were certain "old ruins" on property immediately adjacent. Further, he stated that he had been informed that no one had lived on the land for at least 15 years.

On the other hand, it was uncontested that Smith's father, Skar Stevens, had lived on the land from 1906-1910 until sometime between 1938 and 1944 "when he moved elsewhere permanently." The decision noted, however, that

it appears that when the [Hilscher's] application was filed no one had lived on the tract for approximately 10 years, the only evidence of former occupancy being fallen timber crossbars and pieces of roofing from cabins, rusty tins and similar debris in several places on the ground overgrown with brush.

Id. at 412-13. Smith also stated that she had stored a boat on a beach area bordering the tract since 1950.

The Acting Director, BLM, rejected Hilscher's application not because of the preference right of Smith, but because the tract of land was "claimed" by a Native and thus unavailable for entry under the soldiers' additional homestead regu-

lations, citing 43 CFR 61.7 (1954).⁵ In *Hilscher*, Solicitor Stevens initially noted that there was nothing either in regulation or statute which required rejection of an entry because the land applied for is "claimed" by a Native. *Cf. United States v. 10.95 Acres of Land in Juneau, supra* at 844. Rather, the regulations merely required appellant to state whether or not the land was claimed. Inasmuch as the Smith allotment application was not filed until almost 2 years after Hilscher's application, failure to identify the allotment claim could not serve as a predicate for rejection of Hilscher's application.

Solicitor Stevens then turned to the related question of the existence of a preference right in Smith or, failing that, the existence of a Native occupancy right such as would defeat Hilscher's application.⁶ With reference to Smith's asserted preference right to an allotment, the Solicitor made the statement, set forth *supra*, that Smith's preference right was "presumably extinguished when, sometime between 1938 and 1944, the family left the tract *with the intention of permanently resid-*

ing elsewhere." (Italics supplied.) 67 I.D. at 415. Two points must be raised concerning this statement. First, though the statement expressly notes the existence of an "intention" to reside elsewhere, there is nothing in the decision which would provide a basis for the conclusion that Skar Stevens "intended" to abandon the land. Rather, the original statement, set forth at 67 I.D. 412, merely notes that Skar Stevens lived on the land until 1938 to 1944 "when he moved elsewhere permanently." This was not a statement of his intent but was rather one of fact. The subsequent reference to "intention" appears to be a conclusion derived from the fact of Skar Stevens' actions, not an observation of his state of mind.

Second, and more importantly, this statement must be read in conjunction with the two succeeding paragraphs of the decision. Thus, Solicitor Stevens noted that there was no reason to construe the occupancy contemplated by the Native allotment preference provisions any differently from the occupancy of the Natives which prevented subsequent disposals of land to third parties. Solicitor Stevens then stated:

Occupancy implies some substantial actual possession and use of land, at least potentially exclusive of others, such as necessarily results from residence on or cultivation of land. Such slight and sporadic use of land as shown by the allotment applicant's storing a boat thereon is neither exclusive nor substantial, and, by itself, amounts to actual occupancy of no

⁵ While this specific regulation no longer exists, its provisions are replicated, in relevant part, in 43 CFR 2562.3(d)(2) (trade and manufacturing sites), and 43 CFR 2563.1-1(a)(6) (homesites and headquarters).

⁶ As this Board has had occasion to recognize, situations may arise, such as in communal use, where an individual Native allotment applicant would be unable to qualify for an allotment but such use as was shown would prohibit other forms of disposition. See *Lucy S. Ahvakana*, 3 IBLA 341, 343 (1971).

larger an area than is required for depositing a boat (about 15 feet long) on the ground. *In the instant case there is evidence that no one has resided on the land for many years and that only a small area along the beach on this tract has been even casually used or occupied for at least 15 years.* This evidence will not support a conclusion that in 1954 the tract was occupied, within the meaning of the provisions here relevant, either by the Indian families who formerly resided on it, or by Mrs. Smith, with the exception of that small area on the beach on which she allegedly stored her boat since approximately 1948. Consequently, to the extent that the decisions of the Acting Director and the manager held that the appellant's application must be rejected because the tract was occupied by an Alaskan Indian or natives, the decisions were erroneous. [Italics supplied.]

Id. at 416 (footnote omitted).⁷

We wish to emphasize particularly that Solicitor Stevens' reference to use and occupancy applies equally to use and occupancy under the Native Allotment Act, as well as to occupancy contemplated by the Act of 1884 and its progeny. Support for this construction is readily seen by comparing early Departmental decisions involving Native allotment preference applications (see, e.g., *Frank St. Clair (On Petition)*, *supra*; *Yakutat and South-*

ern Ry. v. Harry, *supra*), with those relating to the occupancy protection afforded under the 1884 Act (see, e.g., *Point Roberts Canning Co.*, 26 L.D. 517 (1898); *Fort Alexander Fishing Station*, 23 L.D. 335 (1896); *A. S. Wadleigh*, *supra*). Thus, the preference right of allotment attached only to the lands occupied or used (*Frank St. Clair (On Petition)*, *supra*), just as the 1884 Act extended only to lands presently under "actual occupation or use." *Naval Reservation*, 25 L.D. 212 (1897); *A. S. Wadleigh*, *supra*.

It is equally clear that a cessation of occupancy could nullify rights acquired by prior occupancy under the 1884 Act. Thus, in *Carroll v. Price*, 81 F. 137 (D. Alaska 1896), Judge Delaney charged the jury, in part, as follows:

A possessory right acquired in public lands may be lost by abandonment, and where a party, having once acquired this right, surrenders his claim, goes off the ground, or gives up his possession in the sense of abandoning his right, the piece of land becomes restored to its original status in the public domain, and is subject to occupation and possession by any other citizen. But if the original occupant, after such abandonment takes place, and before any other person acquires any rights thereon, goes back on the ground, reassumes possession, makes additional improvements, his right to the piece of land becomes restored, and the tract is again segregated from the public domain to such a degree as to enable him to hold it against anybody except the United States. There is some evidence in this case tending to show that the possession and occupancy of the plaintiff and his grantors were not continuous from 1881, but although such possession may have been interrupted, if you find that it was resumed prior to the location and occupancy

⁷ We would note that to the extent that *Hilscher* indicated that residence and cultivation were prerequisites to use and occupancy, its scope was restricted by a subsequent Solicitor's opinion which noted that in determining use and occupancy reference must be made "to the natives' mode of life and the climate and character of the land." *Allotment of Land to Alaska Natives*, *supra* at 359. This latter opinion, however, expressly noted that the requirement of substantial actual possession and use of land, at least potentially exclusive of others "had received judicial approbation." *Id.* at 358.

claimed by the defendants, then the plaintiff has the better right. [Italics supplied.]

Id. at 140-41. While Judge Delaney's charge employs the term "abandonment" it is contextually clear that this "abandonment" was not dependent upon a subject state of mind, but rather related to physical acts in relation to the land.

Under the original instruction for processing Native allotments, published on Feb. 11, 1907, 35 L.D. 437, it is clear that occupancy *to the date of application* was a prerequisite for the assertion of a preference right to an allotment. The instructions included a requirement that the allotment applicant provide an affidavit which "must be sworn to by the person applying, and if claiming under the preference right clause the date of the beginning of his occupancy must be given, and its continuous nature." 35 L.D. at 437. This requirement is clearly reflected in the affidavit form which accompanied the instructions. The preference allotment applicant was required to swear, in relevant part, "that I have occupied the land so applied for since _____." *Id.* at 439. It is clear that the exercise of the preference right was preconditioned on present occupancy or use as of the time of application.

With this in mind, we return to our original statement that completion of 5 years' use or occupancy did not vest a mere preference right to an allotment. Rather, it was only by application, *together with* the requisite use or occupancy, that the

inchoate preference right matured into a vested right. The preference right was not an *in praesenti* grant of land.⁸ On the contrary, it required clear identification of the land sought by an applicant before it could be exercised. Indeed, the system of allotment could proceed on no other basis. A Native could clearly use or occupy in excess of 160 acres in a manner consonant with the Native Allotment Act. Prior to his or her application, the Native's use and occupancy would be protected against outside encroachments, save for that by the United States. By application, however, the Native would receive a preference right to an allotment of up to 160 acres. *See Arthur R. Martin*, 41 IBLA 224 (1979); *cf. Florence May Ree*, 17 L.D. 142 (1893) (application for allotment under General Allotment Act, Act of Feb. 8, 1887, 24 Stat. 388, may be confirmed to heirs). Death of a Native, invested with an inchoate right to apply for an allotment, but who had not applied in his or her lifetime, terminated the inchoate right and no allotment could be predicated based on such Native's use or occupancy. *Louis P. Simpson*, *supra* at 391-92; *Larry W. Dirks*, 14 IBLA 401, 403-04 (1974).

It is recognized that "abandon-

⁸ *See generally New York Indians v. United States*, 170 U.S. 1, 15-24 (1898). In *New York Indians*, *supra*, inasmuch as the Supreme Court found that the Treaty of Buffalo Creek did constitute an *in praesenti* grant of specific land, the Court examined whether subsequent actions constituted an "abandonment" as known in common law.

ment" as used in legal terminology requires not only a relinquishment of occupancy or a failure to proceed with a claim, but also an intent to abandon. *New York Indians v. United States*, *supra* at 35; *United States v. Wheeler*, 161 F. Supp. 193, 198 (W.D. Ark. 1958). We think Judge Clarke was clearly correct in finding that there was no "abandonment" of the claim within the context of Federal law. The problem, however, is that the concept of "abandonment" is simply not applicable to the facts of this case.

What is involved herein is not an abandonment of a claim, but the cessation of use and occupancy. At the time Orock ceased returning to his cabin he had no "claim" to the land since he had not filed an application for an allotment. When an application was filed in 1969, the evidence clearly indicates Orock had not been using the land for at least 9 years. Until 1969, therefore, there was simply no "claim" which Orock could abandon. In contradistinction, had Orock filed his application in 1959, having at that time completed 5 years' use or occupancy, and then removed himself, for whatever reason, from the land, the question of "abandonment" would properly be raised, and proof of his subjective intent to abandon would be prerequisite to nullifying his claim. Moreover, had Orock filed his application in 1959, or at any time prior to Flynn's settlement, that would have segregated the land in his favor, pending adjudication. 43 CFR 2561.1(e); *Evelyn Alexander*, 45 IBLA 28, 35 (1980). Absent an

application, however, removal from land once occupied does not implicate legal concepts of "abandonment."

Indeed, any other system of analysis would create insurmountable problems in administering the public land laws in the State of Alaska. Inasmuch as Alaska was expressly excepted from the purview of the Taylor Grazing Act (sec. 1, Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. § 315 (1976)), land claims in Alaska have continued to be capable of initiation by settlement, *Vernard E. Jones*, 76 I.D. 133 (1969).⁹ It was not until the Act of Apr. 29, 1950, 64 Stat. 94, 95, 43 U.S.C. § 687a-1 (1976), that settlers initiating occupancy claims in Alaska were required, in all cases, to notify BLM of the initiation of their claim within 90 days of establishing settlement. Failure to so notify BLM did not, ipso facto, nullify the claim, but it did prevent the settler from obtaining any credit for such occupancy as occurred prior to the filing of a notice of the claim or application to purchase.¹⁰

⁹ Pursuant to sec. 1 of the Taylor Grazing Act, all vacant public lands, with certain exceptions, were withdrawn from entry, selection, and location under the nonmineral land laws by various Executive orders. Under sec. 7 of the Taylor Grazing Act, the Secretary of the Interior has the authority to classify and open lands to entry. Absent such classification, however, no such entry can be permitted.

¹⁰ The mere filing of a notice of occupancy of land for a trade and manufacturing or homesite vested no rights absent occupancy. See *Peter Pan Seafoods, Inc. v. Schimmel*, 72 I.D. 242 (1965). Moreover, under the provisions of the Act of Apr. 29, 1950, *supra*, mere occupancy of a settlement claim, absent the timely filing of a notice of location or an application to purchase, afforded the occupant no rights such as would prevent a withdrawal from attaching. See *Kennecott Copper Co.*, 8 IBLA 21, 79 I.D. 636 (1972).

To the extent that prior use and occupancy by Natives, and other settlers at least until 1950, afforded specific protections absent any application to acquire title, it was essential that acts of appropriation occur which would disclose to an observer on the ground that the land was under active development or use. *Sandra L. Lough*, 25 IBLA 96, 105 (1976), and cases cited.¹¹ Such occupancy or use would serve as notice to all subsequent persons that the land was under appropriation and thus not available for the initiation of other claims.

Thus, requiring that the occupancy or use be of a continuous nature was essential to the entire structure of Alaskan settlement claims, for the only notice to the world of prior occupation or use would be present occupation or use. In the instant case, the evidence indicates, and Judge Clarke so found, that there was no standing or visible cabin on the site when Flynn initially occupied the land in 1965, nor were there signs of prior use (Decision at 14). No application for an allotment had yet been filed by Orock. Judge Clarke found that Orock did not use the land after

1960, and specifically found that Flynn did not have knowledge of prior occupancy or use of the claim. To require Flynn to somehow become aware of the existence of a prior claim which is neither evidenced on the land nor noticed in the BLM records, at the peril that at some future point in time, his own claim would be subject to invalidation, would enforce a standard of omniscience totally inconsistent with the entire history of land law adjudication in Alaska. *See Evelyn Alexander, supra*.¹²

We hold, therefore, that absent the filing of an application for allotment, cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land, terminated all protected rights under both the allotment and permissive occupancy statutes and re-

¹¹ While these cases arose under the trade and manufacturing and homesite laws, the animating concept applies with equal, if not greater, force to Native use and occupancy. Inasmuch as the Act of Apr. 29, 1950, *supra*, did not affect either permissive occupancy of Natives under the 1884 and subsequent Acts, or occupancy with a view towards acquiring an allotment under the 1906 Act, the only possible way for any individual to be put on notice that the land was used or occupied by a Native would be through physical evidence on the land that it was under the prior appropriation of another.

¹² We are fully cognizant that Flynn, by failing to provide notice of his settlement within 90 days, lost credit for all prior use and occupancy, under the Act of Apr. 29, 1950, *supra*. Thus, had the land which he used been included in a withdrawal prior to the filing of his notice of location in December 1968, the land occupied would have been subject to the withdrawal and that would preclude recognition of any right in Flynn. *See Edwin William Seiler*, 16 IBLA 352 (1974); *Kennecott Copper Co., supra*. This was a risk to which Flynn subjected himself by failing to notice his settlement pursuant to Act of Apr. 29, 1950, *supra*. Moreover, had a Native allotment application been filed prior to the filing of Flynn's notice of settlement, Flynn's right to the land would have been defeated by the segregative effect which occurred upon the filing of an acceptable application, unless he could subsequently show that the allotment applicant had "permanently abandoned occupancy of the land." 43 CFR 2212.9-1(g) (1967). In the instant case, however, Flynn's notice of location preceded Orock's allotment application by almost a year, and thus, the dangers to which Flynn had subjected himself by failing to timely notice his occupancy did not come to fruition.

stored the land to its original status of vacant and unappropriated land, regardless of the existence of any "intent" to permanently abandon such use or occupancy.¹³ Such prior use or occupancy does not serve as a bar for the initiation of rights in the lands by other individuals.

In the context of the present case, we hold that Orock's cessation of use and occupancy in 1960 and the subsequent, if not coterminous disintegration of the cabin on the site, terminated such inchoate rights to an allotment of which Orock may have been possessed, and rendered the land subject to the initiation of rights by Flynn.

Nothing in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), militates against this view. By its nature, the *Pence* litigation involved Native allotment *applicants*. The decision noted that an applicant who meets the statutory requirements is entitled to an allotment which may not be arbitrarily denied. 529 F.2d at 141-42. Thus, to the extent that applicants allege compliance with the statutory mandate they are entitled to notice and an opportunity for hearing on disputed issues of fact prior to rejection of their appli-

cations. See *Donald Peters*, 26 IBLA 235, 241-42, 83 I.D. 308 (1976), *reaff'd*, *Donald Peters (On Reconsideration)*, 28 IBLA 153, 83 I.D. 564 (1976). The *Pence* case, however, did not purport to examine substantive questions concerning the nature of qualifying use and occupancy.

In the instant case, a hearing, as directed by the District Court, has been held. The full due process rights mandated by the Ninth Circuit have been afforded appellants. All sides have had full opportunity to be heard and the dictates of the *Pence* case have been observed.

There are two Departmental cases which arguably conflict with our above analysis. The first is *Wilbur Martin, Sr.*, A-25862 (May 31, 1950). Appellant, a Klamath Indian, had purchased a prior homestead entry of one Arthur Bell in 1922 and moved onto the land, subsequently building a house, woodshed, barn, and smokehouse. Martin resided on the land *with his family*, from 1923 to 1928. After 1928, the opinion notes "Mr. Martin lived in logging camps, as he was working in the timber industry because of his inability to make a living on his homestead, but he never had any intention of abandoning his settlement." The land embraced in his settlement was withdrawn in 1934, but Martin did not apply for an allotment under sec. 4 of the Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 336 (1976), until 1946. Examining, *inter alia*, the question whether by absenting

¹³ We would make one final point on this matter. The regulations permit the performance of the requisite use and occupancy within 6 years *after* the filing of an application. See 43 CFR 2561.2. But the regulations also require that the Bureau of Indian Affairs certify "that the applicant *has occupied* and posted the lands as stated in the application." (Italics supplied.) 43 CFR 2561.1(d). Thus, the present regulations, while recognizing that absolutely consecutive use need not ensue to warrant the granting of an allotment, clearly presuppose the existence of "present" use.

March 18, 1981

himself from the land from 1928 until the time of application in 1946 Martin had forfeited his right to an allotment, Solicitor White stated:

It is to be noted, in this connection, *that there is no requirement in the controlling statute or in the regulations quoted above that after a legal right to an allotment has been acquired, residence must be continuously maintained on the land up to the time of the filing of an application for the allotment. In view of the statements made by the Acting Area Director of the Bureau of Indian Affairs, upon the basis of a thorough investigation, that Mr. Martin left the land (after maintaining his residence there for six years) only because of economic necessity, that he never intended to abandon his settlement, and that he asked the Bureau in 1940, reasonably soon after the establishment of a branch office in his locality, for assistance in getting a patent to the land, and in view of the flexibility which is permissible under the pertinent statutory provision and departmental regulations in making determinations respecting Indian settlement cases of this sort, I have reached the conclusion that Mr. Martin did not lose his right to an allotment of the land because of his long absence from the land and his delay in filing an application for the allotment.* [Italics supplied.]

While this opinion apparently holds that once residency has been established, the right to an allotment vests, regardless of subsequent acts of the applicant (absent an intent to abandon), the fact situation which is described in the decision is not clear. Thus, though it seems likely that the structures constructed during Martin's residency remained intact, the opinion is silent

on this question. Similarly, while the opinion implies that Martin's family remained on the lands sought from 1928 to 1946, this crucial fact is not really stated. Moreover, the decision is related only to Martin's actual residency and does not discuss whether, regardless of where he was actually living, the land was still under his use.

The second case which appears to conflict with our analysis herein is this Board's decision in *Lucy S. Ahvakana, supra*. Ahvakana involved a conflict between a State selection filed by the State of Alaska in 1964, and a subsequent Native allotment application by Ahvakana, filed in 1968. Ahvakana alleged that she had established occupancy on the land at various intervals between 1929 and 1945, and that various improvements, consisting of a two-room house with storm porch and a two-room store building with storm porch had been placed on the land, presumably at that time. The Fairbanks District Office, BLM, rejected the Ahvakana application, but the BLM Office of Appeals and Hearings vacated that decision and remanded the case for investigation of Ahvakana's allegations. The State of Alaska thereupon appealed to the Secretary.

The Board, in *Lucy S. Ahvakana, supra*, affirmed the decision of the BLM Office of Appeals and Hearings. The Board first noted that "even if the Indian allotment application is not found to be allowable, the Indian use of the land may be sufficient to bar the state selection

application *pro tanto*." 3 IBLA at 344. The opinion then went on to say:

If in fact, it is ultimately determined from the investigation that the native has established substantial occupancy prior to the time of the state selection, the land was not vacant and unappropriated and, therefore, not properly subject to a state selection. *As to the charge of abandonment whether a native has permanently abandoned occupancy of claimed land to the extent that he has forfeited any claim he may have established under the Native Allotment Act, depends upon his reason for leaving the land and the interest and relationship he thereafter maintained with the land. See Wilbur Martin, Sr., A-25862 (May 31, 1950).* Here again, a native's intent in such a matter can only be determined after a thorough investigation of the facts. If, however, no positive proof is developed which establishes substantial continuous occupancy for a five-year period prior to the state selection or it is clear that the native had abandoned the land prior to the selection, the allotment will not be allowed and the application will be rejected. [Italics supplied.]

Id. at 345. These two cases, thus, can arguably be said to represent a view contrary to that set forth in our analysis. It is interesting, however, that *Ahvakana* cited only *Martin* as support for its proposition and *Martin* cited no authority whatsoever. In view of all we have said above, we cannot find that *Ahvakana* or *Martin*, to the extent that they hold that upon completion of 5 years' use or occupancy, the right to an allotment vests so that only a legal abandonment can defeat such a right, correctly reflect the law. Accordingly, we hereby expressly overrule *Lucy*

S. Ahvakana, supra, and *Wilbur Martin, Sr., supra*, to the extent that they are inconsistent with the views expressed herein.¹⁴

[3] We now turn to appellants' remaining argument. Appellants' application of 25 U.S.C. § 194 (1976) is misplaced in this case. Sec. 194 reads:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

¹⁴ We also note that in the early case of *Burr v. House*, 3 Alaska 641 (1909), Judge Overfield stated that "abandonment of possessory rights upon the public domain is a question of fact, as well as intent." *Id.* at 643. In that case, however, Judge Overfield found that

"there was sufficient notice given the defendant House, by the physical condition of the lot in question on June 8th, to have put him on his guard that it was claimed by others, and in their occupation and use. In addition to such physical evidence as plainly showed the segregation of this lot from the public domain, there were admittedly, by the testimony of House himself, two signs posted on the said above-mentioned building, referring would-be purchasers in one instance to the agent, Waldron, and in the other to a real estate firm in Valdez." (Italics supplied.) *Id.* at 646-47.

In order to possess something one need not have actual residential occupancy. In *Burr v. House, supra*, Judge Overfield found that the building on the land, which was standing at the time of House's entry, clearly evidenced present possession. In such a situation, abandonment, as a legal term, is properly examined. Our decision is consistent with this approach. Thus, had Oroch's cabin been in a state of repair at the time of Flynn's entry, his continued "possession" would have served as a bar to the initiation of rights by Flynn. Because, however, the evidence indicates as Judge Clarke found, that there was no physical evidence evincing a possessory right, the land was properly deemed to have been restored to the status of vacant and unappropriated land.

Appellants urge that Flynn should have the burden of showing that the required use and occupancy was not accomplished. However, on the issue of use, occupancy, and entitlement to the allotment, the adverse parties are not Orock and Flynn, but rather Orock and the Department of the Interior which issued the complaint against Orock's application.¹⁵ Regardless of Flynn's involvement, the Department could not issue a patent to the heirs of Henry Orock until the requirements of the Native Allotment Act, *supra*, have been met. As noted by Judge Clarke, the burden of meeting the use and occupancy requirement by clear and credible evidence rests with the Native allotment applicant. In any event, regardless of where the burden of proof is determined to rest, it is clear from our review that Orock's application for the 35-acre parcel must be rejected.

In closing, we wish to make mention of a matter which, while it surfaced briefly at the hearing, was not subject to briefing by either party, viz, the question of how the use and occupancy of Orock on the parcel in conflict with Flynn differed from the use and occupancy of the adjacent 125-acre tract which had been approved for allotment by the State

Office decision of Mar. 21, 1977 (*see* Tr. 19-21). Inasmuch as the State Office granted this part of the allotment, Orock's use and occupancy of this adjacent land was not examined.

It is clear, however, that to the extent which we have held that Orock's cessation of use and occupancy vitiated his right of allotment to the land upon which his cabin had formerly been located, the cessation of use of the surrounding land should equally have resulted in the rejection of his application for the 125-acre parcel. While this matter is not part of the instant appeal, the courts have long recognized the continuing authority of the Department to investigate all claims to land until the actual issuance of patent. *Schade v. Andrus*, Nos. 78-3700, 78-3703 (9th Cir. Feb. 2, 1981). Accordingly, absent the issuance of the patent during the pendency of this appeal, we would normally direct BLM to initiate a contest against the remaining 125-acre tract.

Congress, however, in the Alaska National Interest Lands Conservation Act, Dec. 2, 1980, P.L. 96-487, 94 Stat. 2371, 2435, in essence has provided for approval of all Native allotment applications, which were pending on or before Dec. 18, 1971, in the absence of specified conflicts. *See* sec. 905(a)(1). The only conflict of record apparently involves the Flynn application for the 35 acres. Thus, in the absence of any protests from parties identified in

¹⁵ In this regard, we would note that the statement of the Regional Solicitor that the Government was merely a "stakeholder" (Tr. 3) was not necessarily accurate. It is possible that the evidence developed at the hearing would show the subject land had been under prior communal use by neighboring Native communities. Had that eventually transpired, Judge Clarke would have properly rejected both applications.

sec. 905(a) (5), the allotment of the remaining 125 acres will be approved as provided for in the Act. *Cf. Alyeska Pipeline Co.*, 52 IBLA 222 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified for the reasons stated herein.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

**COUNCIL OF THE SOUTHERN
MOUNTAINS, INC.**

v.

**OFFICE OF SURFACE MINING
RECLAMATION & ENFORCEMENT**

3 IBSMA 44

Decided March 23, 1981

Petition for award of costs and expenses, including attorneys' fees, filed with the Board under the authority of 43 CFR 4.1290.

Petition denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/ Costs and Expenses: Final Order

A qualitative analysis of any order asserted to be a final order of the Office of Hearings and Appeals which is a prerequisite

to an award of costs and expenses under the Act must be done before such an award may be considered further; the regulations contemplate that such a qualifying final order will have been issued by OHA setting forth a judgment on the merits of the resolution of the administrative proceeding. Here no such order has been issued and an award would thus be inappropriate.

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/ Costs and Expenses: Substantial Contribution

Where, largely due to what may have earlier appeared to have been a Board indication that it had resolved the compensation issue in petitioner's favor, petitioner made a substantial contribution to the determination of the standards to be used in cases for award of costs and expenses, it would be grossly unfair not to compensate petitioner for that contribution.

3. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/ Costs and Expenses: Standards for Award

The Office of Hearings and Appeals will follow the standards for award of costs and expenses including attorneys' fees set out by the D.C. Circuit Court of Appeals in *Copeland v. Marshall*, — F. 2d — (1980).

APPEARANCES: L. Thomas Galloway, Esq., and Richard L. Webb, Esq., Center for Law and Social Policy, for petitioner, Council of the Southern Mountains, Inc.; Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Mark Squillace, Esq., and Arlene Robinson, Esq., Office of the Solicitor, United States Department of the Interior, for respondent, Office of Surface Mining Reclamation and Enforcement.

COUNCIL OF THE SOUTHERN MOUNTAINS, INC. *v.*
OFFICE OF SURFACE MINING RECLAMATION &
ENFORCEMENT
March 23, 1981

*OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

This case is before the Board on a Petition for Award of Costs and Expenses filed under the authority of 43 CFR 4.1290 by Council of the Southern Mountains, Inc. (Council), on Mar. 7, 1980. Named as respondent in the petition is the Office of Surface Mining Reclamation and Enforcement (OSM). The factual and procedural context of the petition follows.

Council is an Appalachian-based membership organization whose concerns include the various issues surrounding strip mining in central Appalachia. Several of Council's members live in the vicinity of a mountaintop removal project in Ogden Creek Hollow, Knott County, Kentucky, operated by Highland Coal Co. (Highland). These members allegedly had been affected and were upset by certain alleged violations of the Surface Mining Control and Reclamation Act of 1977 (Act) in Highland's operation.¹ Mr. Dan Hendrickson, Coordinator of the Council, communicated the members' complaints by telephone to the Hazard, Kentucky, OSM office on May 29, 1979, follow-

ing that up with a written report on June 1, 1979.²

On 3 days in the middle of June 1979, OSM inspectors visited the Highland site, made some recommendations for improving sedimentation control, but took no enforcement action.

On July 6, Council made a second complaint.³ OSM inspected the Highland site on July 10, apparently in response to this complaint, but (according to Council) only with regard to the grade of the access road. On July 11, OSM informed Council by letter that a complete investigation had been made and that Highland had been found to be in full compliance with the Act.

Prior to the July 11 letter, Council, exercising its right to informal review of an adverse OSM decision under 30 CFR 721.13(d), had requested such review regarding the OSM reaction to the first (May-June) complaint. In that request Council further asked for a meeting with OSM Regional Office personnel to discuss the issues involved. The OSM Regional Director replied to that request, first orally and later in

² The regulation at 30 CFR 721.13 makes provision for the filing of a report by a citizen(s) when such believes that there is a violation of the Act by a mine operator. It also requires OSM to conduct an investigation based on the report unless it has reason to believe the information in the report to be incorrect.

³ The conditions complained of in the July complaint were spoil on downslopes, lack of sedimentation control, unacceptable road conditions, spoil in unauthorized areas, and blasting at times other than those on company records.

¹ Specifically reported by the members were, among other things, excessive and unscheduled blasting, interference with ground water, lack of sedimentation control, improperly constructed access and haul roads, improper disposal of spoil, and failure to salvage topsoil.

a letter dated July 23, 1979, and thereby informed Council that he had reviewed the Highland inspection and found it proper. He further informed Council that the requested meeting was not required by the regulations but that the Regional Office would handle any future, properly made complaint regarding the Highland site. (Council has alleged that the foregoing information related to an asserted oral communication it received from OSM to the effect that the Regional Director's decision represented his belief that Council's purposes would best be served by the filing of another complaint with informal review as necessary.)

Acting upon the Regional Director's asserted suggestion, Council prepared yet another complaint (contained in a letter) and presented it in a meeting with OSM on July 27, 1979. It included a detailed list of suspected violations along with documents and maps.⁴

On the same date Mr. Hendrickson accompanied OSM inspectors on another visit to the Highland site. According to Council, the inspectors did not inspect a number of conditions and practices, failed to take certain quantitative and sampling measures, failed to make an adequate photographic record and, though the inspection report noted conditions and practices constitut-

ing violations and recommended enforcement action, took no such action, all of this despite Council's express requests in favor of such action.

On Aug. 7, 1979, Council presented the Regional Director with a request for informal review of OSM's response (described in the last paragraph) to its July 27 complaint. The Regional Director's decision on that request was issued on Sept. 7, 1979. Therein he reported that OSM had taken enforcement action in some of the areas complained of and promised action in others. Expressing his satisfaction that the action taken plus that promised adequately addressed Council's concerns, the Regional Director denied Council the opportunity for any formal review of his decision.

Council has claimed that two concerns, namely placement of spoil in unauthorized areas and failure to salvage topsoil, were not addressed by the decision, although it appears to be satisfied with the position, set out in the decision, that OSM was unable to determine whether there was a violation as to the latter circumstance. It then prevailed upon the Regional Director to reverse his decision on formal review, which he did on Sept. 28, 1979.

After the Regional Director gave Council the right to appeal, Council filed its notice of appeal with this Board on Oct. 18, 1979. That notice did not set forth any reason for the appeal. Instead, it stated that "appellant will file a statement of reasons for its appeal and a supporting

⁴ The suspected violations contained therein included sedimentation control problems, failure to divert certain runoff through a sedimentation pond, failure to meet grade, durability and drainage requirements on various roads, improper spoil handling, improper handling of toxic materials, failure to salvage topsoil, and various blasting improprieties.

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filing." On Oct. 30, 1979, Council filed a motion for extension of time within which to file the statement of reasons. One of the grounds for the extension request was that Council was negotiating with the operator and that the course of the appeal would depend on the results of those negotiations. On Nov. 5, 1979, the Board granted the motion and extended the filing date to Dec. 21, 1979. On Dec. 12, 1979, Council requested an additional extension because the negotiations with the operator had not been concluded. On Dec. 19, 1979, the Board granted the extension until Jan. 14, 1980. On Jan. 11, 1980, Council filed a motion entitled "*Appellant's Motion for Voluntary Dismissal*." It stated that the "negotiations have met with progress and * * * the purposes of the Act now are best served by dismissal of this action." It further stated that while Council was "entitled to federal enforcement action to secure compliance with the law, such action will not be necessary to secure compliance and this appeal may be dismissed." By a footnote, Council advised that it would subsequently be petitioning the Board for costs and expenses. The motion was granted by order of Jan. 22, 1980. Council filed its petition for costs and expenses, as noted, on Mar. 7, 1980.

Discussion

Council seeks an award under regulations that provide for an

award for costs, expenses, and attorneys' fees when the petitioner has participated in a proceeding under the Act which has resulted in a final order by the Office of Hearings and Appeals (OHA). 43 CFR 4.1290. The award is conditioned on the petitioner's having "made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b). The regulations are silent concerning whether informal proceedings such as were involved here are included. Council maintains they are. OSM urges us to declare that only formal proceedings are covered.

[1] Regardless, though, of whether the regulations extend coverage to informal administrative proceedings, a preliminary determination must be made about the qualitative nature of the final order of OHA upon which the claim is based.

Guidance for resolution of this issue is found in the requirement, set forth in the several subsections of 43 CFR 4.1294, of a finding that the claimant made "a substantial contribution to the full and fair determination of the issues." For OHA competently to make such a finding, it must either have rendered the "full and fair determination of issues," to which claimant purportedly contributed, or have approved some agreement by which such a determination was accomplished. In either circumstance it is contemplated that a final order will have been issued by OHA setting

forth a judgment of the merits of the resolution of the administrative proceeding. In the instance case, however, no such judgment was rendered by the Board or the Hearings Division regarding the determination of issues in the administrative proceeding to which Council claims to have made a substantial contribution.

Here, all of the issues were determined satisfactorily, either with OSM before it was deemed necessary to involve this Board⁵ or by virtue of negotiations, occurring after the appeal to the Board, between Council and the operator. OSM was not involved in the negotiations. Neither OSM nor the Board was supplied with whatever agreement was reached, either for information or approval. All we know, a statement of reasons never having been submitted, is that Council believed that OSM should have done an unspecified more than it did and that Council's negotiations with the operator resulted in some kind of undocumented (and unapproved by OSM or OHA) satisfaction to Council. That is insufficient involvement by OHA to sup-

port, under these regulations, an award of the type sought.

[2] Nevertheless, we do believe that Council has made a contribution that is worthy of compensation and is compensable. Largely due to what may now appear to have been an indication by the Board in its order of July 2, 1980, requesting further briefing, that we had resolved the question of compensation in favor of Council and required assistance only in establishing the standards, Council contributed substantially to the establishment of those standards that we are about to set forth. It would be grossly unfair not to compensate Council for that contribution which, however, did not commence until July 2, 1980, and is concerned solely with the applicable standards of award in those situations where an award is proper.⁶

STANDARDS FOR AWARD OF COSTS AND EXPENSES INCLUDING ATTORNEYS' FEES

Although we cannot conceive of all the combinations and permutations that might arise, the following includes the fundamental principles and standards to be applied by OHA in determining the amount of an award.

⁵ Only OHA, not OSM, has been authorized to make the kind of award sought, and if a dispute between a prospective petitioner and OSM is resolved by that prospective petitioner and some third person, the regulations do not now provide for an award for that kind of resolution. Although the Supreme Court has recognized that a party otherwise entitled to an award in a civil rights case does not lose that entitlement because the party prevailed through settlement rather than litigation, that settlement was presented to the court for approval. *Maher v. Gagne*, 448 U.S. _____, 100 S. Ct. 2570 (1980). In such a situation, where no substantive involvement is required of it, OHA may not be used merely as a lever to pry open the cash box.

⁶ Although not essential to the resolution of this matter, those standards have been well argued before and considered by this Board, and no good purpose would be served by deferring their establishment until we have a case in which we find an award to be proper. Indeed, our decision to award Council for its participation in determining the standards would seem even to require their publication now.

1. Attorneys' Fees

Recently, the United States Court of Appeals for the District of Columbia considered in depth the standards to be employed in granting attorneys' fees in so-called Title VII suits against the Government. *Copeland v. Marshall*, — F.2d — (No. 77-1351, Sept. 2, 1980). There is no reason for us to deviate from those standards.

As stated in *Copeland*, *supra*, the market value of the services rendered is the applicable measure. That means the actual fees charged the client by the attorney are not controlling. The attorney is to receive what the services are worth measured by those standards extant in the community where the services are rendered. Those measurements are to commence with the "lodestar" fee: the number of hours reasonably expended multiplied by a reasonable hourly rate. Our first task, then, is to determine the amount of time reasonably expended. For us to do so, the petitioner should document the amount of work performed so that OHA can segregate into categories the kinds of work performed by the various participating attorneys: The status of the attorney—Senior Partner, Junior Associate, etc., should be set forth along with the reasonable hourly rate prevailing in the particular community for similar work.⁷ Before going on, OHA

must determine whether all of the time was reasonably spent. After appropriate deduction for any unreasonableness, the total number of hours is then to be multiplied by the reasonable hourly rate of the community. *See McPherson v. School District #186*, 465 F. Supp. 749 (S.D. Ill. 1978); *McCormick v. Attala County Board of Education*, 424 F. Supp. 1382 (N.D. Miss. 1976). The resulting total is the lodestar.⁸

The lodestar is then to be adjusted, up or down, to reflect other factors such as the quality of the representation (*Copeland* deals with such matters in great detail and should be reviewed whenever adjustments are to be made). Of first importance in this regard is that the burden of justifying any deviation from the lodestar is upon the one urging it.

2. Costs and Expenses

Although some authorities have debated at length the differences and distinctions between costs and expenses, since both are compensable under our regulations we need not debate those fine points. Suffice it

is similarity, not exactitude, and if a petitioner should persist in maintaining the uniqueness of the services rendered, we will have to, reluctantly, hold that such singularity is not compensable by any coin of this realm.

⁸ The reasonable hourly rate subsumes ordinary overhead items such as rent, secretarial services, ordinary telephone charges, and the costs of paralegals. In regard to compensation to paralegals, *see Postow v. Oriental Bldg. Assn.*, 455 F. Supp. 781 (D.D.C. 1978); *see contra, Parker v. Califano*, 443 F. Supp. 789 (D.D.C. 1978).

⁷ Whether true or not, the argument that the particular bit of work was so novel that there is no similar work with which to compare it will not be accepted. The comparison

that anything compensable as costs under 28 U.S.C. § 1920 (1976) would be compensable under 43 CFR 4.1290. Other items, as well, might be payable under the "expense" rubric. Some which come to mind are extraordinary postage, long distance telephone calls, travel, and housing for out of town counsel.⁹

After all of the calculations are made, before settling an award, OHA should take a final close look to make sure that all of the items and amounts claimed for costs, expenses, and attorneys' fees are reasonable under the circumstances of the particular case. That means that all stipulations as to reasonableness should be carefully scrutinized.

The Board will entertain a proper petition from Council for what it believes to be its compensable contribution to the establishment of the standards herein set forth. Greater Washington, D.C., shall be deemed the locality where the work was performed.

The petition is denied, with leave to file within 15 days another petition as specified above.

MELVIN J. MIRKIN

Administrative Judge

**CHIEF ADMINISTRATIVE JUDGE
IRWIN DISSENTING IN PART AND
CONCURRING IN PART:**

One of Congress purposes in enacting P.L. 95-87 was to "assure

⁹ Although counsel is to be compensated by local standards, we are not saying that where reasonable, counsel may not be sought from afar. In that event, such counsel's traveling and living expenses would be compensable.

that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act."¹ The rationale for this purpose was set forth in the report of the Senate Committee on Energy and Natural Resources on S. 7:

The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State regulatory authority or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. Moreover, a number of decisions to be made by the regulatory authority in the designation and variance processes under the Act are contingent on the outcome of land use issues which require an analysis of various local and regional considerations. While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirement of the Act.

In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert

¹ Sec. 102(1), 30 U.S.C. § 1202(1) (Supp. II 1978).

the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.^{2]}

Similar language appears in the report of the House Committee on Interior and Insular Affairs on H.R. 2.³

One of the provisions designed to accomplish this purpose is sec. 525 (e).⁴ That section provides:

Whenever *an order* is issued under this section, or *as a result of any administrative proceeding* under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper. [Italics added.]

The Secretary implemented this section in rules contained in 43 CFR 4.1290. This rule differs slightly from the statutory language emphasized above in two respects relevant to this case. Under 43 CFR 4.1290 a person may petition for the award of costs and expenses if he has re-

ceived a final order in an administrative proceeding before the Office of Hearings and Appeals (OHA). One might question whether the Secretary either in theory could or in fact did limit the scope of sec. 525 (e) by this rule, but that is not the Board's responsibility. It is the Board's responsibility, however, on behalf of the Secretary, to interpret and apply rules in accordance with Congressional intent. This my colleagues have failed to do; indeed, they have done the opposite.

In my colleagues' view, before a person may be awarded costs "a preliminary determination must be made about the qualitative nature of the final order of OHA upon which the claim is based."⁵ No such determination is mentioned in either the regulations or the comments accompanying them. Rather, the function of issuing an order that sets forth "a judgment of the merits of the resolution of the administrative proceeding" is simply arrogated to the Board.⁶

The comments to 43 CFR 4.1290 anticipated that some cases for which awards would be sought might be settled.⁷ Those comments state that "awards will not be precluded strictly because of the manner of disposition."⁸ There is no indication that a settlement must be submitted to or approved by OHA before an award may be

² S. Rep. No. 95-128, 95th Cong., 1st Sess. 59 (1977).

³ H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 88 (1977).

⁴ A related provision, discussed below, is sec. 517(h).

⁵ Principal opinion, *supra* at 397.

⁶ *Id.* at 403.

⁷ Comment 2, 43 FR 34385 (Aug. 3, 1978).

⁸ *Id.*

granted. Yet that is what my colleagues now impose as a requirement in this case. Otherwise, in their view, OHA is "used merely as a lever to pry open the cash box."⁹

By adding requirements not contained in the regulations, my colleagues not only deny a lever. They also steal a key to effective participation that the Congress clearly intended to provide the public. In addition to being mistaken legally, this decision creates a barrier to the award of costs and expenses that will have at least two undesirable and unnecessary practical effects: (1) Participation by the public will be discouraged, particularly by those members who cannot afford lawyers and witnesses; and (2) litigation will be protracted in order to demonstrate "sufficient involvement" before OHA to be eligible for an award.

For these reasons I dissent from my colleagues' views concerning 43 CFR 4.1290. Because I believe that rule should be interpreted in accordance with Congress expressed intent, however, I join that portion of the principal opinion that authorizes Council to petition for an award in accordance with the standards outlined.

There remains the question whether Council, had it been sufficiently involved before OHA, could be reimbursed for reasonable costs incurred before OSM. The principal opinion leaves this question for another day. The companion dissenting-and-concurring opinion suggests the answer is "no." It does so on the basis of a presumption

that Congress must have meant "agency proceeding" as defined in the Administrative Procedure Act (APA) when it wrote "any administrative proceeding" in sec. 525(e) of the Act. This presumption is convenient at best. Nor is it strengthened by citing references to the APA found elsewhere in the Act, references made for purposes of defining procedures applicable to those sections and not relevant to defining the substantive scope of sec. 525(e). Congressional draftsmen are perfectly capable of using the language of the APA if they wish to do so. In sec. 525(e) they did not. They chose novel language: "any administrative proceeding."

One of the "administrative proceedings to enforce the law"¹⁰ is the kind involved in this case. Sec. 517 (h) requires the Secretary to establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any alleged violation of the Act which any person who is or may be adversely affected has reason to believe exists at a surface mining site and who notifies the Secretary in writing. These procedures are contained in 30 CFR 721.13. As the circumstances of this case indicate, they may involve considerable time and effort. Congress intended citizens to be involved "in all phases of the regulatory scheme * * * [*i*]n addition [to having] access to administrative appellate procedures." (Italics added.)¹¹ For this intent to be realized, awards of reasonable costs

⁹ Principal opinion, *supra* at n.5.

¹⁰ See text at n.2, *supra*.

¹¹ *Id.*

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must be available under 525(e) for participation in the kind of administrative procedures required by sec. 517(h). In my view such procedures are within the meaning of "any administrative proceeding" in sec. 525(e).

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE FRISHBERG CONCURRING IN PART AND DISSENTING IN PART:

I concur with that portion of the principal opinion which concludes that petitioner has not qualified for an award under the Surface Mining Control and Reclamation Act of 1977 (Act) or regulations. Accordingly, I must dissent from that portion of the opinion which authorizes Council to petition for an award for its contribution to the determination of standards relating to costs and expenses. This Board has no such authority.

While the language of sec. 525(e) of the Act (30 U.S.C. § 1275(e) (Supp. II 1978)) is not completely bereft of ambiguity, it clearly contemplates a formal proceeding before costs and expenses, including attorneys' fees, may be awarded, and so it has been interpreted by the Secretary in the Department's regulations. The section begins as follows: "Whenever an order is issued [1] under this section, or [2] as a result of any administrative proceeding under this Act." Petitioner argues that the language of the second

phrase encompasses a wide spectrum of activities, including informal proceedings under sec. 517(h) (30 U.S.C. § 1267(h) (Supp. II 1978)).¹ However, a reading of sec. 525(e) in conjunction with the language of the Administrative Procedure Act (APA)² leads to the conclusion that only formal proceedings were contemplated.

¹ Petitioner states on page 9 of its reply of May 5, 1980, to respondent's answer, after quoting sec. 525(e):

"The major question concerning the scope of § 525(e) involves the meaning of the phrase 'any administrative proceeding.' The plain language of § 525(e) would allow awards for any administrative proceeding, whether it was informal, adjudicative, quasi-adjudicative, or rulemaking. Thus, fee awards would be allowed for such administrative proceedings as:

- 1) Designation of Lands Unsuitable
- 2) Bond Release Proceedings (formal and informal)
- 3) Permit Hearing (formal and informal)
- 4) Rulemakings
- 5) Approval of State Programs
- 6) Withdrawal of Approval of State Programs
- 7) Review of Enforcement (formal and informal)

The language of § 525(e) is clear and unrestricted. By its terms, it is the broadest and most far reaching attorney fee provision ever passed by Congress."

But sec. 525(e) is triggered "[w]henever an order is issued * * * as a result of any administrative proceeding under this Act." Because "order" is defined in 5 U.S.C. § 551(6) (1976) as a final disposition in "a matter other than rulemaking," petitioner is incorrect in its contention that sec. 525(e) proceedings include rulemaking and, if considered akin to rulemaking, designation of unsuitable lands (see subsecs 522(a)(4)(d) and (a)(5)), and approval of state programs (see sec. 503). (See discussion in next paragraph of text re effect of definitions in 5 U.S.C. § 551 (1976) on language in sec. 525(e)).

² The Administrative Procedure Act was repealed as part of the general revision of title 5 of the United States Code, and its provisions were incorporated into subchapter II of chapter 5 and chapter 7 of that title, P.L. 89-554. However, the popular name will be used herein for convenience.

As pointed out by petitioner, "the major question concerning the scope of § 525(e) involves the meaning of the phrase 'any administrative proceeding.'" ³ I agree. The Act contains no definition of "administrative proceedings." See sec. 701, 30 U.S.C. § 1291 (1976). The APA, however, defines "agency proceeding." Pursuant to 5 U.S.C. § 551 (12) (1976), "'agency proceeding' means an agency process as defined by paragraphs (5), (7), and (9) of this section." Paragraph 5, 7, and 9 define rulemaking, adjudication, and licensing, respectively. 5 U.S.C. § 551 (5), (7), and (9) (1976). Moreover, Congress distinguished between "agency proceeding" and "agency action," which is defined separately in 5 U.S.C. § 551(13) (1976): "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." Since Congress selected its language in sec. 525(e) of the Act with knowledge of the definitions contained in the APA, it is reasonable to presume that it meant the same thing by its use of similar terms.⁴

No order was made here under the first phrase of sec. 525(e), "under this section," for that section applies expressly to cessation orders, notices of violation, notices

or orders issued "pursuant to a Federal program or the Federal lands program," sec. 525(a)(1), or to Federal enforcement of a state program, sec. 525(b). Nor was an order "issued * * * as a result of any administrative proceeding under this Act," the second phrase of sec. 525(e), for, as defined in the APA, "agency proceeding" refers only to rulemaking, adjudication, or licensing. The process initiated by petitioner under sec. 517(h) and concluded without participation by the Office of Hearings and Appeals was none of these. Had Congress intended the broad interpretation urged by petitioner, it would have used "administrative" or "agency action," rather than "administrative proceeding." The former term is separately defined and applied in the APA to a wide range of agency activities, including "sanction, relief, or the equivalent or denial thereof," which might encompass an OSM response to a citizen's complaint under sec. 517(h).

Were all of the adjudicative or licensing proceedings in the Act addressed in sec. 525, petitioner's argument would be more persuasive, for "under this section" would be the only language necessary, and the additional phrase, "or as a result of any administrative proceeding under this Act," would have to be given a broader definition than that in the APA or be held meaningless. However, as alluded to above,⁵ the Act requires a number of adjudicative and licensing procedures in sections other

³ See n.1, *supra*.

⁴ While the presumption is rebuttable, see, e.g., 2A Sutherland, *Statutory Construction* § 51.01 (4th ed. 1973), it is buttressed by express reference to and application of the APA throughout the Act. E.g., secs. 514 (permits), 518 (penalties), 525 (cessation orders and notices of violation, referring to secs. 521(a)(2) and (3)), 526 (judicial review), and 703 (employee protection).

⁵ See n.4, *supra*.

than 525 and 521. For example, permit disapproval proceedings under sec. 514(c), civil penalty proceedings under sec. 518, and employee discrimination proceedings under section 703 are required to be conducted pursuant to the APA (5 U.S.C. § 554 (1976)); and notice and opportunity for hearing are given to persons aggrieved by unsuitability determinations under sec. 522(c) and by release of performance bonds under sec. 519(f).⁶

I am not unmindful of Congress intent to provide for an even encourage public participation in enforcement of the Act. It does not necessarily follow, however, that Congress intended all public participation to be compensable. In drafting the regulations, the Secretary clearly and reasonably interpreted the language in sec. 525(e) in accordance with the definition of similar language in the APA.

The Board of Surface Mining and Reclamation Appeals (Board) is given jurisdiction over "[p]etitions for award of costs and expenses under section 525(e) of the Act." 43 CFR 4.1101(a) (7). CFR Chapter VII) is OSM given similar authority, although public participation in monitoring OSM's enforcement is provided and Secre-

tarial response by OSM is required by sec. 517(h).

It was certainly contemplated by Congress that such participation would be successful much of the time at the enforcement or informal (OSM) level without the aid of quasi-judicial or formal (OHA) proceedings.⁷ Had the Secretary felt that costs and expenses involved in successful or constructive public participation before OSM under sec. 517(h) should be compensable, it is difficult to understand why he did not provide that such an award could be made by OSM. While it might not possess expertise equivalent to that of OHA regarding attorneys' fees, OSM could just as easily determine other costs and expenses. Since, due to its informal nature, participation under sec. 517(h) would not ordinarily involve legal representation, why create a need for such representation and thus add considerably to the Government's or a permittee's costs by requiring a petition to, and award by, OHA? The only logical answer is that the Secretary had no such intention, and that the regulations thus do not provide for compensation of sec. 517(h) costs and expenses.

Only if a sec. 517(h) participant is aggrieved by an OSM decision

⁶ There is no direct reference to 5 U.S.C. § 554 (1976) in secs. 522(c) and 519(f) of the Act; however, the regulatory authority is required under sec. 519(h) to make a verbatim record of a hearing, which requirement makes operative the standards in 5 U.S.C. § 554 (1976).

⁷ The Act does not provide for administrative hearings, formal or otherwise, for unsuccessful public participants under sec. 517(h). Indeed, had the Secretary not provided for such review in 43 CFR 4.1280, 4.1281, disappointed members of the public could have appealed directly to court pursuant to sec. 520.

regarding enforcement, appeals to OHA, and makes a substantial contribution "to the full and fair determination of the issues" by OHA, 43 CFR 4.1294(a)(1), may he be compensated for those costs and expenses incurred in the appeal, whether the determination is by the Hearings Division, the Board, or both. *See* 43 CFR 4.1295, 4.1296.

The language of the regulations supports this conclusion. To file a petition for an award, costs and expenses must be incurred "as a result of that person's participation in any administrative proceeding under the Act which results in—(1) A final order * * * by an administrative law judge; or (2) A final order * * * by the Board." 43 CFR 4.1290.⁸ The costs and expenses incurred in this case were not as a result of petitioner's participation in such a proceeding, nor was there such a result. Indeed, there was no proceeding. No issues were presented to OHA, let alone joined. Petitioner's mere filing and subsequent petition to dismiss a notice of appeal did not constitute a "substantial contribution to the full and fair determination of the issues," as required under 43 CFR 4.1294(a)(1).

The Board has no statutory or regulatory authority to grant an award under those circumstances.⁹ Therefore, I must dissent from that

portion of the principal opinion which authorizes compensation to petitioner for its contribution to the determination of the standards governing awards. That such a result may be unfair does not confer upon us authority we do not otherwise possess.

It follows that there is no foundation for the principal opinion's exposition of standards for measuring the amount of an appropriate award. Were there such a foundation, however, I would concur with that portion of the principal opinion which announces those standards, and I do endorse them.

NEWTON FRISHBERG

Administrative Judge

THOROUGHFARE COAL CO.

3 IBSMA 72

Decided March 25, 1981

Appeal by Thoroughfare Coal Co. from the July 11, 1980, order of Administrative Law Judge Frederick A. Miller, in Docket No. NX 9-58-R, dismissing with prejudice the company's application for review of Notice of Violation No. 79-II-20-18 and upholding the notice in its entirety.

Affirmed, in part, as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

⁸ *See also* 43 CFR 4.1291.

⁹ If the Board had such authority, the costs and expenses, including attorneys' fees, of petitioner's contribution to the Board's determination of such an award might well be compensable.

March 25, 1981

An applicant for review of a notice of violation who voluntarily failed to appear at the scheduled review hearing was properly deemed to have waived its right to a hearing, and the Administrative Law Judge could accept as true the allegations of fact contained in the notice of violation under review.

APPEARANCES: Dick Adams, Esq., Adams, Massamore & Moore, Madisonville, Kentucky, for Thoroughfare Coal Co.; John Phillip Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

This appeal was brought by Thoroughfare Coal Co. (Thoroughfare) from the July 11, 1980, order of Administrative Law Judge Frederick A. Miller dismissing with prejudice the company's application for review of Notice of Violation No. 79-II-20-18. The order resulted from Thoroughfare's unexcused failure to attend the hearing scheduled for review of the notice.

Background

Notice of Violation No. 79-II-20-18 was issued to Thoroughfare on May 18, 1979, following inspections by the Office of Surface Mining Reclamation and Enforcement (OSM) of a tippie operation conducted by Thoroughfare in Hop-

kins, Kentucky.¹ A violation of 30 CFR 715.17(a) was charged in the notice: "Failure to cause all drainage from disturbed area to pass through silt structure."²

Thoroughfare applied for review of the notice of violation pursuant to 43 CFR 4.1160 through 4.1164, claiming, *inter alia*, that it did not commit the acts alleged by OSM and that OSM lacked authority to regulate its tippie operation. Answers to interrogatories propounded by OSM to Thoroughfare reveal that from the beginning of 1979 through May 1979, when the notice was issued, Thoroughfare used its tippie facility for the crushing and loading of coal for shipments. During this period 26,568.15 tons of coal were delivered to Thoroughfare's facility. Of this amount, 46.5 percent was received from a mine operated by the Owl Creek Coal Company, Inc., which was then partly owned by the owners of Thoroughfare, Lewis and Houston Vandiver. This mine is located between 10 and 20 miles from Thoroughfare's tippie facility.

At the hearing scheduled for consideration of Thoroughfare's application for review, counsel for Thoroughfare failed to appear. A statement by the Administrative Law

¹ These inspections were conducted pursuant to sec. 502(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1267(a) (Supp. II 1978), and 30 CFR Part 721. The notice of violation was issued pursuant to 30 CFR Part 722.

² 30 CFR 715.17(a) requires, in pertinent part, that "[a]ll surface drainage from the disturbed area * * * shall be passed through a sedimentation pond or series of sedimentation ponds before leaving the permit area."

Judge at the proceeding indicates that counsel called his office in Louisville, Kentucky, at approximately 9 a.m. on June 26, 1979 (the hearing was scheduled to commence at 9 a.m. on June 26 in Evansville, Indiana), to communicate his intention neither to appear at the hearing nor to contest the alleged violation (Tr. 2). Counsel for OSM indicated that he was similarly informed by counsel for Thoroughfare later on the same morning (Tr. 3).

The Administrative Law Judge did not require OSM to present testimony from its witnesses assembled for the hearing or to adduce other evidence. Instead, counsel for OSM was instructed to propose an order upholding its enforcement action against Thoroughfare and dismissing the company's application for review with prejudice. The order ultimately issued by the Administrative Law Judge contains the following:

It is therefore Ordered and adjudged:

1.) That the applicant is deemed to have waived its right to a hearing for failure to appear in accordance with the notice of hearing.

2.) That OSM had jurisdiction over the facility for which Notice of Violation No. 79-II-20-18 was issued.

3.) That Notice of Violation No. 79-II-20-18 including the violation and the remedial action to abate the violation is upheld in its entirety.

4.) That applicant's application for review of Notice of Violation No. 79-II-20-18 be and is hereby dismissed with prejudice.

Thoroughfare filed a timely appeal from the order and requested a

full evidentiary hearing. Both parties filed briefs.³

Discussion

In upholding the notice of violation, the Administrative Law Judge did not provide a statement of findings of fact as required under the Department's regulations at 43 CFR 4.1127.⁴ We decline to remand the case on this ground, however, because the record is unambiguous in material respects and supports the Administrative Law Judge's order. *Cf. Dean Trucking Co., Inc.*, 1 IBMA 105, 86 I.D. 201 (1979) (case remanded for findings of fact).

³Thoroughfare also filed with the Board a document captioned: "Verified Motion for Temporary Relief." This motion was not granted.

⁴43 CFR 4.1127 provides in pertinent part: "An initial order or decision disposing of a case shall incorporate—(a) Findings of fact * * * and the basis and reasons therefore on all material issues of fact." This requirement is based on 5 U.S.C. § 557(c) (1976) (formerly a provision of the Administrative Procedure Act).

In the order under review there is the statement that "[c]ounsel for applicant by telephone informed both the [Administrative Law Judge] and counsel for respondent that it had been decided not to attend [the] hearing and [that] for various reasons the applicant no longer desired the hearing." There is a further statement that counsel for Thoroughfare did not interpose any objection to OSM's proposed order reciting that "OSM had jurisdiction over the facility for which the * * * notice of violation was issued, that such notice of violation including the [alleged] violation and the remedial [order] to abate such violation be upheld in its entirety and that the application for review [of the notice] be dismissed with prejudice." These recitations, which were adopted by the Administrative Law Judge (see text at 407), are ultimate conclusions of law and fact. They are not adequately supported in the order by a statement of underlying findings concerning the basis of OSM's asserted authority over the tippie facility and of the notice of violation.

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[1] By its voluntary failure to appear at the scheduled review hearing, Thoroughfare waived its right to a hearing and, consequently, the Administrative Law Judge could accept as true the allegations of fact contained in the notice of violation. *See* 43 CFR 4.1156 (c); *see also* 43 CFR 4.1195(a).⁵ From those allegations we find the following.

1. On May 16, 17, and 18, 1979, OSM conducted inspections of a tippable facility operated by Thoroughfare Coal Co. in Hopkins County, Kentucky.

2. At the time of OSM's inspections Thoroughfare was using the tippable facility for the processing, other preparation, and/or loading of coal for interstate commerce.

3. At the time of OSM's inspections the tippable facility was oper-

ated by Thoroughfare in connection with and near a surface coal mine.

4. At the time of OSM's inspections there was surface drainage in the area disturbed by Thoroughfare's tippable operation and this drainage was not being passed through a sedimentation pond before leaving the permit area.

On the basis of these findings we conclude that OSM made a *prima facie* showing that it properly exercised its regulatory authority in issuing to Thoroughfare a notice of violation of 30 CFR 715.17(a).⁶ Accordingly, we hold that the order upholding the notice of violation under review is supported by the record.

For the foregoing reasons the July 11, 1980, order of the Administrative Law Judge is affirmed, in part, as modified to include our findings.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

⁵ The cited regulations apply by their terms to summary dispositions in civil penalty and permit suspension or revocation proceedings, respectively. Because OSM's initial evidentiary burden is the same in these proceedings as in a proceeding upon application for review of a notice of violation or cessation order (*see* 43 CFR 4.1155, 4.1193, 4.1171(a)), we take the provisions for summary disposition set forth in those regulations to be appropriate models for summary disposition in a proceeding on an application for review. Under 43 CFR 4.1156 an Administrative Law Judge may accept as true the allegations of fact contained in a notice of violation or cessation order when an applicant is deemed to have waived its right to a hearing. We note, however, that when counsel and witnesses for OSM are present, presentation of OSM's *prima facie* case in regular fashion (under oath and on the record) would best provide the Board and the courts with an appropriate record in the event of an appeal. In any event the regulations contemplate a disposition on the merits, however summary, upon an application timely filed and not withdrawn. Thus, dismissal below of Thoroughfare's application for review was inappropriate.

⁶ OSM's evidentiary burden in a proceeding upon an application for review is that of establishing a *prima facie* case in support of its enforcement action. 43 CFR 4.1171(a). The Board has previously stated that "[a] *prima facie* case is made where sufficient evidence is presented to establish the essential facts and which evidence will remain sufficient if not contradicted." *James Moore*, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979).

The general allegations of OSM's regulatory authority over Thoroughfare's tippable facility, in the notice of violation, are further supported by Thoroughfare's answers (summarized in the text at 408) to the interrogatories propounded by OSM. *See Roberts Brothers Coal Co., Inc.*, 2 IBSMA 284, 87 I.D. 439 (1980); *Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980).

**ESTATE OF VICTOR YOUNG BEAR
(SUPP.)****8 IBIA 254**Decided *March 26, 1981*

Decision on reconsideration of Board's order of July 24, 1980, declaring as invalid an adoption action taken by the agency superintendent of the Fort Berthold Reservation pursuant to the Act of July 8, 1940, 57 Stat. 746.

Reversed.

1. Indian Probate: Adoption: Generally

The Act of July 8, 1940, 54 Stat. 746 (25 U.S.C. § 372a (1976)) gave limited authority to agency superintendents over the adoption of Indian children. Evaluated in light of its legislative history, the Act must be read as allowing superintendents to validate adoptions agreed to in writing by Indian parties as well as Indian custom adoptions.

2. Indian Probate: Adoption: Generally—Indian Probate: Adoption: Crow Tribe

The Act of Mar. 3, 1931, 46 Stat. 1494, relating to the adoption of Indian children on the Crow Reservation in Montana, vested the superintendent of the Crow Agency with adoption authority which served as a model in the draftsmanship of the Act of July 8, 1940.

Estate of Victor Young Bear, 8 IBIA 130, 87 I.D. 311 (1980), is reversed.

APPEARANCES: Janet C. Werness, Esq., for petitioner Theresa Bluhm; James P. Fitzimmons, Esq., for respondent Alice Young Bear; William Babby and Frances Ayer, Esq., for the Bureau of Indian Affairs and Office of the Solicitor, respectively.

**OPINION BY CHIEF
ADMINISTRATIVE JUDGE
HORTON****INTERIOR BOARD OF
INDIAN APPEALS**

On July 24, 1980, the Board issued a decision in the above estate which, among other things, declared as invalid a purported adoption of Theresa Bluhm by the decedent, Victor Young Bear, and his surviving spouse, Alice Young Bear, approved by the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs, on Dec. 26, 1945, under authority of the Act of July 8, 1980, 54 Stat. 746 (25 U.S.C. § 372a (1976)).¹ *Estate of Victor Young Bear*, 8 IBIA 130, 87 I.D. 311 (1980).

On Sept. 12, 1980, Theresa Bluhm, through counsel, filed a petition for reconsideration of the above determination pursuant to the provisions of 43 CFR 4.21(c). The Board agreed to reconsider its adoption ruling by order dated Sept. 16, 1980. Interested parties, including the Bureau of Indian Affairs, were requested to file briefs regarding the Board's July 24, 1980, decision and petitioner's objections thereto. Final comments were received in this reconsideration proceeding on Dec. 8, 1980.

Because the factual background to this controversy is not in dispute, no attempt will be made to summarize the Board's findings of fact set forth in its decision of July 24,

¹ All further references to U.S.C. are to 1976 edition.

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1980. (See 8 IBIA 130, 132-36; 87 I.D. 311-14 (1980)).²

Questions Presented

The legal issues raised with respect to the Board's prior decision may be summarized as follows:

1. Did the Board err in interpreting the Supreme Court's holding in *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976), as the equivalent of a pronouncement that 25 U.S.C. § 372a does not confer authority on agency superintendents to approve or grant adoptions of Indian minors?

2. If 25 U.S.C. § 372a does authorize agency superintendents to approve or grant adoptions of Indian minors, what, if any, limitations are attached to such power and was this power properly invoked in this case?

3. If 25 U.S.C. § 372a was improperly relied upon in this case by the agency superintendent in approving or granting the adoption of Theresa Bluhm, may the Department be estopped from treating the purported adoption as invalid in its probate of Victor Young Bear's trust estate?

Discussion and Conclusions of Law

In *Fisher*, the Supreme Court reviewed a decision of the Montana Supreme Court which held that a

lower state court had jurisdiction over adoption proceedings arising on the Northern Cheyenne Indian Reservation in which all parties were members of the tribe. The Montana Supreme Court read 25 U.S.C. § 372a as a congressional grant of jurisdiction over reservation adoptions to state courts.³ This

³ 25 U.S.C. § 372a (1976) reads as follows:

"§ 372a. Heirs by adoption

"In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption—

"(1) Unless such adoption shall have been—

"(a) by a judgment or decree of a State court;

"(b) by a judgment or decree of an Indian court;

"(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

"(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

"(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: *Provided*, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

"This section shall not apply with respect to the distribution of the estates of Indians of the Five Civilized Tribes or the Osage Tribe in the State of Oklahoma, or with respect to the distribution of estates of Indians who have died prior to the effective date of this section. (July 8, 1940, c. 555 §§ 1, 2, 54 Stat. 746.)"

The first and second paragraphs of 25 U.S.C. § 372a (1976), codify secs. 1 and 2, respectively, of the Act.

² As necessary to the ultimate resolution of this case, certain findings are repeated later in this opinion.

position was rejected by the Supreme Court in the following words:

25 U.S.C. § 372a manifests no congressional intent to confer jurisdiction upon state courts over adoptions by Indians. The statute is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior. It recognizes adoption "by a judgment or decree of a State court" as one means of documentation but nowhere addresses the jurisdiction of state courts to render such judgments or decrees. The statute does not confer jurisdiction upon the Montana courts. [Footnote omitted.]

424 U.S. at 388-89.

In its July 24, 1980, decision, the Board held that *Fisher* "makes it clear that 25 U.S.C. § 372a (1976) is not a statute which bestows authority to grant adoptions." 8 IBIA at 139; 87 I.D. at 316. We went on to state:

The Act simply provides that the Secretary of the Interior may rely on adoptions legally consummated under other specific authority in the course of performing the probate functions conferred on him by Congress. See 25 U.S.C. §§ 372-73 (1976). For example, under the Act of March 3, 1931, 46 Stat. 1494, the Superintendent of the Crow Indian Agency is specifically authorized to approve Indian adoptions on the Crow Reservation in Montana. See 25 CFR 11.29C; *Estate of Walks With A Wolf*, 65 I.D. 92 (1958). In short, Indian adoptions accomplished by the Superintendent of the Crow Agency pursuant to the Act of March 3, 1931, *supra*, or by any other superintendent pursuant to statute, typify the nature of adoption referred to by Congress in section 1(1)(c) of the Act of July 8, 1940 [codified at 25 U.S.C. § 372a(1)(c)]. [Footnote omitted.]

Id.

The above holding was premised, among other things, on the Board's perception that the Supreme Court had categorically declared sec. 1 of the Act of July 8, 1940, as unrelated to the establishment of Indian adoption authority, notwithstanding that only the question of State versus tribal authority was at issue in *Fisher*. That the Court tacitly denied that a purpose of the Act was to vest new adoption powers in the Secretary of the Interior was gleaned from its statement that "[t]he statute is concerned *solely* with * * * documentation necessary to prove adoption * * * in proceedings before the Secretary" and that the Act recognizes adoption by a decree of a state court "*as one means of documentation*" 424 U.S. at 389 (italics supplied). Reading 25 U.S.C. § 372a(1) as a whole, three other means of documentation, in addition to a judgment or decree of a state court, are cited, viz., by a judgment or decree of an Indian court; by a written adoption approved and recorded by an agency superintendent; and by an adoption in accordance with other established tribal procedure. See 25 U.S.C. § 372a(1)(a) through (d).

In addition to the above, the Board was struck by the existence of only one Departmental regulation concerning the adoption authority of agency superintendents—that being 25 CFR 11.29C, which pertains to adoptions of Crow In-

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dians.⁴ It was difficult for us to conceive that the Department could view the Act of July 8, 1940, as a grant of jurisdictional authority to effect adoptions on Indian reservations while not bothering to promulgate any regulations subsequent to the Act to govern the exercise of this authority.

We also looked to the Bureau of Indian Affairs' operations manual for guidance. As noted in our initial decision, there are no manual provisions on adoption.⁵

Lastly, the Department's legislative history file concerning the Act of July 8, 1940, was examined by the Board before it rendered its initial decision in this matter. Although portions of this history are supportive of the theory that the Act vested agency superintendents with jurisdiction to effect adoptions, as

discussed below, this history was considered irrelevant in the face of what we perceived to be a contrary ruling from the Supreme Court.⁶

[1] The Board has carefully re-examined the *Fisher* opinion, the 1940 Act and its legislative history. Based on this examination and our review of the reconsideration briefs filed with the Board, we are persuaded that, contrary to our prior holding, limited authority over the adoption of Indian children was bestowed by Congress on agency superintendents through enactment of the 1940 adoption statute.

In arguing that the narrow, evidentiary purposes of 25 U.S.C. § 372a(1)(c), which pertains to state court adoption decrees, should not be attributed, through a reading of *Fisher*, to 25 U.S.C. § 372a(1)(c), which pertains to written adoptions approved by agency superintendents, the Government's brief in this reconsideration proceeding states:

§ 372a(1)(a) describes a type of evidence which is to constitute acceptable proof of an adoption in Indian probate proceedings. § 372a(1)(c) also describes a type of acceptable evidence and, in addition, delineates the steps to be followed in producing a valid adoption. There is no

⁴ 25 CFR 11.29C states:

"No future adoptions among or by the Crow Indians shall be recognized except those made in accordance with the Act of Mar. 3, 1931 (46 Stat. 1494)."

The Act of Mar. 3, 1931, is discussed in this opinion at page 418.

⁵ Manual provisions do exist on the subject of termination of parental controls. At 66 IAM 3.2.5 D (2) (1957 ed.), it is stated:

"Bureau employees acting in their official capacities shall not accept statements from parents designed to sever their parental controls and responsibilities for their children. Such statements have no legal force or effect in divesting a parent of his control of his child or of his duty to support him. Only by court action can ties between parent and child be legally severed and only by court action can parental control and responsibility for a child be vested in another person or in an agency. Records of such court action or documents issued by the court offer the only evidence of legal changes in status between a parent and his child."

⁶ The Board also reviewed published legislative history of the Indian Child Welfare Act of 1978, 92 Stat. 3069, which is aimed at fostering tribal control over Indian adoptions and other child custody matters arising in Indian country, for any reference or discussion of the Secretary's authority over Indian adoptions. None could be found. See H.R. Rep. No. 95-1386, 95th Cong., 2d Sess. 6, reprinted in [1978] U.S. Code Cong. & Ad. News 7530-7560.

question that 25 USC § 372a did not confer jurisdiction on the state courts if they did not already possess it. The Department and Bureau of Indian Affairs are not, however, on the same footing as a state. Whereas a state has jurisdiction over Indian matters only if Congress permits, the Bureau is that arm of the Federal Government charged with overseeing and implementing Congress' policies. As such, it has authority to carry out those policies and procedures established by Congress. 25 USC §§ 2, 9. In this instance Congressional policy, as shown by the legislative history of § 372a * * * was to assure that there would be a written record of all adoptions. The functions assigned by Congress to the

superintendents were specific mechanisms for effectuating that policy and were functions within the general authority of the Bureau to manage Indian affairs.

Joint Brief of BIA and Solicitor (hereafter, Government's Brief) filed Oct. 27, 1980, at 2.

The most detailed piece of legislative history in this matter is the virtually identical report submitted by Secretary Harold L. Ickes to the House and Senate on Feb. 8, 1940, requesting approval of draft legislation which became the Act of July 8, 1940. It is quoted at length (and line numbered) as follows:

1. The proposed bill provides that * * * no person
2. shall be held to be an heir of a deceased Indian by
3. virtue of an adoption unless the adoption is evidenced
4. by a judgment of a State or tribal court; or is a
5. written adoption approved and recorded by the super-
6. intendent of an agency, an adoption by Indian custom
7. made prior to the effective date of the act and
8. recorded with a superintendent, or a recorded adoption
9. made pursuant to a procedure established by tribal
10. authorities * * *. The broad purpose of the bill is
11. to require that there be a written record of each
12. adoption. The several methods recognized for making
13. such an adoption are those which the administration of
14. Indian affairs has shown to be desirable. The Depart-
15. ment now recognizes the decree of State courts and the
16. bill would continue this practice. Another presently
17. recognized method of adoption is by tribal court action
18. and this jurisdiction of tribal courts is continued.
19. However, the expense attendant upon an action in a
20. State court frequently compels an Indian to forego a
21. court proceeding and some tribes have not yet estab-
22. lished tribal courts; these difficulties the bill
23. would meet by recognizing a third method of adop-
24. tion, that of adoption by written recordation with the
25. superintendent of an agency. Recorded adoptions made
26. in accordance with procedures established by recognized
27. tribal authorities would also be valid under the provi-
28. sions of the bill.
- 29.
30. It is the present practice of this Department to
31. recognize the so-called "Indian custom" adoption when-

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32. ever sufficient evidence of the decedent's intention
33. exists. At one time Indian custom adoptions were by
34. formal ceremonies, but in most tribes this ancient
35. practice has been relaxed and it is difficult to
36. determine whether or not an adoption was actually made
37. in a particular case. In none of the Indian custom
38. adoptions is there a written record and the available
39. evidence is often confusing, conflicting and of dubious
40. character. If the bill becomes law, adoptions made in
41. accordance with practices by persons who died prior to
42. the effective date of the act will be recognized by the
43. Department. Indian customs adoptions made prior to the
44. effective date of the act and participated in by per-
45. sons who are still living can be validated by recorda-
46. tion with a superintendent * * *

47.
48. On March 3, 1981, Congress enacted the "Crow" Act
49. (46 Stat. 1494), covering adoption by the Crow Indians
50. of Montana. The act has eliminated practically all
51. dispute and administrative difficulty in adoption among
52. the Crows. The proposed act is similar to the "Crow"
53. Act and in addition recognizes decrees of tribal courts
54. and adoptions made pursuant to tribal procedures, and
55. provides for the validation of "Indian custom" adop-
56. tions by their recordation during the lifetime of the
57. parties.

58.

59. The subject of adoption has been considered by
60. the tribal council, Government officials and Indian
61. assemblies. All agree that a remedy must be provided.
62. Expressed opinions are (1) adoption should be left to
63. the State courts; (2) it should be handled by the tri-
64. bal agencies; and (3) Indian custom should be recog-
65. nized and made of record.

66.

67. The instant proposal does not conflict with any
68. of these ideas. It embraces all of them and places
69. both the Indian and this Department in a position
70. where in all probate cases a record will be available
71. that will amply protect the bona fide claimant and
72. likewise eliminate the imposter.

The above report is susceptible to several interpretations. On one hand it clearly seems to state that the bill establishes a "method of adoption" by agency superintendents, supplementary to other recognized methods of adoption (lines 22-25). Elsewhere, however, it is said that the broad purpose of the bill is "to require that there be a written record of each adoption" (lines 10-12). In fact, Secretary Ickes describes the "method of adoption" to be followed by super-

intendents as one of "adoption by written recordation" (line 24). These latter statements, among others, suggest that what the Secretary actually proposed to Congress was, in essence, a procedure for recording adoptions at Indian agencies agreed to by interested parties or otherwise recognizable under Indian custom.⁷

Supportive of the argument that the Act of July 8, 1940, created no unique authority within agency superintendents to *grant* adoptions in a judicial sense is the legislative preference to refer to adoptions *approved* by agency superintendents. The terms "approved by" or "to approve" may have different meanings, depending upon the context in which they are used and the subject matter to which they pertain. *City of Springfield v. Commonwealth*, 349 Mass. 267, 207 N.E.2d 891 (1965). Ordinarily the act of "approval" is an action to commend, confirm, ratify, sanction, or to consent to some act or thing done by another. *In re State Bank of Millard County*, 84 Utah 147, 30 P.2d 211 (1934). While in some statutes or texts, the act of "approval" implies the exercise of judicial action or discretion, in other cases it may only contemplate the doing of a purely ministerial act. *Baynes v. Bank of Caruthersville*, 118 S.W.2d 1051 (Mo. App. 1938). Evaluated against the intended "broad purpose" of 25 U.S.C. § 372a—that of providing a

written record for adoptions to facilitate the Secretary's probate functions—we hold that the adoption approval and recordation authority conferred by Congress on agency superintendents in the 1940 Act was ministerial, not judicial, in nature.

If the proposal submitted by Secretary Ickes to Congress contemplated the establishment of jurisdiction in agency superintendents to sit in judgment on adoption matters arising on their reservations, the Secretary could hardly have concluded in his report to both Houses:

The instant proposal does not conflict with any of these ideas [i.e. that (1) adoption should be left to the State courts; (2) it should be handled by the tribal agencies; and (3) Indian custom should be recognized and made of record]. It embraces all of them and places both the Indian and this Department in a position where in all probate cases a record will be available.

There was only limited substantive debate of the Department's proposed adoption bill when it was considered by Congress. It consisted of an exchange in the House between Representative Rogers of Oklahoma and Representative Case of South Dakota, following Mr. Rogers' summary of the bill (H.R. 8499):

Mr. CASE: Does not the gentleman think it would be fair to have a 6-month period, at least during which the Indians might be given notice, and then adoptions that have been made in accordance with the tribal custom may be put on record so that they may be protected?

Mr. ROGERS: It does not affect anything that has been done in the past. It only provides for future cases.

Mr. CASE: Even there the gentleman

⁷ See, e.g., lines 43-46 of the quoted report: "Indian custom adoptions * * * can be validated by recordation with a superintendent."

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knows Indian families have taken children in and, to all intents and purposes, have adopted them; but unless there is some way for these adoptions to be put on record or to be recognized in some way, an injustice might be done.

Mr. ROGERS: That may be true. It would not affect those who have been adopted in the past, because it is provided that if it had been done by a decree of an Indian tribe it shall be valid. The main requirement is that in the future there must be a record kept. The bill provided that the tribe itself shall keep the record, but we finally decided to place this obligation on the Indian Department.

86 Cong. Rec. 3009 (1940).

The above colloquy does not present a penetrating analysis of the bill. It does convey, however, that the proposed legislation was represented to the lawmakers to be a recordkeeping measure.

With respect to the type of Indian adoptions which agency superintendents were authorized to approve and record under 25 U.S.C. § 372a(1)(c), the Government's brief appears to take conflicting stands. Its main contention appears to be that the Fort Berthold superintendent was authorized in 1945 to approve the adoption of Theresa Bluhm by virtue of the 1940 Act, an action taken by the agency on the basis of written statements received by Theresa's natural and adoptive parents. On the other hand, the Government submits that "[t]he kinds of adoptions which the superintendents were authorized to approve and record were, in essence, Indian custom adoptions, for which

written evidence would henceforth be required" (Government's Brief at 4).

The Board observed in its initial decision that Indian custom adoptions were not recognized by the Three Affiliated Tribes of the Fort Berthold Reservation in 1945. 8 IBIA at 142, 87 I.D. at 317. Assuming, in the light most favorable to the superintendent, that the governing tribe of the reservation did not possess exclusive jurisdiction over Indian adoption matters arising thereon,⁸ it was nevertheless incum-

⁸ The Three Affiliated Tribes of the Fort Berthold Reservation accepted the terms of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461-79 (1976), and the Secretary subsequently approved the tribe's Code of Laws, adopted Dec. 9, 1943, which contains provisions concerning adoption.

Without ruling on the question of tribal jurisdiction, we noted before that in this case an apparent indispensable party to the adoption proceeding, Theresa's natural mother, did not live on the Fort Berthold Reservation and was not a member of the Three Affiliated Tribes; neither was Theresa's adoptive mother, Alice Young Bear, a member of the Three Affiliated Tribes. 8 IBIA 141; 87 I.D. 316-317. These circumstances differ from *Fisher* in which the Supreme Court held that the Northern Cheyenne Tribe possessed exclusive jurisdiction over an adoption proceeding. There, the Court noted that all parties were members of the tribe who resided on the reservation at all relevant times, and that none of the acts giving rise to the adoption proceeding occurred off the reservation. (Jurisdictional problems between states and tribes in Indian child custody proceedings have been substantially resolved for the future as a result of the Indian Child Welfare Act of 1978. A major feature of the Act is that it secures to an Indian tribe "jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a) (Supp. II 1978). The Act makes no attempt

(Continued)

bent on the superintendent to approve and record an Indian custom adoption only if such adoptions were recognizable under tribal law.⁹

We do not think 25 U.S.C. § 372a (1) (c) authorizes superintendents to approve and record Indian custom adoptions only. If this is what Congress intended, it is reasonable to suppose that the term "Indian custom" would have been included in subparagraph (c). That it was not intended is also evident from the inclusion of an independent paragraph (sec. 2 of the Act) devoted to the documentation of Indian custom adoptions.

Secretary Ickes' report of Feb. 8, 1940, also shows that Indian custom adoptions were viewed as a separate

kind of adoption subject to BIA approval. *See* report, *supra*, at lines 1-10.

For an adoption to be approved by an agency superintendent under 25 U.S.C. § 372a (1) (c), the Act provides that it be a "written" adoption. The recording of an adoption pursuant to subparagraph (c) does not, in our opinion, satisfy the requirement for an adoption in writing.¹⁰ Consistent with our opinion that the approval power bestowed by Congress to superintendents was ministerial, not judicial, the nature of adoption ultimately subject to agency approval would be "adoptions by consent" or other noncontested adoptions agreed to *in writing* by the parties.

[2] Nothing in the Crow Adoption Act (Act of Mar. 3, 1931, 46 Stat. 1494), which the Department used as a model in the drafting of the 1940 Act,¹¹ contradicts the above interpretations. Modifying our previous assessment of the relationship of the Crow Act to the 1940 law, *see* 8 IBIA at 139; 87 I.D. at 316, we agree with the position of the Government that "25 U.S.C. § 372a is worded virtually identically to the Crow Act and, as evidenced by the legislative history, was intended to become general legislation * * * [applying] the successful adoption

(Continued)

to resolve jurisdictional conflicts between tribes and agency superintendents.)

The Board avoided ruling on the question whether the Three Affiliated Tribes possessed exclusive jurisdiction over the adoption in question here by invalidating the superintendent's action on other grounds. 8 IBIA at 140-41; 87 I.D. at 316. Since we are reversing our prior holding in this reconsideration proceeding, we are obliged to answer that we do not believe the state of the law in 1945 precluded the superintendent from approving the adoption of Theresa Bluhm. We recognize that this is an important ruling and that it is rendered without the benefit of participation in this case by the Three Affiliated Tribes. As interested as we are in putting this case to rest, it is nevertheless appropriate in our view to afford the tribe an opportunity to seek reconsideration of the foregoing opinion pursuant to terms set forth in the closing order of this decision.

⁹ As stated in our initial decision, there is no universal doctrine of Indian custom adoption. 8 IBIA at 141; 87 I.D. at 317. The right to designate the customs that are to be given recognition in regulating matters that affect tribal internal and social relations rests with each tribe as an incident of its sovereignty, *United States v. Mazurie*, 419 U.S. 544 (1975), and such customs may vary among tribes.

¹⁰ Sec. 372a-372a(1)(c) reads, in pertinent part, "no person shall be recognized as an heir of a deceased Indian by virtue of an adoption * * * [u]nless such adoption shall have been * * * by a written adoption approved by the superintendent * * * and duly recorded * * * by the superintendent." (Italics added.)

¹¹ *See* Secretary Ickes' report, *supra*, at lines 48-57.

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procedures in the Crow Act to all tribes"¹² (Government's Brief at 5).

In the case at hand, the Fort Berthold superintendent was furnished written and signed statements by petitioner's natural and "adoptive" parents which satisfied the superintendent that these parties were agreeable to the adoption of petitioner, then age 5, by the Young Bears. It is too late for Theresa's adoptive mother, Alice Young Bear, to challenge the regularity of consents obtained over 30 years ago. See 8 IBIA at 137-38; 87 I.D. at 315. Alice Young Bear's contention that the superintendent lacked jurisdiction to approve Theresa's adoption is rejected on grounds that by virtue of the Act of July 8, 1940, 54 Stat. 746, Congress vested agency superintendents with specific authority to approve and record written adoptions agreed to by Indian parties. The Fort Berthold superintendent was therefore acting within the scope of his authority and in accordance with Federal law by approving petitioner's adoption in 1945.¹³

¹² The Act of Mar. 3, 1931, states:

"[H]ereafter no person shall be recognized as an adopted heir of a deceased Indian of the Crow Tribe of Indians of Montana unless said adoption shall have been by a judgment or decree of a State court, or by a written adoption approved by the superintendent of the Crow Indian Agency and duly recorded in a book kept by him for such purposes: Provided; That adoption by Indian custom made prior to the date of approval hereof involving probate proceedings now in process of consummation, shall not be affected by this Act."

¹³ The Government's Brief observes that enactment of the Indian Child Welfare Act in 1978 reflects "a change in Congressional policy and may eliminate future superintendent approved adoptions." At p. 5.

In accordance with the above, the Board hereby affirms *in toto* the Order Determining Heirs entered Aug. 8, 1979, by Administrative Law Judge Garry V. Fisher in which he held that Theresa Bluhm is entitled to a one-fourth share of the estate of Victor Young Bear.

In light of the above holding, we shall not attempt to answer petitioner's alternative contention that the doctrine of estoppel should be applied to uphold her adoption. We do observe that the Office of Hearings and Appeals has previously acknowledged the passing of the traditional rule that estoppel cannot be invoked against the Government and has recognized the elements of estoppel set forth by the Ninth Circuit in *United States v. Ruby Co.*, 588 F.2d 697 (1978), as the initial test for determining whether estoppel is appropriate. *Dorothy Smith*, 44 IBLA 25 (1979); *Edward L. Ellis*, 42 IBLA 66 (1979); *United States v. Larsen*, 36 IBLA 130 (1978).¹⁴ Assuming we were to adhere to our initial holding that the superintendent's adoption action was unlawful, one possible bar to the appropriateness of an estoppel

¹⁴ The elements of estoppel as identified in *Ruby* (and recited by petitioner) are:

"(1) The party to be estopped must know the facts;

"(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

"(3) The latter must be ignorant of the true facts;

"(4) He must rely on the former's conduct to his injury." 588 F.2d at 703.

in this case is the recognized principle that estoppel is unavailable against the Government if its representative has not acted within the scope of his authority. *Ruby, supra*, at 701-704; *Dorothy Smith, supra*, at 31.

The governing body of the Three Affiliated Tribes of the Fort Berthold Reservation is hereby allowed 30 days from receipt of this decision in which to petition the Board for reconsideration. (*See n.8.*) If no such petition is timely filed, this decision will then be final for the Department.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

MARTIN MATTLER

53 IBLA 323

Decided *March 26, 1981*

Appeal from a decision of the Utah State Office, Bureau of Land Management, denying a petition for reinstatement of oil and gas lease U-41028.

Affirmed.

1. Oil and Gas Leases: Termination

Upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law.

2. Oil and Gas Leases: Termination— Oil and Gas Leases: Reinstatement

A lessee may be entitled to reinstatement of the lease if it is shown, among other things, that reasonable diligence was exercised in mailing the payment, or that the delay in remitting the rental is justifiable. Where a lessee is unable to make the requisite showing, a petition for reinstatement is properly denied.

3. Oil and Gas Leases: Termination— Oil and Gas Leases: Reinstatement

Reasonable diligence generally requires mailing the rental payment sufficiently in advance of the anniversary or due date to account for normal delays in collection, transmittal, and delivery of the mail. Mailing the rental payment 1 day before or on the anniversary date of the lease does not constitute reasonable diligence.

4. Oil and Gas Leases: Termination— Oil and Gas Leases: Reinstatement

A late rental payment or an insufficient tender of rental may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected his or her actions in paying the rental fee. Instances of simple forgetfulness, inadvertence, ignorance of the regulations, reliance on BLM courtesy notices, and similar occurrences do not excuse a failure to exercise due diligence.

APPEARANCES: Martin Mattler, *pro se*.

OPINION BY
ADMINISTRATIVE
JUDGE HENRIQUES

INTERIOR BOARD OF
LAND APPEALS

Martin Mattler appeals from a decision of the Utah State Office,

March 26, 1981

Bureau of Land Management (BLM), dated Jan. 8, 1981, denying appellant's petition for reinstatement of oil and gas lease U-41028. The lease in question was issued effective Oct. 1, 1978, for a period of 10 years.¹

[1] Appellant's petition followed BLM's notification to appellant on Oct. 7, 1980, that lease U-41028 had terminated automatically by operation of law on Oct. 1, 1980, for failure to pay in advance the rental due on this lease. This termination was in accordance with 30 U.S.C. § 188 (b) (1976) which provides in part: "[U]pon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law."

[2] Where a lease has been terminated automatically by operation of law for failure to make timely payment of the full amount of rental due, but such rental was paid or tendered within 20 days thereafter, the Secretary may reinstate the lease if, *inter alia*, it is shown to the satisfaction of the Secretary that such failure to make timely payment was either justifiable or not due to a lack

of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976).

[3] In appellant's case, a check for the full amount of rental due was written on Oct. 1, 1980, and received by BLM on Oct. 6, 1980. Reasonable diligence generally requires mailing the rental payment sufficiently in advance of the anniversary or due date to account for normal delays in collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c)(2). Appellant's payment envelope, however, was postmarked on the date payment was due. This Board has repeatedly held that mailing the rental payment 1 day before or on the anniversary date of the lease does not constitute reasonable diligence. *See, e.g., Ronald C. Hill*, 38 IBLA 315 (1978); *J. R. Oil Corp.*, 36 IBLA 81 (1978); *Hubert W. Scudder*, 36 IBLA 191 (1978); *David R. Smith*, 33 IBLA 63 (1977); *Adolph F. Muratori*, 31 IBLA 39 (1977); *Henry Carter*, 24 IBLA 70 (1976).

[4] A failure to make timely payment may be justifiable, however, if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected his or her actions in paying the rental fee. *See* cases hereinbefore cited. Generally, this standard contemplates occurrences such as injury, *David Kirkland* 19 IBLA 305 (1975); or illness, *Billy Wright*, 29 IBLA 81 (1977); or death, *Fredres E. Laubaugh*, 24 IBLA 306

¹ In appellant Mattler's statement of reasons on appeal, Mattler states that he and Robert Gamble are the only two parties to the lease. BLM notes, however, that there are three record titleholders of oil and gas lease U-41028. They are Robert Gamble, Melbourne Concept, Inc., and appellant. The assignment of a one-third interest from Mattler and Gamble to Melbourne Concept, Inc., was approved by BLM effective Nov. 1, 1979.

(1976). Instances of simple forgetfulness, inadvertence, ignorance of the regulations, reliance on BLM courtesy billing notices, and similar occurrences do not excuse lack of diligence. Similarly, appellant's absence from the country and general unfamiliarity with the leasing process do not rise to the level of justification. *Benjamin T. Franklin*, 38 IBLA 291 (1978).

Accordingly, pursuant to the authority delegated to the Board of

Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed.

DOUGLAS E. HENRIQUES

Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

EDWARD W. STUEBING

Administrative Judge

April 8, 1981

APPEAL OF DYNADYNE, INC.

INTERIOR BOARD OF
CONTRACT APPEALS

IBCA-1329-1-80

Decided April 8, 1981

Contract No. H0133033, Bureau of
Mines.

Sustained in part.

1. Contracts: Construction and Operation:
Allowable Costs—Contracts: Construction
and Operation: Contract
Clauses

Where a cost-plus-fixed-fee contract expressly provides for the payment of finally negotiated overhead rates notwithstanding the foregoing provisions which include the limitation of cost provision, the Board finds that a claim for additional overhead costs is not subject to the limitation of the contract estimated costs.

2. Contracts: Construction and Operation:
Allowable Costs

Under a cost-plus-fixed-fee contract where indirect costs are disallowed as excessive or not directly related to the performance of the contract, the Board finds the determination of allowable costs to improperly apply the standard for direct costs to indirect costs and on review of the costs in question finds entitlement to a portion of the disallowed costs.

APPEARANCES: Donald A. Tobin, Attorney at Law, Sullivan & Beauregard, Washington, D.C., for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY
ADMINISTRATIVE JUDGE
LYNCH

In this appeal, Dynadyne seeks to recover \$32,261.70 in additional indirect costs under a cost-plus-fixed-fee (CPFF) contract. Appellant was a small business concern incorporated in 1972 with 98 percent of the stock owned by the President, Dr. Vennos and his wife. In April 1973, appellant responded to an announcement in the Commerce Business Daily with a proposal to the Bureau of Mines for developing an improved coal mine respirable dust sampler. The announcement contemplated a CPFF contract and on this basis, appellant proposed a total cost and fee of \$30,858 (GE-A).

A preaward survey of appellant's facility, accounting methods and credit rating resulted in the negotiation of an increased provisional overhead rate of 77 percent, the addition of a general and administrative rate of 18 percent, and a total CPFF of \$65,754. This was the second contract to be obtained by appellant. The first contract was a firm fixed price for \$28,600 with another agency of the Federal Government (AE-F3). The instant CPFF contract was awarded on June 27, 1973, with the term of performance to cover the succeeding 20 months. Modification No. 1, dated June 29, 1979, extended the completion date to June 30, 1976, increased the fixed fee to \$4,983, and increased the estimated cost to

\$71,874 for a total contract amount of \$76,857 (AF-E).

A final audit of the contractor's costs of performance is contained in a report dated Jan. 27, 1978 (AF-B6). The audit recommended allowing all of the total direct costs sub-

mitted for reimbursement by appellant in the amount of \$35,101. However, of the \$61,568 of indirect costs submitted for reimbursement, only \$34,901 was recommended for reimbursement. \$26,667 of indirect costs were questioned, as follows:

<i>Description</i>	<i>Costs for year ending 6/30/74</i>	<i>Costs for year ending 6/30/75</i>	<i>Total</i>	<i>Questioned</i>
Rents.....	\$5, 600	\$5, 600	\$11, 200	\$9, 266
Accounting & Audit.....		1, 042	1, 042	1, 042
Travel.....	1, 779	2, 236	4, 015	4, 015
Lab Supplies (R&D).....	2, 683	1, 209	3, 892	3, 892
Prof. Services (R&D).....	4, 226	4, 226	8, 452	8, 452

The contracting officer's final decision dated Jan. 15, 1980, determined that the amount for indirect costs to be paid by the Government would be \$36,773 instead of the \$61,568 then claimed by appellant, thus disallowing \$24,795 in added indirect costs. The decision does not reconcile the amount allowed and the category of costs for which the added \$1,872 was allowed. However, it is noted that the indirect expenses allowed by the contracting officer added to the direct expenses allowed equals the total estimated cost of \$71,874.

Appellant's claim presented at the hearing on July 29, 1980, and the subsequent briefs claims \$32,261 for indirect expenses in addition to the \$36,773 allowed by the contracting officer. The total of \$69,034.70 for indirect expenses claimed represents an increase of over \$7,000 for costs not addressed by the auditor in his report. These costs are primarily indirect wages and salaries and associated payroll taxes. It is

noted that a summary entitled "Corporate auditing (paid & accrued)" prepared by appellant's president and dated Aug. 2, 1977, was forwarded to the Government by letter of the same date (AF-C5). This summary of indirect expenses totals \$61,568. It includes indirect wages and salaries totaling \$10,186 for the contract period, an amount allowed by the auditor and the contracting officer. The summary also includes rent for the contract period in the total amount of \$11,200.

Discussion and Findings-Liability

The Government defends the disallowance of the claimed indirect expenses on the grounds that claimed costs exceed the total estimated cost specified in the contract, and that appellant failed to give the required notice of an overrun and secure the approval of the contracting officer for the added expenditures as required by the Limitation of Cost Clause (LOCC) of the contract. The LOCC provision relied

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on by the Government is contained in Clause 21 of the contract entitled "Costs and Payments."

The "Costs and Payments" clause of the contract contains four major paragraphs A through D, entitled respectively: "Estimated Costs," "Limitation of Costs," "Payments," and "Overhead Rates." Under the first paragraph, the Government agrees to pay the allowable costs in accordance with the Federal Procurement Regulations, provided that the total amount does not exceed the estimated total shown in the schedule. The second paragraph requires that the contractor give prior notice of any impending overrun of costs and limits the Government obligation to pay for costs incurred in excess of the estimated costs in the contract. The third paragraph provides for progress payments. The fourth paragraph contains the following language in the designated subparagraphs:

(1) Notwithstanding the foregoing provisions, the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties.

* * * * *

(5) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the contract, or at billing rates as provided in the contract, or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that period are established.

The fourth and final paragraph of the clause entitled "Overhead Rates" provides that "notwithstanding the foregoing provisions," the overhead rates shall be subject to a final negotiation and to appropriate adjustment when the final rates are established. There is no reference in the "Overhead Rates" paragraph to any limitation on the amount of such indirect costs so determined. The cases cited by the Government have no precedential value in this instance because the cited cases contain the usual Armed Services Procurement Regulation clauses, without an overriding "notwithstanding" provision to apply to finally determined overhead rates. The clear meaning of the phrase "notwithstanding the foregoing provisions" is to make the foregoing provisions inapplicable where there is a conflict with the overhead rate determining provision. In effect, the provisions made inapplicable include the limitation of cost provision, since it precedes the overhead rate determining provision and necessarily conflicts with it when the rate determined would result in costs over the contract estimated cost.

[1] Therefore, we find that the contract expressly excludes the claimed overhead costs from the cost limitation of the contract estimated costs.

Discussion and Finding-Quantum

In the instant case, the contract does not contain provisional rates

for overhead and general and administrative expenses, nor were final rates established. Instead, the auditors and the contracting officer treated each item of claimed indirect expense in the same manner as direct expenses and disallowed all or a portion of each item considered to be excessive or not directly related to the performance of the contract. In fact, the contracting officer's final determination allowed an arbitrary total dollar amount of overhead expenses without explaining the basis on which an increased allowance over that of the auditors was granted. The fact that the amount allowed exactly equalled the total estimated cost of the contract indicates that the individual items questioned by the auditors were not considered in detail to determine whether any portion of the questioned amounts should be allowed.

Additionally, it is noted that the treatment of overhead and general and administrative expenses in the same manner as direct expenses fails to accord any distinction between the categories of cost. The direct expenses of performing the contract are those costs which can be identified specifically with a particular final cost objective (FPR 1-15.202). Indirect costs are those which are incurred for common or joint objectives and therefore are not readily subject to treatment as a direct cost (FPR 1-15.203). The latter category generally includes such items as facility rental and utility costs which cannot be easily identified with each project, but which are included in the overhead

cost pool and are distributed over all projects as a percentage of the direct costs of the project. Here, a fledgling organization had a single CPFF contract during the performance period, but the indirect expenses incurred were based upon the hopes of acquiring and performing additional contracts in the same facility. The fact that the expectation of additional contracts did not materialize and the organization ceased to exist due to health problems of the president, does not warrant the application of the direct cost test to indirect expenses for a determination of allowability.

We now turn to a consideration of the disallowed costs. Respecting rental costs, the appellant claims that discussions with the Government contract negotiators assisting in establishing the provisional overhead rate included an agreement that rent for half of his residence used for contract performance would be charged at \$600 per year. The auditors considered this amount unreasonable and allowed only \$1,934 for 24 months on the basis of depreciating the 50 percent of the residence used for performance. When the contracting officer was queried about this method at the hearing, he termed the resulting monthly rent of about \$81 per month, "ridiculous" and indicated a willingness to negotiate further (Tr. 141). The contracting officer testifying was the official signing the contract with appellant even though he had not participated in negotiating the contract. The Government negotiators of the contract

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were not available at the time of the hearing, and the contracting officer could only state that he was not aware of any advance agreement on rent and that the file does not disclose such an agreement. Contrasted with this testimony, appellant's president stated that the negotiators did not object when he offered the rental figure of \$600 per month (Tr. 23). He further testified that the Government had requested that he obtain rental quotations in the immediate vicinity, and that this resulted in a rate of \$467 per month (or \$11,200 for 24 months). As noted, *supra*, appellant's president used the latter amount in accruing rent on his records (AF-C5). The \$467 per month rental amount is shown on the Jan. 27, 1978, audit report as representing the amount appellant claimed for reimbursement. This amount appears to be the amount that was before the contracting officer in January 1980 when he made the final decision on appellant's claim. The claim of \$600 per month for rent was presented at the hearing with the allegation of an advance agreement to include this amount in overhead for rent. Appellant's testimony regarding the existence of an agreement on rent at \$600 per month is refuted by his own actions to accrue rent on his books at \$467 per month. The records of the appellant submitted to the Government for audit and to the contracting officer for decision are accorded greater weight than the uncorroborated claim of an advance agreement for a higher rental

amount. Therefore, we find that a reasonable rent for inclusion in the indirect expenses is \$467 per month for 24 months or \$11,208.

Appellant contends that \$1,284 in accounting and auditing costs were improperly disallowed as occurring after the contract performance period in 1976. Appellant argues that \$1,042 of such costs were incurred prior to the end of June 1976, the extended completion date, and that all of such costs were directly related to this contract and incurred solely to substantiate appellant's claims. Here appellant cites *Appeal of Recon Systems, Inc.*, IBCA 1214-9-78 (Sept. 25, 1979), 86 I.D. 478, 79-2 BCA par. 14,058, *reconsideration denied*, 80-1 BCA par. 14,245 to claim costs incurred subsequent to the performance period because they were incurred to satisfy demands of the Government. The situation here is distinguishable, in that, the work required in the *Recon* case was necessary to perform the contract. Here, the accounting and auditing costs are costs incurred to prepare and present a claim against the Government, and are no more allowable than attorney fees in the prosecution of a claim. In addition, all indirect costs claimed by appellant, audited by the Government, and partially denied by the contracting officer were incurred in the 2 years of performance prior to June 30, 1975. For reasons not explained, appellant did not claim indirect expenses for the year ending June 30, 1976, during the performance of the

work required by modification No. 1. No rental costs, wages and salaries, or other indirect expenses are claimed. We find no reason to exempt this one expenditure from appellant's apparent agreement to limit his claim for work in the year ending June 30, 1976, to direct costs. Appellant does contend that this expense is in the nature of a direct expense in that it would not have been incurred except for the existence of the instant contract. However, the accounting and auditing expenses remain as indirect expenses incurred to prepare and present a claim. Such costs are disallowed (FPR 1-15.205-31).

Travel expenses of \$2,199 are claimed as allowable indirect expense. The contract required that appellant make a survey of similar instruments for review by the Government before commencing to develop the contract instruments. The contract scope is therefore broadened to encompass a need to keep abreast of concurrent developments. Even if this were not so, a reasonable amount of travel to enable the principals of a firm to keep informed of developments in the firm's field of endeavor is properly considered as overhead expenses. The maintenance of current knowledge of expertise is a normal operating cost and the travel costs are allowed (FPR 1-15.206-46).

Disallowed costs for laboratory supplies in the amount of \$3,892 are claimed by appellant. Appellant described these supplies as small components, screws, resistors or

transistors, machine lubricants, and similar materials necessary to the general running of a laboratory. Appellant stated that the laboratory was well stocked at the beginning of the contract performance (Tr. 46). The costs claimed are the costs of indirect materials purchased during contract performance. Various methods of charging the cost of such materials to contracts are accepted accounting practices as long as the method used does not result in an undue burden to Government contracts. The accounting practice should assure that each project will bear its fair share of the cost of the supplies. Appellant testified that about 20 percent of the supplies may have been used in independent research and development (Tr. 45). Additionally, when such quantities of supplies are purchased in addition to the direct material, there is bound to be an unused portion. When a sizeable inventory remains or the contractor no longer has Government contracts to perform, an inventory adjustment may be taken. (*See Accounting Guide for Defense Contracts*, Paul M. Trueger, 5th Ed., pages 202 and 203.) Inasmuch as appellant charged all the purchases during the contract performance period to this contract and the entire amount was disallowed, the record contains little information on which a determination of an appropriate allowance can be based. However, considering the well-stocked bins shown on appellant's exhibit 16, and the other instruments appellant was

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developing apart from the contract work (AE-17-20), we find that a reasonable allocation of laboratory supply expense to the contract to be one third of the total expenses. We allow \$1,298 for laboratory supplies.

Appellant claimed \$7,016 for indirect professional expenses. Appellant's president testified that a portion of these costs were incurred as expenses of the formation of Dynadyne (Tr. 108). Organizational expenses are unallowable (FPR 1-15.205-23). Still other costs were associated with the independent research and development projects of appellant (Tr. 109-114). Such costs may be allowed, but are required to be equitably applied to all projects of the contractor, including the independent research and development tasks (FPR 1-15.205-31). Appellant's president testified that regarding the contract work, he was virtually a one-man operation (Tr. 32-35) doing the designing, drafting, machining, assembly, administration, and other tasks. The need for professional assistance costing approximately 20 percent of direct costs is not explained sufficiently to permit a determination that all the costs were reasonably incurred. Also, the president testified concerning five or six other instruments developed with the aid of others during the contract period and charged to this category of costs (Tr. 54-62). These projects must bear a pro rata portion of these expenses. In view of the difficulty in identifying the costs asso-

ciated with organization and considering the number of additional independent developments going on concurrently, we allow \$1,000 of indirect professional expenses as a reasonable pro rata portion of the allowable expenses to be charged to the instant contract.

Appellant claims \$7,286.70 for wages and payroll taxes should be allowed for indirect expenses in addition to the \$10,186 presented to the auditors for reimbursement and allowed by the contracting officer. In the posthearing brief, appellant's counsel argues that the president's salary was agreed upon at about \$25,000 per year and that reimbursement for the 2 years should total over \$50,000. The brief notes that the reason for the lower recorded costs is that the president worked at many tasks other than president, and that these tasks of draftsman, machinist, etc., were charged at lower rates. The added costs are presented on appellant's exhibit 9 and discussed by the president at Tr. 97-100 as time reflected on the time and attendance records for corporate management and contract administration. It is noted that exhibit 9 was prepared with the assistance of an accountant subsequent to the time for which the indirect expenses are claimed. Appellant contends that the auditors did not consider these expenses because they did not review the time and attendance records. Exhibit 9 shows consistent entries of 44 hours per month for company manage-

ment and 24 hours per month for contract administration. The time and attendance records said to be the original record supporting this summary sheet are not in evidence. Such records were not examined by the auditors according to the president, who states that he does not know how the auditors arrived at the indirect wages and salaries allowed.

At the hearing, the Government made a motion to dismiss paragraph 25 of the complaint which contained these costs on the basis that the costs had not been presented to the contracting officer for his consideration and were not properly before the Board. Appellant countered that the costs had been presented to the Government in February 1980 (after filing of this appeal). The motion was denied in order that the entire claim could be presented in one hearing, noting that the contracting officer could at any time before decision by the Board reconsider and revise his decision.

Appellant's president testified that his educational background included five degrees, including an MBA in business administration from the Wharton School of Business. He did not include these additional amounts in his corporate audit report of Aug. 2, 1977, except by reference to additional costs in an explanatory note. The Board is not persuaded that a knowledgeable individual such as the president would not present to the auditors in

his claim for reimbursement the best evidence of these costs. These records have not been offered into evidence. Instead, only a summary sheet is provided, which shows monthly entries of 44 hours and 24 hours respectively for company management and contract administration. The president testified that he worked long hours in his various roles of a one-man operation, with the result that he often got only 3 hours sleep (Tr. 35, 81). It is incredulous on the record before us to accept that a single individual engaged in a multitude of business and operating tasks each day, maintained a methodical regimen of spending the same number of hours each day for company management and contract administration.

The fact that much of the president's time was billed as draftsman or machinist at lower rates than that of president or engineer simply shows that the contract performance requirements dictated the use of his time in these capacities. The inclusion of a higher rate for engineer or president in the provisional overhead rate was not an assurance that he would be paid this full annual salary for the life of the contract. Instead, it permitted him to charge the contract at a higher hourly rate for the hours during which he was performing the higher paid function. We find that the additional costs claimed for indirect wages and salaries are not supported by the record.

April 8, 1981

Summary and Conclusion

[2] Upon appeal of a decision of the contracting officer to the Board, the Board considers the issues presented de novo and is not bound by the decision of the contracting officer in any respect. Therefore, we accept only the direct and indirect

costs allowed by the audit before giving effect to our findings on the claimed additional costs. The amount arbitrarily allowed by the contracting officer in the final decision is not related to any specific category of costs and is disallowed as unsupported by the record. Our findings are summarized as follows:

Direct costs allowed by audit.....		\$35, 101
Indirect costs allowed by audit.....	\$34, 901	
Rent \$11,208 less \$1,934 allowed by audit.....	9, 274	
Added accounting and auditing costs.....	0	
Travel costs.....	2, 199	
Laboratory supplies.....	1, 298	
Professional expenses.....	1, 000	
Added indirect wages and salaries.....	0	
Total indirect expenses.....		\$48, 672
Total direct and indirect costs.....		83, 773
Contract estimated costs.....		71, 874
Added indirect costs allowed by Board.....		\$11, 899

Having found that appellant's claim for overrun costs is not barred by the LOC provision of the contract, we find that appellant is entitled to \$11,899 for additional indirect expenses above the contract estimated costs of \$71,874, plus interest to be computed by the contracting officer in accordance with the unnumbered clause of the contract entitled "Payment of interest on contractor's claims."

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

**APPEAL OF MARTIN K. EBY
CONSTRUCTION CO., INC.**

IBCA-1389-9-80

Decided April 8, 1981

Contract No. 8-07-DC-07292, Water and Power Resources Service.

Dismissed.

1. Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Motions—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Contracting Officer

A claim asserted under the Changes clause for increased costs resulting from actions of the President in decontrolling

the price of heavy crude oil is dismissed as being outside the jurisdiction of the Board since the President's action was a sovereign act taken as part of the program to maintain or increase production of heavy crude oil.

APPEARANCES: Jess Myers, Vice President & General Counsel, Martin K. Eby Construction Co., Inc., Wichita, Kansas, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY
CHIEF ADMINISTRATIVE
JUDGE McGRAW*

*INTERIOR BOARD OF
CONTRACT APPEALS*

The Government has moved to dismiss the instant appeal on the ground that the Board is without authority to allow claims for increases in the cost of fuel required for the performance of the contract and attributed to actions of the President in decontrolling the price of heavy crude oil by the issuance of an Executive order. The claims submitted by the appellant on behalf of itself or on behalf of its subcontractor, S & D Paving Co., Inc., have been presented by the appellant as claims cognizable under General Provision 3 (Changes) of the contract.

The appellant did not avail itself of the opportunity to file an opposition to the Government's motion to dismiss and has made no request for a hearing.¹ Our ruling upon the

motion has been made upon the basis of the written record. Reference to exhibits are to those contained in the appeal file.

Discussion

The contract was entered into under date of Nov. 23, 1977, in the estimated amount of \$22,232,407. It calls for the construction and completion of the modification of Grand Coulee Feeder Canal in accordance with the terms of Specifications No. DC-7292 (Appeal File Exhibit No. 1, hereinafter referred to by the abbreviation AF followed by reference to the particular exhibit number involved). Prepared on standard forms for construction contracts, the contract includes the General Provisions set forth in Standard Form 23-A (April 1975 edition). By Order for Changes No. 9, dated Aug. 10, 1979, the time for completion of the contract work has been extended to and including Apr. 30, 1981 (AF 8).

In a letter to the Bureau of Reclamation (now Water and Power Resources Service), under date of June 19, 1979, the contractor states:

As you know, the President, by executive order, initiated the process of removing price controls on petroleum products, as of June 1, 1979. This act of the Government could not have been anticipated, (or) contemplated in Section 1.5.1, Division 1—General Requirements, when we submitted our bid. This act of the Government will directly cause an increase in fuel costs for our contract.

and the appellant has not otherwise advised the Board in any way as to the facts and circumstances it considers pertinent to the issues raised by the appeal.

¹ The notice of appeal dated Aug. 25, 1980, states that "[t]he decision or findings of fact is erroneous because: (Facts and circumstances to follow)." No Complaint was filed

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Our fuel costs have already been increased by our suppliers, since the President announced his intended action, by approximately \$.44 per gallon, in anticipation of the actual act of the Government. We submit, therefore, that any and all increases in our fuel costs for this contract since the date of the President's announcement² are directly attributable to the act of the Government.

Please be advised that we regard this act of the Government as a constructive change order to our contract. We will assert a claim under the provisions of GP 3 of the contract as soon as a reasonably accurate estimate of the equitable adjustment can be prepared.

(AF 7).

By a letter to the Bureau dated July 11, 1979 (AF 6), the contractor revised its letter of June 19, 1979, by substituting the reference GP 13 of the General Provisions for the reference to Sec. 1.5.1, Division I—General Requirements in the June 19, 1979, letter. The cited provision reads as follows:

13. Conditions Affecting the Work

² Except for the reference to the President's announcement in the contractor's letter of June 19, 1979, the record does not disclose what action the President may have taken with respect to decontrolling the price of petroleum products prior to the issuance of Exec. Order No. 12153 on Aug. 17, 1979, 44 FR 48949.

The action of the President referred to by appellant as having occurred on or about June 1, 1979, may have been an announcement by him that he contemplated decontrolling the price of certain petroleum products within the foreseeable future. Concerning this aspect of the case, Government counsel states: "There was no executive order of which we are aware promulgated prior to June 1, 1979, decontrolling the price of petroleum products. The President did, however, on August 17, 1979, promulgate Executive Order 12153 decontrolling the price of heavy crude oil. * * * This point need not be labored, however, because even if all of Appellant's allegations be taken as true, he cannot recover" (Motion to Dismiss, p. 2).

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

(AF 1a).

On Mar. 24, 1980, the contractor transmitted to the Water and Power Resources Service a letter from its asphalt paving subcontractor, S & D Paving Co., Inc., dated Mar. 17, 1980, outlining a claim for additional costs due to what is described by appellant as "unforeseen and unpredictable petroleum products cost increases." The claim submitted by the subcontractor was in the amount of \$57,549.24. With the contractor's markup added, however, the claim as presented to the Government was in the amount of \$71,194.66 (AF 5).

In a letter dated May 14, 1980, the Water and Power Resources Service advised the contractor that neither its claim nor that of its subcontractor was considered to be meritorious, since "[c]hanges made to the contract under Clause No. 3 of the General Provisions of the contract relate to acts of the contracting officer or Government in its contractual capacity and do not apply

to Presidential actions or other acts of the Government in its sovereign capacity" (AF 4). The same rationale was the basis for denying the contractor's claim and that of its subcontractor in the decision from which the instant appeal was taken (AF 2).

Addressing the appellant's claims in the motion to dismiss, Government counsel asserts (i) that the Executive order upon which the claims are based was a sovereign act of the President of the United States exercising his powers under the Emergency Petroleum Allocation Act of 1973,³ and (ii) that under well established principles of Government contract law the Government is not liable to the contractor for any increased costs resulting from a sovereign act of the Government. Fundamental to the Government's position is the assertion that if all of appellant's allegations are accepted as true and the

assumption is made that the President's actions in decontrolling the price of heavy crude oil resulted in increased fuel costs to the contractor, the appellant would still have failed to state a valid claim under the contract. Elaborating upon this portion, the Government states:

[A]ppellant relies solely on the acts of the President. The President took the step of decontrolling certain heavy crude oil as part of his energy program to increase production of crude oil. (EO 12153 1-102). This was a public and general act for the general good issued in the exercise of the sovereign power of the United States for which the Government is not liable. *Anthony P. Miller v. United States*, 161 Ct. Cl. 455, 472 (1963), cert denied 375 U.S. 879 (1963) * * *.

(Government Motion to Dismiss, pp. 3, 4).

While the rationale for the claims asserted has not been fully articulated, appellant's position appears to be that the actions the President took in decontrolling the price of heavy crude oil could not have been anticipated at the time of bidding; that such actions were a departure from the basis of the bargain between the parties; and that the action of the President in decontrolling the price of crude oil should be treated as a constructive change order to the contract. To support its contention that the action of the President could not have been anticipated at the time of bidding, the appellant points to Clause No. 13 (text, *supra*) of the General Provisions. In *McNamara Construction of Manitoba, Ltd. v. United States*, 206 Ct. Cl. 1, 6 (1975), however, the Court of

³ In especially relevant part Exec. Order No. 12153, dated Aug. 17, 1979 (44 FR 48949), and captioned "Decontrol Of Heavy Oil," reads as shown below:

"By the authority vested in me as President by the Constitution and statutes of the United States of America, including the Emergency Petroleum Allocation Act of 1973, as amended (15 U.S.C. 751 *et seq.*), and notwithstanding the delegations to the Secretary of Energy in Executive Order No. 11790 * * * it is hereby ordered as follows:

"1-101. Effective August 17, 1979, prices charged in the first sale of heavy crude oil are exempted from price controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended. * * *

"1-102. The Secretary of Energy, or his delegate, shall expeditiously conduct a public inquiry as to what other types of heavy crude oil, if any, should be exempted from price controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, in order to maintain or increase production of such crude oil."

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Claims construed a clause identical to Clause No. 13 of the instant contract as placing responsibility upon the contractor to take steps reasonably necessary to ascertain the general and local conditions which could affect the work or the cost thereof.⁴

In the case before us the contract was entered into in November of 1977 or approximately 3 years after the enactment of the Emergency Petroleum Allocation Act of 1973 providing for the imposition of price controls (n. 3, *supra*). The appellant has not even alleged that there was any understanding or agreement between the parties as to how long price controls applicable to heavy crude oil at the time of bidding would remain in effect. Absent a showing that an agreement of this nature was reached and then breached by the President decontrolling the price of heavy crude oil with adverse consequences to the contractor, the Board concludes that the risk of mistake arising from the appellant's investigation of the general and local conditions affecting the contract work remained with the appellant. (n. 4, *supra*).

The appellant's reliance upon the Changes clause as the vehicle for recovery is also considered to be misplaced. That clause provides for an equitable adjustment in the

contract price when the contracting officer orders changes in the work within the general scope of the contract. The contractor has not alleged that the contracting officer (or anyone purporting to act for him) gave an order, issued a directive or took any other action which increased the cost of performing the contract work; nor is there any allegation that the costs for which claim has been made arose as a result of the contractor being required to perform the contract work in a manner different than was contemplated at the time of bidding.

The Government concedes that the actions the President took in decontrolling the price of heavy crude oil in the summer of 1979 did materially increase the amount the contractor was required to pay for fuel required for the performance of the contract. The actions of the President upon which the claims are based involve or are related to the promulgation of Exec. Order No. 12153, dated Aug. 17, 1979, under the authority of the Emergency Petroleum Allocation Act of 1973. The appellant has not contended that the action of the President in decontrolling the price of heavy crude oil was other than a public and general act for the general good issued in the exercise of the sovereign power of the United States.⁵

⁴In *McNamara* (text, *supra*) the Court of Claims stated at p. 7: "[T]he contractor carries the risk of mistake arising from his investigation of general and local conditions which can affect the work or the cost thereof."

⁵See *Tony Downs Foods Co. v. United States*, 209 Ct. Cl. 31, 36, 37 (1976), in which the Court of Claims stated:

"Plaintiff's failure to challenge the character of the Executive Orders herein at issue renders unnecessary an extended discussion of

—Continued

Decision

There is nothing in the record before us to indicate that the appellant distinguishes in any way between acts of the United States in a contractual capacity and acts of the United States in a sovereign capacity or that with respect to monetary claims it recognizes the legal consequences of a particular act of the United States being placed in one category or the other. The distinction was recognized by the Supreme Court in *Horowitz v. United States*, 267 U.S. 458, 461 (1925), however, where the Court stated:

It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming v. United States*, 1 Ct. Cls. 190, 191; *Jones v. United States*, 1 Ct. Cls. 383, 384; *Wilson v. United States*, 11 Ct. Cls. 513, 520.^[9]

their public and general nature or that they were unquestionably promulgated for the general good. Suffice it to say that in *McCrary v. United States*, 114 Ct. Cl. 12, 84 F. Supp. 368 (1949), the court found the Government immune from damages resulting to a contractor from the imposition of an Executive Order labor freeze, akin to the instant Executive Order price freeze, holding such damages to be unrecoverable as *damnum absque injuria*. *McCrary v. United States*, *supra*, 114 Ct. Cl. at 36, 84 F. Supp. at 371.⁹

⁹ Immediately thereafter the Supreme Court stated at p. 461:

"In the *Jones Case*, *supra*, the court said: 'The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it

The rule of sovereign immunity is still followed by the Court of Claims and has been applied by the various boards of contract appeals in a variety of situations. See, for example, *Granite Construction Co.*, IBCA-947-1-72 (Nov. 13, 1972), 79 I.D. 644, 72-2 BCA par. 9,762, where this Board dismissed a contractor's claim where it found that the act of the President in impounding funds appropriated by Congress was a sovereign act for which no relief was available under the Suspension of Work clause. See also *Blake Construction Co., Inc.*, GSBICA No. 4118 (May 23, 1975), 75-1 BCA par. 11,278, in which the General Services Board denied a construction contractor's claim under the Change clause for the increased costs attributable to the lifting of the wage and price controls on the ground that the United States cannot be held liable for obstruction of a particular contract resulting from its public acts as sovereign.

In this appeal there are no material facts in dispute. For the purposes of the motion to dismiss the Government appears to concede that all of the additional costs for which claim has been made resulted from the President decontrolling the price of heavy crude oil in the summer of 1979. In support of the mo-

enters with private persons. * * * In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

April 9, 1981

tion, the Government asserts that the President's actions in this case constitute public and general acts for the general good in the exercise of the sovereign power of the United States for which the Government is not liable. Although the assertions so made were accompanied by citations to authority, the appellant has filed no response. Nowhere in the record has the appellant addressed the defense the Government has raised of sovereign immunity. The text of the Executive order decontrolling the price of heavy crude oil indicates that the actions taken by the President were of a public and general nature for the general good in the exercise of the sovereign power of the United States and that they were taken as part of the energy program to maintain or increase production of heavy crude oil. There is nothing in the record to indicate otherwise.

The contract contains no price escalation provision. Neither the change clause nor any other clause contained in the contract provide a basis for granting the appellant relief. Absent such a clause, the Board has no jurisdiction⁷ over the ap-

peal. The appeal is therefore dismissed.⁸

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

ESDRAS K. HARTLEY

54 IBLA 38

Decided April 9, 1981

Appeal from decision of Arizona State Office, Bureau of Land Management, rejecting oil and gas lease offer A 12541.

Set aside and remanded.

1. Oil and Gas Leases: Lands Subject to—Public Lands; Leases and Permits—Withdrawals and Reservations: Effect of

Public domain land withdraw or reserved is presumed to be available for oil and gas leasing unless the withdrawal or reservation specifically provides otherwise.

2. Oil and Gas Leases: Discretion to Lease

A decision of BLM refusing to issue an oil and gas lease in the exercise of the discretionary authority of the Secretary of the Interior over oil and gas leasing will be affirmed where it sets forth the reasons therefore and the facts of record support the conclusion that refusal to lease is in the public interest.

⁷ It is not possible to say whether the appellant's claims may also be predicated upon the theory of mutual mistake of fact. Assuming this to be the case, the appellant has made no effort to show that it would be entitled to relief on that ground. See *McNamara Construction of Manitoba, Ltd. v. United States*, *supra* at 4-13 (1975). As the appellant has failed to elect to have its claims considered under the Contract Disputes Act of 1978 (P.L. 95-563, 92 Stat. 2383, 41 U.S.C.A. §§ 601-613 (West Supp. 1980)), however, the Board would have no jurisdiction to consider a mutual mistake of fact claim in any event.

⁸ *Granite Construction Co.* (text, *supra*).

3. Oil and Gas Leases: Discretion to Lease—Oil and Gas Leases: Stipulations

Rejection of an oil and gas lease offer is a more severe measure than the most stringent stipulations and the record supporting a decision rejecting a lease offer in the public interest should ordinarily reflect consideration of whether leasing subject to clear and reasonable stipulations would adequately protect the public interest concerns of the surface management agency.

4. Oil and Gas Leases: Consent of Agency—Oil and Gas Leases: Discretion to Lease—Public Lands: Leases and Permits

Where public domain land is withdrawn or reserved for administration by another agency for a particular purpose, BLM should properly consider the recommendations of the surface management agency regarding lease issuance and any required stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for appellant.

OPINION BY ACTING ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Esdras K. Hartley appeals from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated May 16, 1980, rejecting his noncompetitive oil and gas lease offer, A 12541, for sec. 10,

T. 24 S., R. 28 E., Gila and Salt River meridian, Arizona. The land was reserved by Exec. Order No. 2138 of Feb. 19, 1915, for use by the Arizona National Guard as a rifle range. The BLM decision was based upon a determination by the Adjutant General of the Arizona National Guard that it would not be in the best interest of the National Guard to allow mineral leasing on the rifle range.

Appellant filed his oil and gas lease offer on Oct. 1, 1979, specifying that "[n]otwithstanding anything contained in subject offer to lease, offeror is applying for a sub-surface lease only inasmuch as the surface is reserved for military purposes for use of the National Guard of Arizona as a rifle range." On Oct. 24, 1979, BLM issued its first decision rejecting appellant's offer in which it stated:

The Adjutant General was contacted for input in regard to use of the lands for oil and gas leasing. A response to the request was received and we quote "It is determined by this Headquarters that it would not be in the best interest of the National Guard to allow mineral leasing on the above-mentioned rifle range."

The BLM decision further recited that prior to issuance of leases, the Geological Survey must concur with the stipulations attached to each lease. BLM contended that it is a practice of that agency to deny requests for clearance on stipulations excluding surface occupancy on the entire leasehold. BLM asserted in the decision that such a stipulation would effectively preclude

mineral development and therefore the tract should not be leased.

Appellant requested and was granted extensions of time to seek a change in the Adjutant General's recommendation. On May 12, 1980, the Contract Officer, Office of the Adjutant General, informed appellant that the Division of Military Affairs, State of Arizona, objected to oil and gas leasing of the lands in issue. He explained that the closest range that could be used by units currently utilizing the lands in issue is about 60 miles distant. He noted that such travel would be prohibitive with the fuel allowances provided. On May 16, 1980, BLM rejected appellant's oil and gas lease offer for the reasons stated in the decision of Oct. 24, 1979.

On appeal, appellant asserts that issuance of an oil and gas lease on the subject lands, with appropriate protective stipulations, is not inconsistent with and will not materially interfere with use of the lands for military purposes by the Arizona National Guard as a rifle range. Appellant contends in the statement of reasons for appeal that where the surface of public domain lands is administered by an agency other than BLM, the recommendation of that agency as to oil and gas leasing is advisory in nature and the ultimate decision of whether or not to lease remains with the Secretary.

Appellant acknowledges the proposition that BLM may refuse to issue a lease if the record supports the conclusion that the refusal

to lease is required in the public interest. However, appellant contends that there are no facts of record in this case to support the conclusion that leasing is not in the public interest and there is no indication that BLM independently determined that rejection was required.

Appellant further contends that BLM has improperly failed to give any consideration to the possibility of accepting the lease offer subject to reasonable stipulations. Counsel for appellant states that even if BLM determines that no accommodation can be made for surface access by the lessee without interfering with the use of the surface by the National Guard, appellant is willing to accept a lease with a no surface occupancy stipulation.

Accordingly, the issue presented by this appeal is whether a decision of the BLM rejecting an oil and gas lease offer in the exercise of the Secretary's discretionary authority will be affirmed as not being arbitrary, capricious, or an abuse of discretion in the absence of reasons supported by facts of record establishing that refusal to lease is required in the public interest and that clear and reasonable stipulations would not be sufficient to protect the public interest concerns raised by the surface management agency.

[1] Unless a withdrawal or reservation of public domain land specifically provides otherwise, the land withdrawn or reserved is presumed to be available for oil and gas leasing under secs. 1 and 17 of

the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181, 226 (1976). *Joseph C. Manga*, 9 IBLA 319, 320 (1973); see *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

[2] Sec. 17 of the Act, 30 U.S.C. § 226 (1976), requires that if an oil and gas lease is issued for lands not within the known geological structure of a producing oil or gas field, it must go to the first qualified applicant, but "it left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, *supra* at 4; *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969). Further, the discretionary authority of the Secretary of the Interior to refuse to issue oil and gas leases for public domain lands applies even where the lands have not been withdrawn from operation of the mineral leasing laws. *Udall v. Tallman*, *supra*; *Robert P. Kunkel*, 41 IBLA 77 (1979). But cf. *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980) (withholding action on substantial numbers of lease offers embracing very large tracts of public domain for extended period may be construed as a withdrawal under sec. 103 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(j) (1976)). A decision of BLM refusing to issue a lease will be upheld provided it sets forth the reasons for doing so and provided the background data and facts of record support the conclusion that the refusal is required in the public interest. *Robert P. Kunkel*, *supra*

at 78; see *Cartridge Syndicate*, 25 IBLA 57 (1976). No weight is attached to conclusory declarations of what is required in the public interest where supporting data is not submitted. See *James O. Breene, Jr. (On Reconsideration)*, 42 IBLA 395, 399 (1979).

[3] BLM has the authority to require execution of special stipulations to protect environmental and other land use values when deciding to issue a lease. Rejection of an oil and gas lease offer is a more severe measure than the most stringent stipulations and the record where leasing has been refused should ordinarily reflect that BLM has considered whether leasing subject to clear and reasonable stipulations would be sufficient to protect the public interest concerns raised by the surface management agency. *Robert P. Kunkel*, *supra* at 79; see *Howard L. Ross*, 49 IBLA 87 (1980); *James O. Breene, Jr. (On Reconsideration)*, *supra*.

[4] Where public domain land is withdrawn for administration by another agency for a particular purpose, BLM should properly consider the recommendations of the surface management agency regarding lease issuance and any required stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values. See *Stanley M. Edwards*, 24 IBLA 12, 83 I.D. 33 (1976); *Esdras K.*

April 9, 1981

Hartley, 23 IBLA 102 (1975).¹ In a recent case this Board considered an appeal from rejection of an oil and gas lease offer for land withdrawn for use by the Arizona National Guard as a rifle range where rejection was based on a determination of a Guard official that it would not be in the best interest of the National Guard to allow mineral leasing of the land. The Board held that rejection of an oil and gas lease offer for public domain lands withdrawn for the Arizona National Guard for use as a rifle range, based solely on the summary objection of the National Guard, where the record is devoid of any indication that BLM or Guard officials made an independent determination whether leasing as in the public interest, is not a proper exercise of discretion. *Howard L. Ross*, *supra* at 88.

This is consistent with the statutory provision cited in *Howard L. Ross*, *supra*, to the effect that no disposition of minerals on public lands withdrawn for use by any agency of the Department of Defense shall be made "where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved." 43 U.S.C. § 158

(1976). Compatibility of leasing with the military purposes for which the land is withdrawn and whether such military uses might be protected by stipulations are certainly important (and perhaps dispositive) factors in determining whether leasing is in the public interest. However, no decision rejecting a lease offer can be sustained on the mere conclusory assertion that leasing is inconsistent with military use of the withdrawn lands. Accordingly, in the present context we need not reach the issue of whether the Arizona National Guard constitutes an agency of the Department of Defense which must consent to lease issuance under the statutory provision. 43 U.S.C. § 158 (1976).²

BLM rejected the offer in issue on the basis of the conclusory determination of the Adjutant General that it would not be in the best interest of the National Guard to allow mineral leasing on the rifle range. The only reason the National Guard offered for recommending against leasing the land was that it would be an inconvenience and a financial hardship for the Guard to travel to another rifle range 60 miles

¹ This should be distinguished from leasing of minerals in acquired lands of the United States under sec. 3 of the Mineral Leasing Act for Acquired Lands, *as amended*, 30 U.S.C. § 352 (1976), which requires the consent of the agency having jurisdiction over the lands containing such minerals. See *Duncan Miller*, 6 IBLA 216, 79 I.D. 416 (1972).

² As a general rule the National Guard is the organized militia of the states and constitutes a state governmental agency. 53 Am. Jur. 2d, *Military and Civil Defense* § 38 (1970); see *Mela v. Callaway*, 378 F. Supp. 25 (S.D.N.Y. 1974). Members of the Army National Guard of the United States are not in active Federal service and not part of the regular Army (under the Department of Defense) except when ordered into Federal service under law. 10 U.S.C. §§ 3062(c), 3495 (1976); 53 Am. Jur. 2d, *Military and Civil Defense* § 15 (1970); see *Satcher v. United States*, 101 F. Supp. 919 (W.D.S.C. 1952).

from the one at issue. The record does not disclose how much of the 640 acres of land is actually used as a rifle range and how frequently the range is used. There is no indication in the record of consideration by either BLM or the National Guard of whether surface use could be restricted to certain portions of the lease in a way which would avoid interference with use of the land by the National Guard.

Finally, BLM has misconstrued this Board's holding regarding issuance of oil and gas leases subject to no surface occupancy stipulations covering the entire lease area. Although as a general rule a stipulation should not be so restrictive as to preclude any right of enjoyment and a lease should not be issued under such circumstances, this Board has recognized an exception where, as in this case, the offeror manifests his willingness to accept a lease embodying those stringent conditions. *Cartridge Syndicate*, *supra* at 59.

Accordingly, the case will be remanded to BLM to consult further with the National Guard and to make a determination supported by the record regarding whether lease issuance is incompatible with the military use to which the land is being devoted and whether protective stipulations may be utilized as a means of eliminating any such incompatibility. The decision on remand should given reasons supported by information of record in the case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside and the case is remanded to that office for further consideration consistent with this decision.

C. RANDALL GRANT, JR.
Acting Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

JAMES L. BURSKI
Administrative Judge

TETLIN NATIVE CORP.

5 ANCAB 197

Decided April 14, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-20518, Sept. 24, 1980.

Motion to dismiss portion of appeal sustained.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The Board has jurisdiction to decide whether the Bureau of Land Management, in issuing a decision to convey land pursuant to ANCSA, erred by failing to identify and adjudicate an alleged third-party interest derived from a source other than the Federal Government or the State of Alaska.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Sec. 14(g) of ANCSA mandates identification, in conveyance documents issued pursuant to ANCSA, of only those interests issued by the United States or the State of Alaska. Alleged third-party interests derived from sources other than the United States or the State of Alaska are not within the scope of § 14(g) of ANCSA.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance

Departmental policy expressed in Secretary's Order No. 3029 and converted into the Departmental Manual at 601 DM 2.3 and 2.4 does not require the Bureau of Land Management to identify or adjudicate alleged third-party interests derived from sources other than the Federal Government or the State of Alaska.

APPEARANCES: Frederick H. Boness, Esq., Preston Thorgrimson, Ellis & Holman, for Tetlin Native Corp.; Elizabeth S. Ingraham, Esq., for Doyon, Limited; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Carl Winner, Esq., Robertson, Monagle, Eastaugh and Bradley, for Resource Associates of Alaska (listing limited to persons addressing the issue decided).

**OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD**

Summary of Appeal

This appeal involves in part the question whether the Bureau of Land Management need identify and adjudicate, prior to conveyance of the subject lands pursuant to ANCSA, a mineral lease executed by the grantee Native corporation and a third party.

The Board holds that the Bureau of Land Management need neither identify nor adjudicate said mineral lease prior to conveyance of the subject land pursuant to ANCSA. Said lease is not within the scope or subject matter of § 14(g) of ANCSA. Departmental policy expressed in Secretary's Order No. 3029 and converted into the Departmental Manual at 601 DM 2.3 and 2.4 does not require the Bureau of Land Management to identify or adjudicate third-party interests derived from sources other than the United States or the State of Alaska.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision dismissing a portion of the appeal of Tetlin Native Corp. from the above-

designated decision of the Alaska State Office, Bureau of Land Management.

Procedural Background

On Nov. 15, 1973, pursuant to § 19(b) of the Alaska Native Claims Settlement Act (ANCSA), Tetlin Native Corp. (Tetlin) elected to receive title to lands within the former Tetlin Indian Reserve.

On Sept. 24, 1980, the Bureau of Land Management (BLM) issued its above-designated decision numbered F-20518 approving for conveyance to Tetlin a portion of the lands within the former Tetlin Indian Reserve.

On Oct. 24, 1980, Tetlin appealed the above-designated decision on the grounds, *inter alia*, that BLM failed to identify and adjudicate as invalid a mineral lease executed by Tetlin and Resource Associates of Alaska, Inc. (RAA), which lease purported to apply to all the lands approved for conveyance to Tetlin.

In its Answer, dated Jan. 20, 1981, to Tetlin's Statement of Reasons, RAA declared that this Board is without jurisdiction to determine the validity of the subject lease, that the BLM was correct in not addressing said lease in the challenged decision, and that said lease is in any case entirely valid and enforceable.

On Jan. 30, 1981, pursuant to the order of the Board, Tetlin filed a supplemental brief in support of its Statement of Reasons. Tetlin's primary argument was that § 14(g) of ANCSA and the Departmental

policy reflected in Secretary's Order No. 3016 (Dec. 14, 1977) (S.O. 3016) required the BLM to identify all valid third-party interests in the conveyance document. Appellant argued that the subject mineral lease, executed by RAA and Tetlin in August 1977 without the knowledge and consent of the BLM but purporting to be immediately applicable, could not possibly be valid, because at the time of execution of the lease the subject lands were Native-selected and under the administrative jurisdiction of the BLM. Appellant asserted that new third-party interests in the land could be created only pursuant to Federal law and only by the BLM. Appellant took the position that, prior to conveyance of the land pursuant to ANCSA, it is impossible for private parties to create a valid lease upon the subject lands without the BLM's knowledge and participation. Appellant asserted that while the lease is clearly invalid, certainty of title following conveyance to Tetlin requires that the lease be adjudicated and ruled invalid by the BLM.

On Feb. 10, 1981, RAA filed its answer to Tetlin's supplemental brief and a motion to dismiss for lack of jurisdiction. Quoting 43 CFR 4.1(b)(5),¹ RAA asserted that the Board lacked jurisdiction to decide Tetlin's appeal with re-

¹ Sec. 4.1(b)(5) provides that: "The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act."

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spect to the mineral lease. RAA argued that BLM did not make any "findings of fact or decisions" on the mineral lease, and that the lease is not a matter "relating to land selection arising under the Alaska Native Claims Settlement Act."

RAA cited *Appeal of Chickaloon Moose Creek Native Association, Inc.*, 4 ANCAB 250, 87 I.D. 219 (1980) [VLS 80-1] as disposing of an analogous appeal before this Board.

RAA also argued that the BLM was correct in not addressing the mineral lease. RAA asserted that the lease was not a third-party valid existing right requiring identification or adjudication pursuant to § 14(g) of ANCSA or Secretary's Order No. 3029, 43 FR 55287 (1978) (S.O. 3029), which superceded S.O. 3016. RAA argued that the lease, a private transaction, is not the sort of third-party valid existing right with which Congress, in enacting ANCSA, was concerned. RAA quoted *Appeal of Theodore J. Almasy, et al.*, 4 ANCAB 151, 160, 87 I.D. 81, 85 (1980) [RLS 79-12], where this Board concluded that: "Valid existing rights protected under § 14(g) are, in all cases, derived from and created by the State or Federal Government."

In summary, RAA argued that the mineral lease, executed in 1977 by private parties without government involvement, does not affect the conveyance of the subject lands to Tetlin pursuant to ANCSA. Further, the lease is not a matter relating to land selection, and it

was not recommended to the attention of the BLM by Congress when it mandated protection of valid existing rights.

Responding to RAA's motion to dismiss, Tetlin asserted that the Board does have jurisdiction to consider whether the lease should have been identified by the BLM in its Decision to Issue Conveyance (DIC). Tetlin argued that RAA's assertion that jurisdiction was lacking was based upon RAA's misreading of 43 CFR 4.1(b)(5) and of Tetlin's position in this appeal.

Tetlin argued that the DIC from which this appeal was taken is clearly a decision which satisfies the Board's jurisdictional requirement, and the fact that the DIC was silent regarding the RAA lease could not possibly, in and of itself, preclude jurisdiction in the Board to consider whether the omission was appropriate.

Tetlin further reclarified its position, regarding the mineral lease, that it is seeking to have this Board address only its contention that private parties cannot create a lease of lands within the public domain. Tetlin declared that it is not asking the Board to adjudicate completely the nature of the agreement between RAA and Tetlin.

On Mar. 9, 1981, the BLM filed its Answer to Tetlin's supplemental brief. BLM asserted that the Departmental policy cited by Tetlin had been modified by S.O. 3029 and, subsequently, in the Departmental Manual. It quoted 601 DM 2.3 in pertinent part, "[I]t is appropriate

for BLM to determine in the first instance the validity of those interests created by federal laws which are administered by BLM." BLM argued that the RAA lease is not an interest created by a Federal law administered by the BLM, and that therefore BLM has no duty to adjudicate the validity of the lease.

The BLM further argued that the BLM should not identify the subject mineral lease in the DIC because the lease was not created by the State or by another Federal agency. In support of this position, BLM quoted 601 DM 2.4:

The Bureau of Land Management will identify third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department will not adjudicate these interests.

Decision

Jurisdiction of the Board is determined pursuant to Departmental regulations in 43 CFR 4.1(b)(5):

Alaska Native Claims Appeal Board. The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act (85 Stat. 688).

The subject BLM decision to convey to Tetlin, pursuant to § 19(b) of ANCSA, lands formerly within the Tetlin Indian Reserve is a decision "rendered by Departmental officials in matters relating

to land selection arising under the Alaska Native Claims Settlement Act." Tetlin's appeal of that decision, alleging that the decision should have identified and adjudicated the subject mineral lease, is accordingly an appeal from the type of decision described in 43 CFR 4.1(b)(5).

While arguing that the lease was invalid, Tetlin specifically appealed the BLM's failure, in the subject decision, to identify and adjudicate the RAA lease. Thus, the thrust of Tetlin's appeal was BLM's alleged error rather than the invalidity of the lease *per se*.

RAA is correct in their contention that the BLM decision did not make "findings of fact or decisions" on the disputed mineral lease. The decision is silent on the lease. It is this very omission which Tetlin appeals, asserting that BLM should have adjudicated the lease, and that the decision to convey should have reflected the status of the lease as determined by that adjudication. In arguing that the Board lacks jurisdiction because BLM did not make findings on the lease, RAA apparently takes the position that omission of any matter from a conveyance decision, even if erroneous, cannot be appealed. This is not the case. Where the alleged error is BLM's failure to adjudicate an interest and to note its validity or invalidity in an ANCSA conveyance decision, the appeal is from a land selection decision under ANCSA, and the Board clearly has jurisdiction.

RAA also challenges the Board's jurisdiction over this appeal because of the Board's ruling in *Appeal of Chickaloon Moose Creek Native Association, Inc., supra*, that contractual disputes between the appellant and other corporations are not appeals from findings of Departmental officials within jurisdictional regulations in 43 CFR 4.1(b) (5) and could not be decided by the Board. The issue on which the Board made this ruling in *Chickaloon* was whether a contract between the appellant Native corporation and other corporations was valid. As noted above, the threshold question before the Board in the present appeal is whether BLM erred in failing to adjudicate such a private contract. The Board's jurisdiction to decide that question is not addressed by the ruling in *Chickaloon*.

[1] Therefore, the Board holds it has jurisdiction to decide whether the BLM erred, in the above-designated decision, by failing to identify and adjudicate the RAA mineral lease.

Turning to the question whether BLM erred in failing to identify and adjudicate the subject mineral lease, the Board holds that the BLM did not err.

Tetlin argued that the lease was a purported "valid existing right," and that § 14(g) of ANCSA and Departmental policy reflected in S.O. 3016 required BLM to identify in the conveyance document all valid existing rights. Further, Tetlin argued that for Tetlin to re-

ceive "certainty of title" in lands conveyed pursuant to ANCSA, BLM is required to identify and adjudicate all alleged valid existing rights, even those which are "clearly invalid."

The RAA mineral lease here in dispute is not the sort of third-party interest with which Congress, in drafting § 14(g) of ANCSA, was concerned. With regard to identification of "valid existing rights," § 14(g) specifically provides:

Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent, shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement * * *. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented * * *. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration.

[2] Sec. 14(g) mandates identification, in conveyance documents issued pursuant to ANCSA, of only those leases and other interests issued by the United States or the State of Alaska. Interests derived from sources other than the United States or the State of Alaska are not within the scope of § 14(g). Accordingly, the Board held in *Appeal of Theodore J. Almasay, et al., supra*, that "[v]alid existing rights

protected under § 14(g) are, in all cases derived from and created by the State and Federal Government." 4 ANCAB 151, 160, 87 I.D. 81, 85.

The current Departmental policy regarding identification and adjudication of alleged third-party interests in lands being conveyed under ANCSA was stated in S.O. 3029, and subsequently embodied in the Departmental Manual at 601 DM 2.3 and 2.4:

2.3 * * * Regarding adjudication of third party valid existing rights, it is appropriate for BLM to determine in the first instance the validity of those interests created by federal laws which are administered by BLM * * *.

2.4 *Procedures.* The Bureau of Land Management will identify third party interests created by the State, as reflected by the land records of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department will not adjudicate these interests.

[3] Departmental policy expressed in S.O. 3029 and converted into the Departmental Manual at 601 DM 2.3 and 2.4 does not require BLM to identify or adjudicate alleged third-party interests derived from sources other than the Federal Government or the State of Alaska. Since the RAA mineral lease was not issued by the Federal Government or the State of Alaska, the BLM is not required to identify or adjudicate the lease prior to conveyance of the subject lands pursuant to ANCSA.

Order

Accordingly, the Board hereby dismisses the above-designated appeal of Tetlin Native Corp. insofar as it concerns the RAA mineral lease.

Left for future determination by this Board are those portions of Tetlin's above-designated appeal regarding site easement EIN 2 C5 and the business lease issued to Ray Scoby on Oct. 12, 1960.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

BELVA COAL CO., INC.

3 IBSMA 83

Decided April 17, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement from that part of an Apr. 29, 1980, decision of Administrative Law Judge Tom M. Allen vacating violation 3 of Notice of Violation No. 79-I-47-20 issued for failure to maintain access and haul roads (Docket No. CH 0-17-P).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance—Surface Mining Control and

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Reclamation Act of 1977: Words and Phrases

"Road." A "road" that leads from a coal stockpile of an underground mining operation to a state road and over which coal trucks travel in moving between the stockpile and the state road is a road within the meaning of 30 CFR 710.5 and is subject to the maintenance requirements of 30 CFR 717.17(j) (3) (i).

2. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

The road maintenance requirement of 30 CFR 717.17(j) (3) (i) is a preventive measure and proof of the existence of the harm it is intended to prevent is not necessary to establish a violation of that requirement; proof of the road's condition and maintenance practices of the road is required.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

In a civil penalty proceeding when OSM's prima facie case as to the fact of violation is effectively controverted by the person charged with the violation, the violation must be vacated because OSM has the ultimate burden of persuasion in accordance with 43 CFR 4.1155.

APPEARANCES: Ricklin Brown, Esq., Bowles, McDavid, Graff & Love, Charleston, West Virginia, for Belva Coal Co. Inc; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office

of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY THE
INTERIOR BOARD OF
SURFACE MINING AND
RECLAMATION APPEALS*

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of that part of an Apr. 29, 1980, decision of Administrative Law Judge Tom M. Allen vacating violation 3 of Notice of Violation No. 79-I-47-20, issued pursuant to the Surface Mining Control and Reclamation Act of 1977.¹ The violation alleged was a failure "to maintain access and haul roads by surfacing with a durable, nontoxic material" in accordance with 30 CFR 717.17(j) (3) (i). We affirm the Administrative Law Judge's decision, although for different reasons, as discussed below.

Background

On May 10, 1979, OSM inspectors visited the Belva Coal Co., Inc. (Belva), underground Mine 8-B in Logan County, West Virginia, and issued Notice of Violation No. 79-I-47-20 alleging four violations. Belva did not file an application for review of the notice, but did seek an assessment conference on the proposed civil penalty. After receipt of the conference report, it filed a petition for review of the civil

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

penalty assessment. Following a hearing, the Administrative Law Judge vacated the notice and ordered repayment of the civil penalty. On May 29, 1980, OSM sought review of the decision. In its brief filed on July 11, 1980, OSM indicated that only alleged violation 3 was in issue.

At the hearing, the OSM inspector stated that on the date of his inspection the road leading from the state road to a stockpile area was covered with "rather large" amounts of coal fines and mud (Tr. 11). He cited Belva for failing to maintain a durable surface on that road (Tr. 16). He described the condition of the road, which was a little over 100 feet long (Tr. 32) and which he considered to be a haul road (Tr. 31), as follows:

On that date the road was fairly dry; there was some seepage coming out of the stockpile area, it was draining down the road a ways and off in to the pond near the end of the road. The material that was on the road was fairly dry but there was evidence in the past where trucks had been moving out that that had been an extremely muddy soupy situation and passage of a truck had caused material to slop out of the road on both sides.

(Tr. 16). The inspector said the road had been surfaced with stone at one time but the stone had not been replaced and the road had not been scraped (Tr. 38). "[T]he stone had been beat into the bottom and mud and coal fines from the hauling process deposited on the road and had not been removed" (Tr. 39). The inspector testified that material thrown out by the tires of trucks

would land on either side of the road, from where it would continue down the ditch line and would eventually enter a stream (Tr. 41). He stated that the ditch did not empty into a sedimentation pond (Tr. 41).

This last statement conflicted with the testimony of Jack Hughes, safety director for Belva, and Danny Vance, surface foreman for Belva. Hughes stated that the stockpile road was ditched on both sides; that there was a culvert under the stockpile road; and that ditches on the minesite side of the road led to a sedimentation pond (Tr. 69-70). He also stated that any drainage from the haul road area would have "no recourse but to enter one of the ponds" (Tr. 66). Vance stated that the ditch on the mine side of the state road emptied into the surface run-off pond (Tr. 86). Hughes estimated that the road was 75-100 feet in length (Tr. 68). He said it had been surfaced with crushed stone and on the date of inspection there was "some accumulation of dried mud and some coal fines" on the road (Tr. 68). He said the accumulation was a result of the coal loading process and dirt from the unpaved state road (Tr. 68). Vance stated that over a period of time coal fines and mud accumulate on the road (Tr. 84). He did not recall the amount of accumulation on the day of inspection, but stated:

We grade the roads quite frequently and when a build-up occurs on there we take the grader and remove it from the surface.

* * * * *

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Summer months it's not too often; winter months it's daily because you have more of a mud build-up off of your dirt roads in the winter months.

(Tr. 90). Vance stated that he considered a haul road to be one used to haul coal and that Belva hauled coal on the road in question (Tr. 89).

Discussion and Conclusions

In his opinion, the Administrative Law Judge states the first issue as "[w]hether or not the 'haul road' was in fact a haul road and properly maintained." His discussion of this issue is as follows:

A haul road is defined as: "A road built to carry heavily loaded trucks at a good speed. The grade is limited on this type of road and usually is kept to less than 9 [*sic*²] percent of climb in direction of load movement."⁷

The regulations define "road" as: "Roads means access and haul roads constructed, used, re-constructed, improved, or maintained for use in surface coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage area."⁸

The "haul road" in question is, at most, 100 feet long (Tr. 68), or according to respondent, 50-55 feet (Tr. 20; Appl. Exh. 2).

It accesses the public road from the raw coal pile where trucks are loaded by means of a front-end loader.

According to the definition published by the Department of the Interior, it would be highly unlikely that any loaded coal

trucks could muster any appreciable speed in such a short distance.

While it could technically, although not accurately, be called a road, it appears to fall more into the category of a driveway to a coal loading facility. This, however, is of little consequence in light of other factors.^[3]

[1] Of course, it is the definition in the regulations that governs, not that in the Department's *Dictionary of Mining, Mineral, and Related Terms*. The definition in the regulations is a functional one: if a road is "used * * * by coal-hauling vehicles" it is a haul road or access road. Belva's representatives testified that the road was so used. Other evidence corroborates that fact. It is thus a road within the meaning of 30 CFR 710.5.

On the issue of whether Belva had properly maintained the road in accordance with 30 CFR 717.17(j)(3)(i), the Administrative Law Judge stated that OSM had not presented a *prima facie* case. He set forth the following, apparently as criteria for a *prima facie* case:

To charge an operator with a violation of this nature, without (1) determining by some means whether the road was soundly constructed of a durable, non-toxic material, or (2) that the maintenance schedule was nonexistent, ineffectual, or current, and (3) that the condition was likely to effect [*sic*] the hydrologic balance off the permit property, is certainly an unwarranted exercise of authority in light of Island Creek and Pegasus together with knowledge that any runoff from the road went

² The text of the dictionary quoted from reads "17 percent."

⁷ U.S. Dept. of the Interior, "A Dictionary of Mining, Mineral and Related Terms" (1968).

⁸ 30 CFR 710.5.

³ Decision of Apr. 29, 1980, Docket No. CH 0-17-P at pp. 6-7.

into ditches that led to sediment ponds.[⁴]

[2] *Island Creek Coal Co.*, 1 IBSMA 285, 86 I.D. 623 (1979), referred to in the excerpt above, also involved a violation of the requirement of 30 CFR 717.17(j) (3)(i) that haul roads "shall be routinely maintained by means such as, but not limited to, wetting, scraping, or surfacing." In that decision we discussed the relationship between whether a haul road was properly maintained in accordance with sec. 717.17(j) (3)(i) and whether the road was constructed of a durable, non-toxic material as required by sec. 717.17(j) (2)(iv).⁵ We also stated that OSM need not prove an adverse effect on water quality in order to establish a violation of sec. 717.17(j) (3)(i). Because the maintenance requirement is designed to *prevent* such effects, it is not necessary to demonstrate that the effects have occurred

to show that the preventive measures were not taken. Nor does the existence of ditches leading to sedimentation ponds vitiate a violation of 30 CFR 717.17(j) (3)(i). What *is* germane to a violation of that regulation is the condition of the road and the methods of maintaining it.⁶

On these latter issues the evidence in this case was conflicting. OSM's inspector testified that mud and coal fines were on the road when he inspected, that the stone surfacing had been beaten down and that the mud and coal fines deposited on the road had not been removed.⁷ This is adequate evidence to establish the essential facts and is sufficient for a *prima facie* case.⁸ It was, however, contradicted. Although Vance conceded there was some mud and coal fines on the road when it was inspected, he stated that Belva regularly scraped off accumulated deposits when needed, more often in winter than in summer.

[3] Because this was a civil penalty proceeding, in order to prevail OSM must carry the ultimate burden of persuasion on the fact of the violation.⁹ In this case its *prima facie* case was effectively controverted. Weighing all the relevant evidence, we hold that OSM did not carry its burden of persuasion.

⁴ *Id.* at 7-8. "Pegasus" refers to a July 13, 1979, decision in *Pegasus Mining Co.*, Docket No. CH 9-37-R, that preceded the Board's decision in *Island Creek*, discussed below.

⁵ *Island Creek Coal Co.*, *supra* at 290 n.10, 86 I.D. at 626 n.10 (1979), reads in part:

"The ALJ's opinion questions why OSM did not cite *Island Creek* for a violation of 30 CFR 717.17(j) (2)(iv). This subsection pertains to standards for the construction of roads and includes a requirement that they be surfaced with 'durable material.' In contrast, 30 CFR 717.17(j) (3)(i), which requires the routine maintenance of roads by means including surfacing, does not specify that durable material must be employed in such maintenance. The resurfacing of a road with a durable material may, however, be necessary under some circumstances to maintain a road in compliance with the purpose of 30 CFR 717.17(j). Regardless, however, of the cause of the deficiency, it is the fact of the inadequacy of the roadway conditions and not that cause which is at issue here."

⁶ Maintenance practices and schedules will, of course, depend on the road's use and other circumstances, e.g., weather. Whatever they are, they must be adequate to prevent additional contributions of suspended solids to stream flow.

⁷ Tr. 11, 39.

⁸ *James Moore*, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979).

⁹ 43 CFR 4.1155.

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The Administrative Law Judge's decision vacating the notice of violation is therefore affirmed as modified.

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

UNITED STATES

v.

ROBERT A. PETTIGREW

54 IBLA 149

Decided April 17, 1981

Appeal from a decision of Administrative Law Judge R. M. Steiner granting permission to engage in placer mining on lands withdrawn for power development. CA MC 60454.

Reversed.

**1. Mining Claims: Powersite Lands—
Mining Claims: Surface Uses—Mining
Claims Rights Restoration Act**

Under the Mining Claims Rights Restoration Act of 1955, it is proper to prohibit all placer mining operations on a mining claim on land withdrawn for power development or powersites, where unrestricted placer mining on such land would result in substantial interference with the use of the land for recreational purposes.

**2. Mining Claims: Powersite Lands—
Mining Claims: Surface Uses—Mining
Claims Rights Restoration Act**

The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or powersites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose on permission to mine is that the locator must restore the surface of the claim to its condition immediately prior to mining operations.

APPEARANCES: James E. Turner, Esq., Office of the Solicitor, U.S. Department of the Interior, Sacramento, California, for appellant.

*OPINION BY
ADMINISTRATIVE JUDGE
HENRIQUES*

*INTERIOR BOARD OF
LAND APPEALS*

The United States through the Bureau of Land Management (BLM), Department of the Interior, appeals from a decision of Administrative Law Judge R. M. Steiner, dated Jan. 7, 1981, granting permission to Robert A. Pettigrew to engage in placer mining on lands withdrawn for power development. Judge Steiner's decision was issued following a public hearing pursuant to the provisions of the Act of Aug. 11, 1955, 30 U.S.C. §§ 621 through 625 (1976), also known as the Mining Claims Rights Restoration Act

of 1955. The claim at issue, the Retirement Crevice No. 1, was located on Jan. 15, 1980, in S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 22, T. 11 N., R. 10 E., Mount Diablo meridian, El Dorado County, California.¹

[1] Pettigrew's claim was located pursuant to the Act of Aug. 11, 1955, *supra*, which provides for location of mining claims on lands withdrawn for power development or powersites. The Act requires any person who locates a mining claim on such lands after Aug. 11, 1955, to file a copy of the notice of location in the district land office within 60 days of location. 30 U.S.C. § 623 (1976). A person who files a placer mining claim with BLM may not conduct mining operations on the claim within 60 days after filing in the land office, in order to give the Secretary the opportunity to decide whether a hearing should be held on the question of "whether placer mining operations would substan-

tially interfere with other uses of the land included within the placer claim." 30 U.S.C. § 621(b) (1976). If the Secretary decides to hold a hearing, mining operations on the claim must be suspended until the hearing has been held and an appropriate order issued which

shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining.

30 U.S.C. § 621(b) (1976). *See also* 43 CFR Subpart 3730.

At the hearing, BLM presented evidence that mining operations would interfere with rafting activities on the South Fork of the American River. The claim at issue includes land on both sides of this river. Interference would be caused by cables anchoring the claimant's dredge to the banks of the river (Tr. 23). Such cables would not only interfere with rafting, but would also interfere with access to the shore (Tr. 31) and enjoyment of a special use permit issued by BLM to a third party (Tr. 19). Evidence was further offered that private use of the South Fork of the American River for rafting activities totaled approximately 15,000 passengers during 1978.

We note that while the subject lands are withdrawn for power development, the phrase "other uses of the land included within the

¹ An examination of Government Exhibit 3 reveals that the lands sought by the claimant were, as of the date of the hearing, within the boundaries of a withdrawal for Power Project 2761 Proposed. Sec. 2 of the Act of Aug. 11, 1955, *supra*, excepts from mineral location those lands, *inter alia*, which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an unanceled permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once. While the file does not reveal the status or existence of the permit involved, it is possible that the lands sought by claimant were closed to mineral location pursuant to sec. 2 at the time of claimant's filing of his location notice. If so, his location was void ab initio. The Government's decision to challenge the Retirement Crevice claim and our holding herein make unnecessary further inquiry into this issue.

v.

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placer claim" in sec. 621(b) is not restricted to power development uses. Although the Mining Claims Rights Restoration Act applies by its terms to land within power development withdrawals, all uses of the land are to be considered in determining whether placer mining operations will substantially interfere with the use of the land. *United States v. Cohan*, 70 I.D. 178, 179 (1963). In fact, the decisions considering whether to prohibit placer claims on powersite classifications have been concerned with uses other than power development. *United States v. Western Minerals & Petroleum, Inc.*, 12 IBLA 328 (1973) (use of the land for watershed); *United States v. Bennewitz*, 72 I.D. 183 (1965) (use of the land for recreational purposes); *United States v. Cohan*, *supra* (use of the land for recreational and homesite purposes). On the basis of the language of sec. 621(b) and the Departmental decisions which interpret it, it must be concluded that the "other uses" to which that section refers are not restricted to power development or powersites. Therefore, placer mining which would substantially interfere with recreational use of the withdrawn land is properly prohibited.

Based upon the evidence summarized above, Judge Steiner concluded that the Government had failed to establish that placer mining on the Retirement Crevice No. 1 would substantially interfere with

other uses of the land. Judge Steiner found instead that the claimant showed by a preponderance of the evidence that mining operations on the subject claim would not so interfere. Permission was granted to the claimant to engage in placer mining on the condition that the locator, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to these operations. While we might acknowledge that claimant Pettigrew's mining operation would be unlikely to substantially interfere with other uses of the lands, we do not believe this is the real issue here.

[2] The Mining Claims Rights Restoration Act of 1955, *supra*, allows the Department only three alternative courses of action. As we have already noted, those three alternatives are: (1) To bar any placer mining activity; (2) to allow such mining activity without restriction; or (3) to allow placer mining with the restriction that the land be restored to its former condition after the cessation of mining. In considering the impact of mining operations on the environment, the Department looks at the impact of *normal* placer operations carried on without restrictions, and not just at the proposed operations of *the particular locator*. The reason for this policy is clear:

The statute permits the Secretary to act only once. He cannot issue an order now allowing unrestricted mining on the basis

of a one or two dredge operation and then if additional dredges are added or larger ones are substituted or a totally different type of operation is adopted, issue an order prohibiting mining. He can act only once, either to permit or prohibit. Because his course of action is so limited, to avoid defeating the purpose of the act, he should be able to base his decision not only on what the claimant proposes to do but also on what the claimant or his successor may be able to do in the way of placer mining.

United States v. Bennewitz, supra at 188; *accord, United States v. Weigel*, 26 IBLA 183 (1976); *Boyd McGinn*, 25 IBLA 188 (1976); *United States v. Western Minerals & Petroleum, Inc., supra*.

We agree with appellant that unrestricted mining on the claim site would substantially interfere with recreational uses of the lands. In so holding, we are looking not only to the claimant's proposed operations but also to potential operations involving additional dredges and different mining techniques. The grant of permission to the claimant to engage in placer mining is hereby revoked.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Steiner is reversed.

DOUGLAS E. HENRIQUES,
Administrative Judge

WE CONCUR:

JAMES L. BURSKI,
Administrative Judge

C. RANDALL GRANT, JR.,
Acting Administrative Judge

CONCORD COAL CORP.

3 IBSMA 92

Decided April 17, 1981

Appeal by Concord Coal Corp. from the Sept. 26, 1980, decision of Administrative Law Judge Tom M. Allen, Docket Nos. CH 0-314-R, CH 0-335-R, and CH 0-349-R, rejecting its claim that its coal mining activity in Logan County, West Virginia, is excepted from the coverage of the Surface Mining Control and Reclamation Act of 1977, as an incidental part of government-financed construction, and sustaining enforcement action by the Office of Surface Mining Reclamation and Enforcement against Concord.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Extraction of coal as an incidental part." For the purposes of 30 U.S.C. § 1278(3) (Supp. II 1978) and 30 CFR 700.11(d), which exclude the "extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction" from the coverage of Federal performance standards otherwise applicable to surface coal mining operations, the phrase "extraction of coal as an incidental part" means, in accordance with 30 CFR 707.5, the extraction of coal which is necessary, from an engineering standpoint, to enable the construction to be accomplished and does not mean the extraction of coal for the purpose of financing the construction.

APPEARANCES: Philip G. Terrie, Esq., Charleston, West Virginia, for

Concord Coal Corp.; Thomas L. Hindes, Esq., Office of the Field Solicitor, Charleston, West Virginia, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, and James M. McElfish, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY THE
INTERIOR BOARD OF
SURFACE MINING AND
RECLAMATION APPEALS*

This appeal was brought by Concord Coal Corp. (Concord) from the Sept. 26, 1980, decision of the Hearings Division upholding four notices of violation issued by the Office of Surface Mining Reclamation and Enforcement (OSM) pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).¹ Concord challenged these notices on the ground that the violations alleged relate to activities which are an incidental part of government-financed construction and consequently are excepted from OSM's regulatory authority by sec. 528(3) of the Act, 30 U.S.C. § 1278 (3) (Supp. II 1978). The Administrative Law Judge rejected this challenge. For the reasons set forth below we affirm the decision on appeal.

*Factual and Procedural
Background*

Following its inspections of Concord's surface coal mining

operation in Logan County, West Virginia, on July 22 and 23, 1980, OSM served Concord with four notices of violation of the Department's initial program regulations. Concord applied for review of the notices and on Sept. 25, 1980, the matter was heard before the Hearings Division as submitted on a stipulated statement of issues and facts (SSIF), joint exhibits, and argument.² A summary of the evidence pertinent to our decision follows.

On Jan. 26, 1977, the Logan County Airport Authority (Airport Authority) executed a contract with Concord for the latter to construct a runway, access road, taxiway, parking apron, and approach zones on a 302-acre tract of land owned by the Airport Authority (Exh. I). The agreement provides that Concord will complete construction by Dec. 31, 1981; will receive \$1,050,000 in public funds as partial compensation for the work; and will derive the remainder of its compensation from the sale of coal pursuant to a lease agreement (Exh. G) among Concord, the Airport Authority, and Dingess-Rum Coal Co. (Dingess-Rum), also executed on January 26 and incorpo-

² With the exception of violation 7 of Notice of Violation No. 80-I-107-54, charging Concord with placing spoil in violation of 30 CFR 715.14(h)(3), Concord did not seek review of the violations alleged in the four notices on grounds other than its challenge of OSM's regulatory authority over its activities. Concord has requested temporary relief from the remedial action ordered by OSM to correct this alleged violation. The request is under consideration in the Hearings Division.

¹ Act of Aug. 3, 1977, 91 Stat. 445-532, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

rated into the contract by reference.³

Under the lease Concord is granted the right to mine and sell coal, owned by Dingess-Rum and underlying the airport property and adjacent land, in return for royalty payments to Dingess-Rum.⁴ The lease is subject to cancellation in the event of cancellation or termination of the construction contract with the Airport Authority. It has been estimated that 55 million cubic yards of overburden and 5 million tons of coal will be removed in operation pursuant to the lease (SSIF at 5). Total potential revenues from the sale of this coal at \$26 per ton (the approximate current price) would be \$130,000,000 (SSIF at 6).

Arguing that its surface coal mining operation is merely an incidental part of government-financed construction, Concord has sought to

have the notices of violation vacated on the basis of sec. 528 of the Act. That section provides in part: "The provisions of this Act shall not apply to any of the following activities: * * * (3) the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority." 30 U.S.C. § 1278(3) (Supp. II 1978). The Administrative Law Judge rejected Concord's argument:

I find that the mineral rights were not donated nor are they owned by the Airport Authority. Based upon that * * * I find that the contract to mine coal is not with the Airport Authority. I find that the grant of Federal funds is not to Concord Coal Corporation. I therefore find that the coal project is not a Federally funded project within the exemption granted by the Act, and that OSM has jurisdiction to enforce the interim regulations.

(Decision of Sept. 26, 1980, at 2). Concord timely appealed the decision against it; both parties filed briefs with the Board.

Discussion and Conclusions

The decision below turned on the Administrative Law Judge's finding that the coal lease agreement between Dingess-Rum and Concord does not implicate the Airport Authority to the extent that the revenues obtained by Concord under the lease may be treated as government funds. We agree with the result reached in the decision, but base our agreement on a different rationale drawn from the provisions of 30

³ The business arrangements described in the contract and lease agreements arose from earlier efforts by the Airport Authority to secure construction of the facilities without regard to the coal resources underlying its 302-acre surface estate (Exh. A). The original project plans called for construction of the runway and related features at an elevation between 1,695 and 1,745 feet above sea level, which would have entailed excavation of approximately 3 million cubic yards of unclassified material (*id.*). The Airport Authority rejected all bids for the construction work as too costly and ultimately negotiated the arrangements with Dingess-Rum and Concord under which the airport will be located at the lower elevation as the result of the excavation of coal owned by Dingess-Rum (*id.*; SSIF).

⁴ It is not clear from the record what portion of the estimated 5 million tons of coal subject to the lease underlies land adjacent to the Airport Authority's surface estate. By a conditional lease executed on Feb. 4, 1976, Concord was granted the right to mine such coal prior to commencing its mining of coal underlying the Airport Authority's property (Exh. H).

April 17, 1981

CFR 700.11 and Part 707, which implement sec. 528 of the Act.⁵

[1] Under 30 CFR 700.11(d) "[t]he extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction in accordance with 30 CFR Part 707" is excepted from the Department's regulation of surface coal mining. In Part 707 the phrase "extraction of coal as an incidental part" is defined to mean "the extraction of coal which is necessary to enable the construction to be accomplished." 30 CFR 707.5.⁶

⁵ These regulations were promulgated in accordance with the provision in sec. 528(3) of the Act that government-financed construction be excepted from the coverage of the Act "under regulations established by the regulatory authority." 30 U.S.C. § 1278(3) (Supp. II 1978). During the Federal initial program the term "regulatory authority" includes the Office of Surface Mining Reclamation and Enforcement. 30 U.S.C. § 1291(22) (Supp. II 1978); 30 CFR 700.5; 44 FR 14949, Comment 1 (Mar. 13, 1979). Before the Hearings Division both parties misdirected their attention to an earlier version of 30 CFR 700.11(d) published at 42 FR 62677 (Dec. 13, 1977). This version included the term "noncommercial" as a qualification of "government-financed construction" which could be excepted from the coverage of the Act. On appeal Concord has continued to focus on the earlier version of the regulation, arguing that the Secretary exceeded his regulatory authority by so qualifying sec. 528(3) of the Act (Brief for Appellant at 2-3). In its brief, OSM recognized that the present version of 30 CFR 700.11(d) became effective on Apr. 12, 1979, along with 30 CFR Part 707 (Brief for Appellee at 4). Whether Concord might have raised a similar argument against the current provisions implementing sec. 528(3), had it addressed those, is not of consequence. We view those provisions as being consistent with the manifested intent of Congress in promulgating sec. 528(3). See 44 FR 14948-50 (Mar. 13, 1979) (and congressional materials cited therein).

⁶ It is further provided in the definition:

"[O]nly that coal extracted from within the right-of-way, in the case of a road, railroad, utility line or other such construction, or within the boundaries of the area directly

Necessity, under this definition, is meant to be a function of engineering—not cost—constraints.⁷ In this respect the record is unambiguous: the extraction of coal underlying the site of contemplated airport construction is not necessary, as a matter of engineering, to facilitate that construction.⁸ Accordingly, Concord's coal mining operation does not qualify for exception under sec. 528(3) of the Act and 30 CFR 700.11(d).

As a result of our holding it is not necessary for us to address whether Concord's construction work is "government-financed construction," as the company has asserted. We do agree, however, with the Administrative Law Judge's finding (quoted in the text, *supra* at 458) that the Airport Authority does not own the coal being mined by Concord.⁹ From this finding we conclude that the revenue Concord may generate from its sale

affected by other types of government-financed construction, may be considered incidental to that construction. Extraction of coal outside the right-of-way or boundary of the area directly affected by the construction shall be subject to the requirements of the Act and this Chapter." 30 CFR 707.5.

⁷ The proposed definition of the phrase "extraction of coal as an incidental part" was "extraction of coal the market value of which is less than 50 percent of the cost of the government-financed construction." 43 FR 41808 (Sept. 18, 1978). It was changed in recognition of perceived congressional intent that the exemption provision in sec. 528(3) of the Act be applied on the basis of engineering judgments. 44 FR 14949, Comment 4 (Mar. 13, 1979).

⁸ Exh. A and SSIF (summarized, in pertinent part, in n.3, *supra*).

⁹ Whatever rights the Airport Authority may have as a third party to the coal lease do not extend to an ownership interest in coal (Exh. G).

of coal pursuant to the mining lease cannot be characterized as government funds, and, because this revenue will ultimately constitute the predominate source of compensation for the airport construction, it follows that the construction is not "government-financed" within the meaning of 30 CFR 707.5.¹⁰

The decision of the Hearings Division is affirmed.

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

JOSEPH C. MANGA ET AL.

5 ANCAB 224

Decided April 20, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-19155-16 and F-21779-16.

Appellant Joseph Manga has standing to appeal. Appellants Dan Patrick

¹⁰ The term "government-financed construction" is defined as "construction funded 50 percent or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds, but * * * not * * * government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments." 30 CFR 707.5. Financing for the airport construction by Concord was stipulated by the parties to be: \$130,000,000 estimated revenue from the sale of coal and \$1,050,000 revenue from public grants. Thus, less than 50 percent of the financing of the project is to be by qualifying funds.

and Harvey Strassburg do not have standing to appeal.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed" as required by 43 CFR 4.902.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

3. Alaska Native Claims Settlement Act: Easements: Public Easements—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights; Generally—Alaska Native

**Claims Settlement Act: Easements:
Public Easements**

The private right of access protected by § 17(b) (2) of ANCSA for holders of valid existing rights is separate from public access routes specifically identified pursuant to § 17(b) (1). Possible protection under § 17(b) (2) does not preclude an individual from asserting that a public easement decision affects his or her property interest so as to meet the standing test of 43 CFR 4.902.

**5. Alaska Native Claims Settlement
Act: Easements: Public Easements—
Alaska Native Claims Settlement Act:
Alaska Native Claims Appeal Board:
Appeals: Standing**

An individual claiming standing to appeal a § 17(b) (1) public easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b) (2) private access right.

APPEARANCES: Keith A. Christenson, Esq., Johnson, Christenson & Associates, for appellants; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; James Q. Mery, Esq. and Elizabeth S. Ingraham, Esq., for Doyon, Limited.

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD***Summary of Appeal*

This opinion decides the question of whether any member of the general public has standing to appeal a public easement decision. The standing regulation in 43 CFR 4.902 requires an appellant to "claim a property interest in land affected by

a determination." Appellant Manga asserts his mining claims are affected by a Bureau of Land Management decision which did not reserve a portion of an existing trail as a § 17(b) (1) public easement. Appellant claims use of the trail by the public.

The first argument opposing standing is that an appellant must have a property interest in the land to be conveyed, and a member of the public cannot claim a property interest in either the easement or the land underlying the easement. Second, even if a private interest is sufficient, the interest cannot be affected by a public easement decision because the holder of such interest has private access rights under § 17(b) (2).

The Board holds that because a § 17(b) (1) easement necessarily affects lands other than those to be conveyed, a member of the public seeking to appeal a public easement decision may claim a private property interest located outside a conveyance for standing purposes; and further, possible protection of private access right under § 17(b) (2) does not preclude an appeal from a public easement decision.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implement-

ing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision dismissing a portion of the appeal of Joseph C. Manga, *et al.*, from the above-designated decision of the Alaska State Office, Bureau of Land Management.

Procedural Background

On Jan. 15, 1980, Appellants Joseph C. Manga, Dan Patrick and Harvey Strassburg appealed the Decision of the Bureau of Land Management F-19155-16 and F-21779-16, dated Dec. 10, 1979, as modified on Dec. 26, 1979. On Jan. 23, 1980, appellants filed a Supplemental Notice of Appeal specifying grounds in this appeal.

On Feb. 11, 1980, appellants filed exhibits supplementing the record on appeal. The exhibits are holographic statements by Appellants Manga, Patrick and Strassburg on the issues in this appeal.

The Board, on Feb. 20, 1980, accepted the documents filed by appellants as constituting a statement of standing and reasons and ordered "[a]ll parties wishing to file briefs in response to the documents filed by appellants may do so within thirty (30) days from receipt of this Order."

The Bureau of Land Management (BLM), on Feb. 22, 1980, filed its Motion to Dismiss or to Require a More Definite Statement of Reasons and Standing.

The Board, on Mar. 12, 1980, issued an Order to Show Cause, stating *inter alia*:

Having reviewed this motion [BLM's Motion to Dismiss] and supporting memorandum, the Board hereby Orders appellants to show cause, within fifteen (15) days from the date of this Order, why this appeal should not be dismissed for the reasons stated in BLM's motion dated Feb. 21, 1980.

In response to a joint stipulation filed on Mar. 28, 1980, by BLM, Doyon, Limited, and the appellants, the Board on Apr. 11, 1980, dismissed all issues except the issue involving easements EIN 1a L and EIN 1b L and granted a 30-day time extension for appellants to respond to BLM's Motion to Dismiss and the Board's Order to Show Cause. The Board also ordered that:

Doyon, Limited and the Bureau of Land Management are granted an extension of time in which to respond to all documents filed by the appellants of thirty (30) days from the date on which the Board rules on the standing issues set forth in the March 12, 1980, Order to Show Cause. [Italics added.]

The question immediately before the Board is whether the appellants have standing to appeal the issue concerning the extent of EIN 1a L and EIN 1b L.

The BLM, in its memorandum filed Feb. 22, 1980, in support of its motion to dismiss, states:

It is the position of the BLM that the appellants lack standing to appeal any of the issues raised and that this appeal should therefore be dismissed. In order to have standing to appeal a BLM decision to this Board, a party must claim "a property interest in land affected by a determination" of the BLM. 43 CFR

§ 4.902. It is the BLM's position that the appellants do not meet this requirement.

1. *Issues concerning the extent of E1N [sic] 1aL and E1N [sic] 1bL:*

The appellants allege that, although E1N [sic] 1aL and E1N [sic] 1bL are proper, the BLM erred in failing to reserve a more extensive easement following existing cat trails and connecting the two in a continuous loop. The appellants alleged that this failure serves to "restrict the appellants' access." The appellants do not allege that they have a "property interest in land" in the existing cat trails. Unless the appellants can claim such a property interest, the appeal must be dismissed insofar as it relates to the issue of easements.

Appellants, on May 12, 1980, filed a brief entitled "Initial Brief of Appellants," which provided information and argument in favor of their standing to appeal the captioned decision.

Appellants identified their interest and easement use as follows:

Appellant, JOSEPH C. MANGA, is, in addition to his other endeavors, a prospector and miner who is possessed of certain unpatented mining claims for which the subject easements serve as alternate access depending on seasonal factors. Mr. Manga is possessed of fifteen (15) mining claims situated approximately thirty (30) miles southwest of the Galena townsite near the confluence of Bishop Creek and Little Bishop Creek. Of those claims, three (3) claims and portions of others are in one of the townships of the land selected (Township 11 South Range 9 East KRM). See Exhibit A attached hereto. There exists an exclusion mineral survey application, designated F-23158, to those claims within section 30 and 31, Township 11 South, Range 9 East KRM. Appellant Manga has been engaged in usage of the trails represented by the referenced easements for a

period of approximately twenty (20) years.

Appellant DAN PATRICK has used the trails for a period of approximately twenty (20) years for hunting, fishing, and recreation.

Appellant HARVEY STRASSBURG has been engaged in the usage of both easements as a trapline and as access to Native allotments which he uses in the area. [Italics added.]

Initial Brief of Appellants, *supra*, at 1-2.

Asserting historic and present use of the trial by themselves and other members of the public, appellants argue that BLM is misreading 43 CFR 4.902 and that

* * * the party desiring to appeal need only possess land affected by the [BLM] determination. Certainly, an easement itself is a property interest and has been such for time immemorial under the common law. Of greater import, however, is the fact that where a determination, whether with respect to a regional selection or otherwise, serves to divest a party of actual legal or practical access to lands owned or used by that party, the party has been affected by the determination being made and possesses standing. The question is not whether the land itself constitutes an inholding but rather is whether a property interest is affected by the determination.

Initial Brief of Appellants, *supra*, at 5.

Appellants argue further that the question of usage of the easements is of paramount concern:

[I]t cannot be seriously contended by the BLM that a person currently using an existing trail which is proposed to be lifted to easement status has no voice in the matter or effective legal recourse where the proposed decision will divest

him of his usage and/or access. That member of the public is directly affected by the decision being made and he is entitled to be heard and, if need be, is entitled to his day in the courts.

* * * * *

In essence, Appellants submit that all that is needed for standing is a knowledgeable [*sic*] concerned person who is a user of an easement or is a potential user of an easement to cross over Native lands to get to the public lands.

Initial Brief of Appellants, *supra*, at 5-6.

Finally, appellants contend that BLM's failure to reserve a public easement over those portions of the existing trails traversing T. 11 S., R. 9 E., K.R.M.,

* * * has effectively landlocked the public lands from public usage. The Appellants herein are not just prospective users of those trails, they are current and past users of those trails and are thus aggrieved by the determination being made and possess the requisite standing herein.

Initial Brief of Appellants, *supra*, at 7.

Decision

Appellants argue that (1) an easement is a property interest and if that alleged interest is affected by the BLM determination, then the appellants have standing to appeal; (2) "all that is needed for standing is a knowledgeable [*sic*] concerned person who is a user of an easement or is a potential user of an easement," and as such they "are thus aggrieved by the determination being made and possess the requisite standing"; (3) BLM's failure to delineate the entire cat trail as an easement has served to deprive the

appellants, and the public, of historic and viable usage of that trail for purposes of access to public lands.

The remedy sought by the appellants in this appeal is the reservation of a public easement pursuant to § 17(b)(1) of ANCSA, which provides as follows:

The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.¹

The rationale for § 17(b)(1) is described by the court in *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 674 (D. Alaska 1977):

As previously mentioned the Act grants to the Alaska Natives 40 million acres of land in Alaska. The specific land which comprised the grant to eligible entities was not delineated. Rather the Village and Regional Corporations were to choose their land from the areas designated in conformity with the Act. In such circumstances Congress was justifiably concerned that certain portions of the State which were to remain in the public

¹ It is noted that decisions to reserve or not reserve public easements identified by the Planning Commission are actually made pursuant to § 17(b)(3) of ANCSA, which provides: "Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary." To eliminate confusion, however, the Board uniformly refers to public easements as being established pursuant to § 17(b)(1).

domain would become inaccessible, or landlocked by Native lands. It appears, therefore, that the public easements were to be reserved to provide access to the lands not selected.

Implementing regulations in 43 CFR 2650.4-7(b)(1) discuss the purposes for which public transportation easements may be reserved:

Public easements for the transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native corporations. Such purposes may also include transportation to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in number to constitute a public use, and government reservations or installations.

Members of the public, therefore, may reasonably assume that ANCSA guarantees continued access to public lands after adjacent lands have passed into private, Native ownership. The mechanism for this guarantee is the reservation of public easements. Whether this guarantee can be pursued through an administrative appeal to the Board depends on interpretation of the standing regulations in 43 CFR 4.902:

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

Prior to Aug. 1975, the Board determined standing pursuant to

43 CFR 2651.2(a)(5), which employed the "party aggrieved" test to determine who had standing to appeal decisions of village eligibility. When the Board's separate regulations were published in August of 1975, the Department determined that the standing test under ANCSA would be more precise. The language presently contained in 43 CFR 4.902 is the result.

The language in 43 CFR 4.902 is unique as a test of standing. While there is precedent for the proposition that administrative boards have, and should have, wider discretion than the courts in determining who may appeal (*see, Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976)), it is evident that the standard in 43 CFR 4.902 was intended to be more restrictive than the test under a "party aggrieved" standard. The Board has found that the two standards require different interpretations and that the standing test in 43 CFR 4.902 is the more restrictive. (*Appeal of Sam E. McDowell*, 2 ANCAB 350 (1978) [VLS 78-2].)

[1] Therefore, as to appellants' claim that they have standing to appeal as parties aggrieved, the Board concludes they do not. The Board reiterates its finding in *Appeal of Sam E. McDowell, supra*, that the appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a de-

termination from which an appeal to the Alaska Native Claims Appeal Board is allowed."

The requirement that an appellant claim a property interest affected by the decision appealed clearly limits the rights of members of the general public to appeal easement decisions. In *Appeal of Sam E. McDowell, supra*, the Board found that recreational use of a river did not constitute a property interest sufficient to confer standing. Implicit in the finding that "use" is insufficient to meet the standing test is the conclusion that the only members of the public who can assert property interest for standing purposes are those with some private property right acquired under State or Federal laws.

The issue in this appeal is whether any member of the public, even one who claims a private property interest, has standing under the test in 43 CFR 4.902 to appeal a public easement decision.

It has been argued that since a member of the public cannot claim a property interest in the public easement itself, or in the land underlying the easement, such individual cannot meet the standing test.

In *Appeal of the State of Alaska*, 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78-42], the Board, ruling that the State could not claim a property interest in lands it had never selected under the Statehood Act, found that the possibility that the State might select such lands in the future was too remote and spec-

ulative to constitute a property interest within the meaning of 43 CFR 4.902.

In *Appeal of Chickaloon Moose Creek Native Association, Inc.*, 4 ANCAB 250, 87 I.D. 219 (1980) [VLS 80-1], the Board ruled that where an appellant with selection rights had not selected the lands in dispute, it could not claim a property interest in them based on alleged impact of a third-party contract, and therefore lacked standing.

In its Order Partially Dismissing Appeal, dated Feb. 8, 1980, in *Appeal of Chickaloon Moose Creek Native Association, Inc.*, 4 ANCAB 134, 144 (1980) [VLS 80-1], the Board declared:

Where a party has not selected lands within the lands in dispute in an appeal, that party cannot be found to claim a property interest in such lands within the meaning of standing regulations in 43 CFR 4.902. (See *Appeal of State of Alaska*, 3 ANCAB 196 (1979).)

Appeal of the State of Alaska, supra, and *Appeal of Chickaloon Moose Creek Native Association, Inc., supra*, are both distinguishable from the present appeal. In each of the prior appeals, the appellant sought to prevent BLM from conveying title for specific lands to a Native corporation. Neither appellant had previously selected the land.

In the present appeal, appellants do not seek to prevent conveyance to the selecting Native corporation. They are not competing for title to the land proposed for conveyance. Rather, they seek to have a public

transportation easement reserved across lands to be conveyed.

There are fundamental legal differences between the effect of a decision to convey title and the effect of a decision to reserve a public easement. An easement reservation under § 17(b)(1) does not involve a competing title interest. A potential appellant desiring to appeal a public easement decision cannot claim a property interest in the land underlying the easement, because, pursuant to ANCSA, title to the land underlying the easement goes to the selecting Native corporation. Likewise, a potential appellant cannot claim a private property interest in a § 17(b)(1) easement because these are public easements. The concept of private ownership of a public easement is a contradiction in terms.

The argument that an appellant must have a property interest in the land to be conveyed, regardless of the subject matter of the appeal, ignores the fact that a decision to convey land and a decision to reserve an easement across land affect property differently.

[2] The Board holds that decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

In examining the purpose of public easements established pur-

suant to § 17(b)(1) of ANCSA, the court in *Alaska Public Easement Defense Fund, supra*, at 674, interprets the intent of § 17(b)(1) as follows:

The quest for a resolution of this issue leads to the consideration of the purpose of the public easement section of the Act.

[3] As previously mentioned the Act grants to the Alaska Natives 40 million acres of land in Alaska. The specific land which comprised the grant to eligible entities was not delineated. Rather the Village and Regional Corporations were to choose their land from the areas designated in conformity with the Act. In such circumstances Congress was justifiably concerned that certain portions of the State which were to remain in the public domain would become inaccessible, or landlocked by Native lands. *It appears, therefore, that the public easements were to be reserved to provide access to the lands not selected*, and they were not intended to provide the public with a right to use the Native lands for recreational activities. This construction of the Act is supported by its language and legislative history.

Subsection 17(b)(1), in defining the scope of public easements, states that they are to be 'across lands' which would indicate an easement for travel. [Footnote omitted.] [Italics added.]

The Board notes from the court's interpretation of the language in § 17(b)(1) that the purpose of a public easement is to allow travel "across" lands selected by Native corporations to "lands not selected" and not for purpose of access onto Native lands for such activity as hunting, fishing, trapping or recreation.

[3] Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands

to lands not selected, the Board concludes that a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

It also has been argued that even the holder of a private property interest lacks standing to appeal because such individual is provided a right of access under § 17(b)(2) of ANCSA, and therefore the placement of a public easement can have no effect on his or her property interest.

Sec. 17(b)(2) provides in part:

[A]ny valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

This provision is implemented by regulations in 43 CFR 2650.4-7(d)(5):

All conveyance documents shall contain a general provision which states that pursuant to section 17(b)(2) of the Act, any valid existing right recognized by the Act shall continue to have whatever right of access as is now provided for under existing law.

The Board has already ruled that an individual who does not have a specific claim of property interest is without standing to bring an appeal. The thrust of the previous ar-

gument is that a person who *does* claim a property interest also lacks standing to appeal a public easement decision because such person will continue to have a private right of access, and the property interest is therefore not affected by the decision.

The consequence of this position would be that no member of the general public, regardless of any claim of property interest, would have standing to appeal a decision rendered pursuant to that subsection of ANCSA specifically drafted for the benefit of the general public—§ 17(b).

The Board concludes that neither the Act nor the regulations mandate this result.

The court, in *Alaska Public Easement Defense Fund*, *supra*, distinguishes subsec. 17(b)(1) from subsec. 17(b)(2) as follows:

Subsection 17(b)(2), however, which protects access to valid existing uses appears to stand independently from the portions of the section which apply to the reservation of public easements. Its purpose is to insure that those who have valid existing uses do not lose access rights because of the public easement section. It maintains prior access in spite of the public easement section rather than serving as a limit on the scope of public easements.

435 F. Supp. 664, 678.

The court's findings that the two subsections appear to stand independently and have separate purposes and that § 17(b)(2) does not serve "as a limit on the scope of public easements," rebut the argument that protection under one subsection

is paramount to protection under the other.

It is clear that § 17(b) (1) is the statutory basis to assert a need of the general public for specifically located easements, and that such assertions are to be articulated to the Secretary of the Interior. Subsec. 17(b) (2), on the other hand, is the statutory basis to assert status quo protection for "whatever right of access as is now provided for under existing law," and such assertion is to be made by the individual claimant, through the courts if necessary.

Since the Department is not reserving § 17(b) (2) easements in conveyance documents, a claimant could not assert a right to a particular private access route through the Department, nor could the Department assure a claimant that a particular private access route would be protected pursuant to § 17(b) (2).

In this appeal, for example, the Secretary of the Interior could not guarantee Mr. Manga that § 17(b) (2) gives him a private right of access over the exact route he is attempting to have reserved pursuant to § 17(b) (1). Having no procedure to guarantee a property holder that the protection extended by § 17(b) (2) will attach to a particular route, the Secretary, through this Board, is unable to deny the property holder standing to appeal a public easement decision on the grounds that he or she will have the right to use the same access route under § 17(b) (2).

[4, 5] The Board finds that the private right of access provided to holders of valid existing rights pursuant to § 17(b) (2) of ANCSA is separate from the right provided in § 17(b) (1) of specifically-identified public access routes. Possible protection under § 17(b) (2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to satisfy the standing test of 43 CFR 4.902. However, an individual claiming standing to appeal an easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b) (2) private access right.

In the present appeal, Joseph Manga claims private property interests on public lands to which he seeks access through the conveyance area. He asserts public use by himself and others of an existing trail through the conveyance area to gain access to his mining claims and to the public lands on which they are located. He seeks a public access easement for that purpose, along an existing route.

The Board concludes that Joseph Manga's claims of affected property interests fall within the meaning of 43 CFR 4.902, and that he has standing to appeal.

Two other individuals seek standing as co-appellants with Mr. Manga. Dan Patrick does not claim any property interest in, or in the vicinity of, the conveyance appealed. He asserts only that he has used the trails for which he seeks an easement for a period of 20 years for

hunting, fishing, and recreation. Harvey Strassburg similarly does not claim a property interest, but alleges that he has used "both easements" (presumably EIN 1a L and EIN 1b L) as a trapline and as access to Native allotments which he uses. He does not allege a property interest in these allotments. Because neither individual claims a property interest in any way affected by the conveyance, the Board under regulations in 43 CFR 4.902 must find that neither Mr. Patrick nor Mr. Strassburg has standing to appeal. It should also be noted that insofar as the trails were used in connection with activities on the lands now to be conveyed to a Native corporation, such uses do not justify reservation of a public easement under ANCSA.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

ADMINISTRATIVE JUDGE BALDWIN CONCURRING SPECIFICALLY

I concur that Appellants Dan Patrick and Harvey Strassburg do not have standing to appeal the BLM decision because they do not meet the property interest requirements of 43 CFR 4.902.

I am in agreement with the conclusion reached by the majority that Appellant Manga has standing to bring this appeal before ANCAB. However, my contention is that, in view of the limiting terms of the

criteria specified in 43 CFR 4.902, and of the Board's previous decisions, the majority's findings as stated are insufficient to give standing without consideration of appellant's claim of interest affected by BLM's decision.

I agree with the majority that under previous decisions, in order to sustain a claim of standing under the provisions of 43 CFR 4.902, an individual must claim a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed. (*See, Appeal of Sam E. McDowell*, 2 ANCAB 350 (1978) [VLS 78-2].)

Judge Bazelon, in *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978), in his concurring remarks, discusses standing and therein asks the question "[w]hat *should* be the standards for determining standing to appear before an agency [Federal]?" Bazelon suggests that "[t]he starting point in determining administrative standing should be the language of the statutes and regulations that provide for an administrative hearing, appeal or intervention." Bazelon concludes that where the statutes or regulations provide specific criteria for determining standing, those statutes or regulations should be controlling. As an example he cited 43 CFR 4.902 (1976) as providing relatively precise standards. Bazelon further concludes that

[t]his regulation quite clearly establishes three classes of persons who have stand-

ing; *those asserting a property interest in land*, federal agencies, and regional corporations in land selection cases. It thus provides fairly objective criteria that can be applied without recourse to a more refined analysis. [Footnote omitted.] [Italics added.]

580 F.2d 601, 614.

I concur that the Board's previous decisions on standing under § 4.902 are based upon an appellant's claim of a competing property interest in selected lands which is different from that involved in a claim of interest in lands affected by reservation of a public easement. However, I disagree that because of such a difference the only appellants of a public easement decision by BLM would be the selecting Native corporation because they will obtain title to the lands underlying the public easement. The determination by BLM to reserve an easement across Native-selected lands would also affect any other party having an existing interest to those same lands. Thus, I contend that pursuant to the Board's previous decisions the holder of a valid existing right under § 14(g) of ANCSA may also have standing to appeal BLM's decision to reserve a public easement across the lands covered by said § 14(g) interest.

It appears that the majority's finding that: "[3] * * * [A] member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b) (1) easement decision, may rely on this

private holding as his or her 'property interest' affected within the meaning of 43 CFR 4.902" would not require an appellant to establish or assert how his claimed property interest is or can be affected by BLM's public easement decision other than to assert public use of the desired easement. I would contend that in the absence of establishing some basis for finding that an appellant has a claim of property interest which can be affected by BLM's public easement decision, that standing cannot be given within the terms of § 4.902.

Appellant Manga asserts a property interest in certain unpatented mining claims located within the boundary of lands selected by the Native corporation. These certain mining claims are contiguous with Manga's other mining claims located outside of the boundary of lands approved for conveyance. Appellant Manga asserts to have historically used the cat trail to access his mining claims and public lands. The cat trail is a roughly semicircular route with Manga's mining claims located approximately midway along the arc. Appellant Manga concurs with BLM's determination to place easements over a portion of each end of the cat trail to provide access to public lands. However, Appellant Manga, in Notice of Appeal, asserts that BLM's failure to "delineate" the entire cat trail as an easement deprives him of his historic and viable usage for purpose of access.

Appellant Manga's mining claims are located in part within the boundary of lands selected; the major portion of his claims are located on lands to remain in the public domain. The conveyance documents exclude those portions of Appellant Manga's mining claims located within the boundary of lands selected thus leaving their status unaffected at the time of conveyance; they are a property interest on public domain lands. Therefore, I am in agreement with the majority in this decision that Appellant Manga's mining claims are located on public lands. Further, it can be concluded that the mining claims are entirely outside of the boundary of lands approved for conveyance.

The Board has previously ruled on the question of standing to appeal when asserted interests are located outside of the boundary of lands approved for conveyance. In the *Appeal of Morpac, Inc.*, 3 ANCAB 89 (1978) [VLS 78-53], the Board concluded that:

The lands described by Morpac as those in which it claims a property interest are not included in the description of lands to be conveyed to the Eyak Corporation in the BLM Decision AA-8447-A, AA-8447-B; such lands are all seaward of the meandering mean high tide line and therefore are tidelands and submerged lands.

* * * * *

Morpac, Inc., has failed to show that the tidelands and submerged lands in which it asserts an interest are in any way affected by the decision here appealed. Morpac has not appealed BLM's treatment of its upland special use permits

as valid existing rights, subject to which Eyak Corporation will receive conveyance.

[1] Where the lands in which an appellant claims a property interest are not included in the decision to convey, *and appellant fails to show any connection between such land and land interests which are conveyed pursuant to such a decision, the Board finds that appellant has failed to meet the requirement for standing set forth in 43 CFR 4.902 and the appeal must therefore be dismissed.* [Italics added.]

3 ANCAB 94.

In the instant appeal, *if* Appellant Manga is claiming his unpatented mining claims as property interest affected, the record fails to show how the mining claims are affected.

Appellant Manga emphasizes that "[t]he question is not whether the land itself constitutes an inholding but rather is whether a property interest is affected by the determination." Appellant Manga further asserts that "a person currently using an existing trail which is proposed to be lifted to easement status * * * is directly affected by the decision being made and he is entitled to be heard." The record shows that Appellant Manga has been a user of that portion of the cat trail not identified as a public easement to access his unpatented mining claims.

There is no disagreement with the majority's discussion and findings that the interest in a private right of access under § 17(b)(2) is separate from and does not preclude the reservation of a public easement under § 17(b)(1) which is in accordance with finding in

Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977).

It is agreed that determination of standing under § 4.902 cannot be based upon a claim that appellant's private needs for access under § 17(b)(2) are viewed as an alternative or a trade-off for reservation of a public easement under § 17(b)(1) as stated by the majority.

While the majority's findings make a determination that appellant's right to private access does not preclude reservation of a public easement, it fails to require from the appellant any affirmative assertion which I believe the file record must establish as a basis for a claim of interest within the selected lands and which is affected by BLM's decision before standing can be allowed under § 4.902.

At the time of bringing this appeal the only possible claim of interest which may be available to the appellant "in land affected by a determination" as required by § 4.902 is the asserted claim of access under § 17(b)(2).

The court's finding in *Alaska Public Easement Defense Fund*, *supra*, that a claim of private access under § 17(b)(2) is separate from, and does not prevent reservation of, a public easement under § 17(b)(1) would not preclude an assertion by appellant that the former may constitute an interest in the selected lands. The court was there confronted with a contention that a public easement must follow an ex-

isting use which it repudiated and did not rule on the issue of the interest itself.¹

While there is no dispute that Manga's unpatented mining claims constitute a property interest, there is a question raised by Appellant Manga that his property interest may be in the form of § 17(b)(2) access affected by the public easement determination. The record shows that Appellant Manga's § 17(b)(2) access would most probably begin from the public easements along the route of the "cat trail" connecting easements EIN 1a L and EIN 1b L. For purpose of determining standing, where the record shows that a property holder has valid existing rights access provided for by § 17(b)(2) that could be affected by the easement decision of BLM, that property holder should have standing to appeal the easement determination of the BLM.

I would therefore conclude that appellant's assertion of being eligible to acquire a private access under § 17(b)(2) does make a claim of an interest in the selected lands which gives standing under § 4.902 to appeal BLM's public easement decision. This is consistent with the finding that whatever interest appellant may acquire across selected lands under § 17(b)(2) is wholly separate from any public easement.

¹"At various points in the course of the briefs the contention has been made that public easements can be reserved only on the basis of valid existing use. * * * This contention finds its origins in subsec. 17(b)(2) which protects access to valid existing uses." *Alaska Public Easement Defense Fund*, *supra*, at 678.

When an appellant is granted standing to appeal a public easement determination on the basis that his property interest is affected, as required by 43 CFR 4.902, the appellant's private right of access pursuant to § 17(b) (2) may not be argued before the Board for lack of jurisdiction to hear such appeals.

JOSEPH A. BALDWIN
Administrative Judge

DRUMMOND COAL CO.

3 IBSMA 100

Decided April 21, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement from the Oct. 3, 1980, decision of Administrative Law Judge David Torbett in Docket No. NX 0-139-R, vacating violation 1 of Notice of Violation No. 80-II-84-11 issued to Drummond Coal Co., for an alleged violation of the topsoil handling provisions of 30 CFR 715.16.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Topsoil: Redistribution—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Topsoil." For purposes of the redistribution requirements of 30 CFR 715.16(b), topsoil means at least the same material as was required under 30 CFR 715.16(a) to be removed from areas to be disturbed by surface coal mining operations.

2. Surface Mining Control and Reclamation Act of 1977: Topsoil: Generally

Because neither the Act nor the regulations make only "irreplaceable" topsoil subject to 30 CFR 715.16, all topsoil is covered by that regulation.

3. Surface Mining Control and Reclamation Act of 1977: Topsoil: Redistribution

There is a violation of 30 CFR 715.16(b) when topsoil is redistributed in a way that does not protect it from erosion and no other protective measures are taken.

4. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions

The remedial action required in a notice of violation may be modified in the document terminating the notice if the termination clearly shows in writing the remedial action accepted by OSM as an alternative abatement.

APPEARANCES: Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Mark Squillace, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Richard E. Dick, Esq., Jasper, Alabama, for Drummond Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of an Oct. 3, 1980, decision of Administrative Law Judge David Torbett. That decision vacated violation 1 of Notice of Violation No. 80-II-

84-11 issued to Drummond Coal Co. (Drummond). We reverse that decision.

Background

On Feb. 13, 1980, OSM inspected Drummond's Natural Bridge 738 surface mine in Winston County, Alabama, and issued a notice of violation alleging two violations of the Surface Mining Control and Reclamation Act of 1977 (Act)¹ and its implementing regulations. Drummond contested only violation 1 which alleged that it had failed to protect topsoil from wind and water erosion after respreading in violation of 30 CFR 715.16. The notice required Drummond to "seed and/or mulch all respread topsoil for protection from wind and water erosion."

Drummond objected to the remedial action required in the notice and attempted to obtain a modification. On Mar. 3, 1980, OSM terminated the notice because the "operator has constructed diversion ditches across retopsoiled area instead of seeding and/or mulching. He feels that this will protect the respread topsoil from erosion."²

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

² On Mar. 5, 1980, OSM issued Notice of Violation No. 80-II-84-20 to Drummond. This notice alleged the same violation after it was discovered on a second inspection, after a rainstorm, that the diversion ditches had breached and that topsoil was eroding from the area. Drummond sought review and temporary relief from this notice and a hearing was held on Mar. 28, 1980. At the conclusion of that hearing, the Administrative Law Judge issued an order from the bench vacating the notice. OSM did not appeal that decision.

Drummond sought review of this notice and a hearing was held on July 2, 1980.³ On Oct. 3, 1980, a decision was issued that vacated the notice because the remedial action required was inconsistent with the alleged violation. Although the Administrative Law Judge agreed with OSM that he had the authority to refashion the remedial action, he declined to exercise that power in this case "particularly in view of the fact that there is a real doubt as to whether the notice of violation was properly issued to begin with" (Decision at 3). This statement refers to the finding that "[t]he soil in question was not topsoil and it was not irreplaceable. If a considerable amount of the material eroded between the time it was spread and the time a protective cover was planted then additional material could have been obtained to replace the eroded material" (Decision at 3).

OSM appealed this decision to the Board and both parties filed briefs.

Discussion and Conclusions

[1] The decision below states that the material being respread in this case was not topsoil. Topsoil was defined for purposes of 30 CFR 715.16(a) in *Carbon Fuel Co., Inc.*, 1 IBSMA 253, 256-57, 86 I.D. 483, 485 (1979) as "all the A horizon

³ At this hearing, both parties stipulated that the transcript of the Mar. 28, 1980, hearing on Notice of Violation No. 80-II-84-20 contained the facts necessary to decide Notice of Violation No. 80-II-84-11.

where there is more than 6 inches of A horizon. Where there is less than 6 inches of A horizon, topsoil is either all the A horizon plus unconsolidated material down to a depth of 6 inches or all unconsolidated material if there is less than 6 inches of A horizon and unconsolidated material." Sec. 715.16(a) describes the soil material that must be removed before further disturbance of an area. Sec. 715.16(b), the section allegedly violated here, describes the requirements for redistributing the material that was previously removed as topsoil. Therefore, for purposes of 30 CFR 715.16(b), topsoil means at least the same material as was required to be removed under 30 CFR 715.16(a).

The evidence presented at the hearing was that A horizon was scarce at Drummond's mine and that the material being saved and respread was predominantly a mixture of B and C horizon material (Tr. 29). This material is topsoil for purposes of the redistribution regulations.

[2] The decision below also found that this material was not irreplaceable. Neither the Act nor the regulations make only "irreplaceable" topsoil subject to sec. 715.16. Instead, that section applies to all topsoil whether or not it is possible to replace that material from another source.

[3] Because the material being respread at Drummond's mine was topsoil, it was subject to the provisions of 30 CFR 715.16(b). The evidence presented at the hearing by

both OSM and Drummond shows that topsoil was redistributed down the slope rather than around the contour. Drummond alleged that redistribution was done in this manner because of equipment safety considerations. Such a practice would not necessarily constitute a violation if other measures were taken to protect the topsoil from erosion.⁴ The evidence shows, however, that nothing was done before the notice was issued to provide protection against erosion. There was, therefore, a violation of the topsoil redistribution provisions of 30 CFR 715.16(b).

The notice required Drummond to seed and/or mulch the redistributed topsoil. Drummond argues that seeding and mulching is not required under sec. 715.16(b) but rather is a revegetation requirement of sec. 715.20.⁵ Because a sec. 715.20 remedy is inappropriate to abate a sec. 715.16(b) violation, Drummond argues that the notice should be vacated. Drummond does not suggest that the remedial action required was illegal, but only that it was incompatible with the violation.

⁴ 30 CFR 715.14(k) states:

"All final grading, preparation of overburden before replacement of topsoil, and placement of topsoil, in accordance with § 715.16, shall be done along the contour to minimize subsequent erosion and instability. If such grading, preparation or placement along the contour would be hazardous to equipment operators then grading, preparation or placement in a direction other than generally parallel to the contour may be used. In all cases, grading, preparation or placement shall be conducted in a manner which minimizes erosion and provides a surface for replacement of topsoil which will minimize slippage.

⁵ We note, however, that seeding and mulching may be required to protect topsoil stockpiles from erosion under 30 CFR 715.16(c).

[4] It is not necessary to resolve that question, however, in deciding this case. OSM terminated this notice on the basis of remedial action different from that originally required. The termination notice recorded in writing the remedial action actually taken and the fact that OSM accepted that action as an alternative abatement. Although it would be preferable to have a separate modification document, as long as the modification is shown in writing in the document terminating the violation, it is an acceptable modification of the original notice.⁶ Therefore, the remedial action finally required for this notice was the construction of diversion ditches in the respread topsoil. Such remedial action is an appropriate abatement for a sec. 715.16(b) violation.

The Oct. 3, 1980, decision below vacating violation 1 of Notice of Violation No. 80-II-84-11 is reversed, the violation is reinstated, and it is upheld.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

⁶ Sec. 521(a)(5) of the Act, 30 U.S.C. § 1271(a)(5) (Supp. II 1978), requires that notices and orders be in writing. Any modification must also, therefore, be in writing.

This conclusion should not be construed to encourage modifications to be recorded in this manner. Both OSM and a permittee have an interest in reducing modifications to writing as soon as possible in order to avoid perhaps costly misunderstandings.

ATOMIC FUEL COAL CO., INC.

3 IBSMA 107

Decided April 23, 1981

Appeal by Atomic Fuel Coal Co., Inc., from the Aug. 29, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-255-R, which required the elimination of certain portions of a highwall as described in Notice of Violation No. 80-I-43-20.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

Elimination of that portion of a highwall created before May 3, 1978, will not be required when OSM, after negotiations with the permittee, agrees that pre-May 3 highwalls need not be eliminated and does not dispute that part of the highwall was created before that date, and when there is no evidence that post-May 3 operations had any adverse physical impact on the pre-May 3 highwall.

APPEARANCES: Dennis E. Jones, Esq., Jones & Godfrey, Lebanon, Virginia, for Atomic Fuel Coal Co., Inc.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, Glenda Hudson, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE
INTERIOR BOARD OF
SURFACE MINING AND
RECLAMATION APPEALS

Atomic Fuel Coal Co., Inc. (Atomic Fuel), has sought review of the Aug. 29, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-255-R. That decision required Atomic Fuel to eliminate certain portions of a highwall created at its minesite. For the reasons set forth below, we affirm that decision as modified in this opinion.

Background

Prior to May 3, 1978, the effective date of the initial regulatory program regulations promulgated under the Surface Mining Control and Reclamation Act of 1977,¹ Atomic Fuel began surface coal mining operations in Buchanan County, Virginia. When the Office of Surface Mining Reclamation and Enforcement (OSM) inspected the site on May 7, 1980, it issued Notice of Violation No. 80-I-43-20, alleging two violations of those regulations. Only violation 1, failure to eliminate highwalls in order to achieve approximate original contour, remains at issue. After receiving this notice, Atomic Fuel indicated to OSM that much of the disturbance had been done prior to May 3, 1978. OSM agreed that areas disturbed before May 3 would not have to be returned to approximate original contour, and modified the notice of violation accordingly on May 22, 1980.

Atomic Fuel applied for review of and temporary relief from the

notice on May 19, 1980. After the hearing the Administrative Law Judge requested that the parties survey the area so that exact points could be identified to separate the different phases of the mining operation. A survey was prepared and a decision was issued on Aug. 29, 1980. Atomic Fuel appealed from part of this decision, and both parties filed briefs.

Discussion and Conclusions

Atomic Fuel was mining two coal seams at this site: Blair (upper) and Glamorgan (lower). The disputed area involves the highwall located between points G to H and H to I, as identified in Additional Exhibits I and II and the decision below. In these areas Atomic Fuel stated that the Blair seam had been removed before May 3, 1978, but that the Glamorgan seam was removed after May 3. In addition, however, Atomic Fuel testified that some of the approximately 50 feet of overburden separating the two seams had also been removed before May 3. OSM did not dispute this testimony. The decision below, however, appears to require Atomic Fuel to eliminate the entire highwall up to the Blair seam in these areas.

[1] We do not believe that the Administrative Law Judge's decision intended to require elimination of highwall created before May 3, 1978, particularly in light of OSM's agreement that such measures would not be required and failure to dispute Atomic Fuel's testimony

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

on what had been disturbed before May 3. Neither will we impose such a requirement in the absence of evidence in the record of any adverse physical impact on that highwall from operations conducted after May 3. *Cf. Miami Springs Properties*, 2 IBSMA 399, 87 I.D. 645 (1980); *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979). The decision below is modified to clarify that only so much of the highwall between points G and I as was created after May 3, 1978, must be eliminated.

Therefore, the Aug. 29, 1980, decision of the Hearings Division is affirmed as modified.

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

MELVIN J. MILKIN

Administrative Judge

HOME PETROLEUM CORP. ET AL.

54 IBLA 194

Decided April 23, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, canceling oil and gas lease W 60414, rejecting and returning drawing entry cards drawn with second and third priorities in the July 1977 drawing of simultaneous offers for the leased parcel, and voiding overriding royalty interests retained in the lease.

Affirmed in part, reversed in part, and remanded.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: First-Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5 (b).

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: First-Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make

a showing as to their respective interests under 43 CFR 3102.7.

3. Equitable Adjudication: Generally—Estoppel—Federal Employees and Officers: Authority to Bind Government—Oil and Gas Leases: Applications: Generally

The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level.

4. Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Bona Fide Purchaser

A party which purchases a first-drawn simultaneous noncompetitive DEC lease offer is a bona fide purchaser of this interest where, at the time it agreed to purchase the offer, BLM's case records contained nothing to indicate that the DEC was defective or that a protest against the offer was ongoing; and where, at the time it consummated the agreement by payment of consideration for the offer, these records showed that BLM had proceeded to issue the lease, thus indicating that there was no defect in the DEC, provided that the purchaser had no actual knowledge of any defect in the DEC.

5. Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: First-Qualified Applicant

An undated DEC lease offer is defective and must be rejected.

6. Oil and Gas Leases: Bona Fide Purchaser—Oil and Gas Leases: Cancellation—Oil and Gas Leases: Overriding Royalties

tion—Oil and Gas Leases: Overriding Royalties

An overriding royalty interest retained by a lessee after he has assigned the lease to a bona fide purchaser is voidable and properly canceled where it is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly canceled, as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease. BLM should, on remand, sell these canceled overriding royalty interests as provided in 30 U.S.C. § 184(h) (1976) and 43 CFR 3102.1-2(b).

7. Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Bona Fide Purchaser

A "remote purchaser," that is, one who purchases an oil and gas lease interest from a bona fide purchaser, is protected just as is the latter, even where it is chargeable with knowledge that there may have been a legal discrepancy when the lease was initially issued.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for Home Petroleum Corp., and Enserch Petroleum, Inc.; Melvin E. Leslie, Esq., Salt Lake City, Utah, for M. T. McGregor and Geosearch, Inc.; David B. Kern, Esq., Milwaukee, Wisconsin, for Anthony C. Pagedas, Calvin J. Gillespie, Peter G. Sarantos, Tom Pagedas, Donald Albrecht, and Resource Service Co., Inc.; Harold J. Baer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

*OPINION BY
ADMINISTRATIVE JUDGE
STUEBING*

April 23, 1981

INTERIOR BOARD OF LAND APPEALS

This is the second time this matter has been before us. In *Geosearch, Inc.*, 41 IBLA 291 (1979), we vacated a decision by the Wyoming State Office, Bureau of Land Management (BLM), which dismissed the protest of Geosearch, Inc. (Geosearch), against the validity of several oil and gas leases, including W-60414 held by Enserch Petroleum, Inc. (Enserch). BLM originally issued this lease to Anthony C. Pagedas, *et al.*,¹ on Sept. 27, 1977, after his offer for this parcel of land was drawn with first priority in BLM's July 1977 drawing of simultaneous noncompetitive oil and gas lease offer drawing entry cards (DEC's).

On Nov. 9, 1977, Fred L. Engle, d.b.a. Resource Service Co., Inc. (RSC), filed an "Assignment of Royalty Payment" with BLM. This assignment, which Pagedas had executed, stated that he had assigned his interest in lease W-60414 to Enserch on Aug. 30, 1977,² and that he had retained the right "to receive certain overriding royalty payments," that is, the right to re-

ceive 5 percent of the total proceeds of any production from the lease. The assignment also stated that Pagedas had in turn assigned a percentage of this overriding royalty interest to Engle. Accordingly, Engle requested approval of this assignment of Pagedas' overriding royalty to him.

On Nov. 30, 1977, 2 days after the 90-day period prescribed by 43 CFR 3106.3-1, Enserch filed a copy of the Aug. 30, 1977, assignment from Pagedas to it for BLM's approval. As Engle had stated earlier, Pagedas assigned 100 percent of his record title to Enserch, but reserved a 5 percent overriding royalty interest in the lease. Enserch requested that BLM approve the assignment despite the untimeliness of its submission, and BLM did so, effective Dec. 1, 1977.

BLM apparently never approved the assignment of Pagedas' overriding royalty interest to Engle, as there is no notation so indicating on Engle's request for approval filed on Nov. 9, 1977. BLM explained subsequently that it does not approve assignments of overriding royalties, but merely places notice of such assignments in the case file for record purposes only.

On Oct. 3, 1978, Geosearch filed a protest against the continued validity of 14 leases, including W-60414. Geosearch asserted an interest in the matter based on an agreement with M. T. McGregor, whose DEC for this parcel had been drawn with second priority in the July 1977 drawing. McGregor ap-

¹ The offerors named on the DEC were Anthony C. Pagedas and Calvin J. Gillespie. Other parties in interest identified on the card were Tom Pagedas, Peter G. Sarantos, and Donald Albrecht. The statement of interests which accompanied the DEC indicated that each person held a 20 percent interest in the offer. For convenience, we shall refer to the DEC as though it were filed by Pagedas alone.

² On Nov. 9, 1977, the record contained no reference to an assignment to Enserch. However, the 90-day period for Enserch to file this assignment for BLM's approval had not expired at this time.

parently agreed to assign a percentage of whatever rights she still held in the lease offer to Geosearch.

Geosearch's protest asserted that BLM had issued this lease to Pagedas in violation of 43 CFR 3100.0-5(b), 3102.7, and 3112.5-2, in that Fred Engle had had an interest in Pagedas' offer at the time it was filed which was not disclosed and which effectively and illegally gave Engle an increased chance of success in the drawing. Geosearch sought a cancellation of all lease interests, including overriding royalty interests, remaining in the hands of persons who were not bona fide purchasers and requested that BLM issue such interests to it as the successor second drawee. BLM dismissed this protest on Oct. 5, 1978, noting that the lease had been assigned to Enserch effective Dec. 1, 1977, and stating that it believed that the second drawee had no interest left to assign to Geosearch.

On appeal to this Board, we vacated BLM's denial of Geosearch's protest, noting that the offer of McGregor, the second drawee, remained viable, as BLM had never rejected her offer. *Geosearch, Inc.*, *supra* at 293. We also remanded the matter to BLM to join Enserch to the protest proceeding in order to give it the opportunity to show that it held and acquired Pagedas' lease interest as a bona fide purchaser and to allow Geosearch to present prima facie evidence to the contrary, as provided in 43 CFR 3102.1-2(c). *Id.* at 294.

On remand, BLM inquired into the circumstances surrounding the filing of Pagedas' offer and requested a copy of any service agreement between Pagedas and Engle. On Aug. 29, 1979, a copy of this service agreement, dated Mar. 11, 1977, which apparently gave Engle a vested right for 5 years to a specific share in the proceeds of the sale of any lease won by Pagedas, was filed. Engle, through counsel, argued that he had disclaimed this interest by filing an amendment and disclaimer with BLM in January 1977 and requested that BLM suspend its proceedings until litigation on the efficacy of this waiver was completed.

On Oct. 18, 1979, BLM joined Enserch to the proceedings and directed it to present evidence of its status as a bona fide purchaser of Pagedas' lease, on pain of cancellation of the lease. On Nov. 13, 1979, Enserch responded, asserting that it acquired the lease as a bona fide purchaser without knowledge of any possible defect, and requesting accordingly that it be dismissed as a party to the proceedings. Enserch noted that it inquired into BLM's file, which revealed no defect in Pagedas' lease, as late as Oct. 11, 1977, just before it paid him consideration for the least interest as agreed on Aug. 30, 1977.

On Nov. 27, 1979, BLM afforded Geosearch 60 days in which to refute Enserch's assertion of bona fides by prima facie evidence. Geosearch responded with an affidavit from Melvin Leslie, Esq., its attor-

April 23, 1981

ney, asserting that Enserch should have been alerted to the possibility that Pagedas' lease was defective in view of this Board's holdings concerning other of Engle's clients on Aug. 19, 1977, in *Lola I. Doe*, 31 IBLA 394 (1977), and on Sept. 12, 1977, in *Sidney H. Schreter*, 32 IBLA 148 (1977), and should have examined Pagedas' service agreement with Engle. Geosearch asserted that Enserch is properly charged with constructive notice of the contents of this agreement, including the interest-creating provision, and so should have known that Pagedas had violated the regulations by not disclosing the existence of this interest when making his offer.

On Nov. 26, 1980, BLM, denying Engle's request for suspension, issued its decision in this matter. BLM held that Engle had held an interest in Pagedas' offer at the time he filed it in July 1977; that Engle's unilateral filing of an amendment and disclaimer did not alter this fact; that Pagedas' offer violated 43 CFR 3102.7 and 3112.5-2 (1979) because of Engle's interest; that Pagedas had assigned his interest in the lease to Enserch before the lease had issued, so that Enserch was not a bona fide purchaser; and that the lease should therefore be canceled. BLM declared the overriding royalty interests held by Pagedas and Engle null and void ab initio, due to their regulatory violation. BLM also questioned the good faith of Home Petroleum Corp., (Home) in its purchase of one-half of the rec-

ord title of Enserch,³ noting that Home had good reason to know of the defect in the underlying lease offer in 1978 when the assignment to it was executed. Finally, BLM held that Geosearch was not entitled to any interest in the lease.

On Nov. 26, 1980, BLM also rejected the DEC's of M. T. McGregor and James G. and Eugene J. D'Amico, which had been drawn with second and third priorities, respectively, in the July 1977 drawing, stating that the lease had been issued to the first qualified offeror.

Anthony Pagedas, *et al.*, RSC, Enserch, Home, M. T. McGregor, and Geosearch appealed BLM's decision. On Jan. 30, 1981, we granted a joint motion by appellants Enserch and Home to expedite our consideration of this matter, in order to limit possible drainage of the area by producing wells on adjacent private leases and to minimize any loss of Federal royalty oil and/or gas.

We have considered the question of the validity of offers filed by RSC clients in these circumstances many times in the past and have held consistently that they must be rejected. *Estate of Glenn F. Coy*, 52 IBLA 182, 88 I.D. 236 (1981); *D. R. Weedon, Jr.*, 51 IBLA 378 (1980); *Donald W. Coyer (On Judicial Remand)*, 50 IBLA 306 (1980); *Frederick W. Lowey*, 40

³ BLM alludes to "a pending assignment in the file which, if approved will transfer 50% of the record title from Enserch to Bridger Petroleum Corp., now Home Petroleum Corp. (Home)." We are unable to locate this document.

IBLA 381 (1979) (appeal pending); *Alfred L. Easterday*, 34 IBLA 195 (1978); *Sidney H. Schreter*, *supra*; *Lola I. Doe*, *supra* at 394.⁴ We have also affirmed BLM's rejection of offers in which other leasing services held similar undisclosed interests at the time their clients' offers were filed. *Gertrude Galauner*, 37 IBLA 266 (1978); *Marty E. Siot*, 36 IBLA 374 (1978). We adhere to these holdings.

[1, 2] The service agreement in effect at the time Engle filed Pagedas' offer gave Engle an "interest" in this offer.⁵ This interest was not abrogated by Engle's unilateral attempt to disclaim it, as Engle did not communicate this putative waiver to Pagedas or receive any consideration from him to bind the contract.⁶

We note additionally that this purported amendment and disclaimer, by its own terms, does not apply to the service agreement between Engle and Pagedas. This agreement was entered into on Mar. 11, 1977, well after Jan. 13, 1977, the date of the amendment and disclaimer, which clearly applies only to agreements extant on

Jan. 13. Thus, the purported disclaimer, even if legally effective would not apply to these offers. *D. R. Weedon, Jr.*, *supra* at 382; *Frederick W. Lowey*, *supra* at 385-86.

Pagedas failed to disclose Engle's interest at the time he made his offer as required by 43 CFR 3102.7, and the offer should therefore have been rejected because it violated this regulation.⁷

[3] The question of whether the Department is estopped from rejecting Engle's client's offers was fully considered in *Donald W. Coyer (On Judicial Remand)*, *supra* at 313-14. We adhere to our holding there that the Department is not estopped to reject these offers *in toto*.

Similarly, we adhere to our holding in *D. R. Weedon, Jr.*, *supra* at 383-84, wherein we considered and rejected the suggestion of Engle and his clients that it is unfair to give retroactive effect to our decision to reject offers such as Pagedas' in which Engle had an undisclosed interest.

[4] Even though Pagedas' offer was defective, the lease issued pursuant to this offer may not be canceled if it has been assigned to a bona fide purchaser. 30 U.S.C. § 184(h)(2) (1976); 43 CFR 3102.1-2. BLM held that Enserch, to which Pagedas assigned title to lease W 60414, was not a bona fide purchaser, citing *Winkler v. An-*

⁴ This appeal marks the fifth opportunity Engle has had to litigate the identical issues before this Board. See *Donald W. Coyer (On Judicial Remand)*, *supra* at 312 n.6; *D. R. Weedon*, *supra* at 381 n.2. However, we need not consider whether he is estopped from doing so here, as several additional issues are presented.

⁵ *Donald W. Coyer (On Judicial Remand)*, *supra* at 312; *Frederick W. Lowey*, *supra* at 383; *Alfred L. Easterday*, *supra* at 198; *Sidney H. Schreter*, *supra*; *Lola I. Doe*, *supra*.

⁶ *Donald W. Coyer (On Judicial Remand)*, *supra* at 313; *Frederick W. Lowey*, *supra* at 384-82; *Alfred L. Easterday*, *supra* at 199.

⁷ *Donald W. Coyer (On Judicial Remand)*, *supra*; *Gertrude Galauner*, *supra*; *Marty E. Siot*, *supra*; *Alfred L. Easterday*, *supra*; *Sidney H. Schreter*, *supra*; *Lola I. Doe*, *supra*.

drus, 494 F. Supp. 946 (D. Wyo. 1980), and it accordingly canceled this lease. We reverse BLM's holding and reinstate the lease.

In order to determine whether Enserch was a bona fide purchaser, it is necessary to examine the state of its knowledge, both actual and constructive, at the time of the assignment. *Winkler v. Andrus*, 614 F.2d 707, 712 (10th Cir. 1980); *Southwestern Petroleum Corp. v. Udall*, 361 F.2d 650, 656 (10th Cir. 1966). Assignees of Federal oil and gas leases who seek to qualify as bona fide purchasers are deemed to have constructive notice of all of the BLM records pertaining to the lease at the time of the assignment. *Winkler v. Andrus*, *supra* at 713; *Southwestern Petroleum Corp. v. Udall*, *supra* at 655-56. An assignee is not required to go outside those BLM records relating to the particular parcel of land assigned. *Ibid*.

We must first determine whether the conclusion is influenced by the date when the assignment occurred. The general rule is that the relevant date is the date that the consideration for the assignment was paid. *Winkler v. Andrus*, 614 F. 2d at 712, citing 77 Am. Jur. 2d, *Vendor & Purchaser* § 706 (1975).⁸ In *Wink-*

ler, the Tenth Circuit nevertheless stated that the critical time was instead when the agreement was formed. However, here, as in *Winkler*, it is immaterial whether the critical time is regarded as the date the parties agreed to the assignment or the date consideration was paid.

On Aug. 30, 1977, Enserch agreed to purchase Pagedas' offer to lease, and lease if issued. BLM's records showed the DEC to be entirely proper on its face with no indication of, nor means to discover, its actual infirmity at that time. Although the presence of the DEC's of the second and third drawees and the fact that BLM had not yet issued a lease to Pagedas might have given Enserch some reason to speculate that BLM might still reject Pagedas' offer, there was nothing in the record suggesting that it would have any basis to do so. The DEC was apparently completely and accurately filled out. Enserch had no way to tell from BLM's file that Engle actually had an undisclosed interest in the offer. On Aug. 30, 1977, the first decision issued by this Board which pointed out the

analogy. On May 1 "B" contracts to purchase an estate from "A" subject to A's ability to demonstrate that he has merchantable title. At that point B may not contend that any equitable interest held by him by reason of the contract enjoys the protection afforded to a bona fide purchaser, because the adequacy of the vendor's title is still the subject of B's inquiry and doubt. But when, on June 1, A produces satisfactory evidence that he indeed is invested with merchantable title, and nothing appears of record to refute or dispute A's showing, B may conclude the transaction by paying the consideration and assert thereafter that he acquired the title as a bona fide purchaser.

⁸ The parties in *Winkler v. Andrus*, 614 F.2d. 707, apparently disagreed on whether the relevant date was the date of the assignment agreement or the date of payment of consideration. The Court, while citing the general rule favoring the latter, announced its support for the former, but did not actually have to choose, as it found that the result was the same in either case. *Id.* at 712.

The question of what point in time must be the focus of the determination of a purchaser's bona fides may be resolved by hypothetical

illegal practice in which Engle and his clients had engaged, *Lola I. Doe*, *supra*, had not yet been distributed publicly, so that Enserch could not have been put on inquiry by familiarity with *Doe*.

Moreover, by the time Enserch completed its transaction with Pagedas by paying him for the lease on Oct. 28, 1977, it appeared even more certain that it was valid. BLM's records still revealed no flaw in the offer, and BLM had issued the lease, thereby investing Pagedas with a leasehold interest which was *prima facie* valid. Any small room for doubt which might have faced Enserch in August was erased, and there was no longer any reasonable basis to disbelieve that Pagedas had a legitimate oil and gas lease interest. We conclude that, at all times in question, the record gave Enserch a firm basis to conclude in good faith that it was buying valid title to an oil and gas lease from Pagedas.

In its decision and on appeal, BLM argues that Enserch was not a bona fide purchaser under the rule set out and applied in the *Winkler* cases. BLM's reliance on this rule here is misplaced, as in *Winkler* unlike the instant case, BLM's file gave the would-be bona fide purchaser very good reasons to question whether he was purchasing a valid lease, both at the time he agreed to purchase and at the time he paid for the interest. His assignor's DEC had been drawn only with *second* priority, and, while both BLM and this Board had concluded

that the *first* DEC was invalid (*Joseph A. Winkler*, 24 IBLA 380 (Apr. 29, 1976)), this question had not been finally resolved as of July 12, 1976 (the date of assignment), or July 26, 1976 (the date the assignee paid for the assignment), because the 90-day statutory time period for filing a petition for judicial review of our decision had not run. Thus, as the assignee was imputed to have had constructive knowledge both of the 90-day appeal period and of the contents of BLM's file, he knew that litigation about the validity of the first-drawn DEC was still in prospect, and that this first priority interest possibly could be revitalized by such proceedings. Accordingly, he could not have taken the second priority interest without some uncertainty as to its validity, and so did not qualify as a bona fide purchaser, either on the date of the agreement or when he paid the assignor. *Winkler v. Andrus*, 494 F. Supp. at 949. At all times during the assignment negotiations, BLM's records gave notice to the purchaser of a climate of adversity surrounding the interest he was purchasing. As discussed above, the present case is quite different.

BLM attempts to analogize *Winkler* to the present situation, stressing that here, as in *Winkler*, the validity of the assigned interest had not yet been finally established at the time of the assignment. It argues that a challenge to the validity of Pagedas' offer was still possible even after the lease issued, because the second and third drawees

could have protested the issuance of the lease to Pagedas or could have appealed the rejection of their offers.⁹ We do not think that the rule in *Winkler* extends so far as to dictate that one may not purchase an oil and gas lease interest in good faith simply because there is a possibility that the validity of the lease someday might be subject to challenge. As discussed above at n.9, one may never be entirely certain that a protest will not be filed against a lease, even long after it is issued. See, e.g., *Beard Oil Co.*, 1 IBLA 42, 77 I.D. 166 (1970), where the protest was filed 4 years after the lease issued. Accordingly, we hold that, in the absence of a climate of adversity surrounding the interest, which is evident from BLM's records, such as was present in *Winkler*, one may be a bona fide pur-

chaser even where the validity of the lease might be subject to some future attack. That is, if there is nothing in the record suggesting that an adverse claim may be asserted and prevail, such as a protest or apparent defect in the lease, the lease may be purchased in good faith. This is particularly true where, as here, the assignee's purchase of the offer was expressly contemplated by the Departmental regulations governing assignments. 43 CFR 3106.3-4; see *Barbara J. Niernberger* (concurring opinion), 53 IBLA 112, 119-21 (1981).

Therefore, in the absence of anything in the record showing that Enserch had actual knowledge of the defect in Pagedas' offer, we conclude that it was a bona fide purchaser, as there is no basis for imputing to it constructive knowledge of the defect.

⁹ We note two pertinent practical difficulties with this argument. First, there is no specific time period within which to protest. For instance, Geosearch waited over a year from the date of issuance of the lease to protest on behalf of the second drawee. Second, BLM did not routinely reject and return second and third DEC's in 1977, and did not start doing so until recently. For example, in this case, BLM did not reject the second and third offers until over 3 years after issuance of the lease. Moreover, we believe that there are hundreds of ongoing oil and gas leases issued under the DEC system in which BLM has never rejected these second and third DEC's. In these circumstances, the effect of adopting BLM's suggestion would be that no assignee of any of these hundreds of leases could be a bona fide purchaser, as BLM's records would have shown the assignee that it was still possible for the second or third drawee to protest the validity of the lease, because their offers were still extant despite the fact that the lease has long since issued. This result is clearly at odds with the congressional purpose in enacting the bona fide purchaser provision (cited *infra*), as it would virtually eliminate this protection and throw lease ownership into chaos.

We affirm BLM's decision of Nov. 26, 1980, to reject and return the DEC's of M. T. McGregor and James G. and Eugene J. D'Amico, which were drawn with second and third priority, respectively, in the July 1977 drawing. BLM draws DEC's with subordinate priority in order not to have to relist a parcel for offers if the first DEC is rejected. If BLM had not previously rejected them, the second- or third-priority DEC might be recognized as a valid offer in the event that a lease issued to a superior offeror was canceled. *Estate of Glenn F. Cou.*, 52 IBLA 182, 194-95, 88 I.D. 236, 242; *Geosearch, Inc.*, 51 IBLA 59, 61 (1980). In the instant case,

the lease has been issued to a superior offeror, and this lease may not now be canceled because of any defect in that superior offer, because the lease has been assigned to a bona fide purchaser. In these circumstances, the second- and third-priority DEC's are properly rejected, as there is no longer any interest at stake to which they apply. See *Geosearch, Inc.*, 41 IBLA at 293.

[5] Even disregarding the above, the DEC of McGregor was defective and must be rejected, as it was not dated. *Sorensen v. Andrus*, 456 F. Supp. 499 (D. Wyo. 1978); *Donald E. Monington*, 42 IBLA 380 (1979), *aff'd Monington v. Andrus*, Civ. No. C-79-366K (D. Wyo. Apr. 11, 1980).

[6] We disagree with BLM's holding that the retained overriding royalty interest now held by Pagedas and Engle were null and void ab initio. We regard these interests as merely *voidable* and subject to cancellation. Were such interests wholly void from their inception, they would be nonexistent, and no administrative action would be necessary to dispose of them. Moreover, if such interests never existed as a matter of law, it well might be argued that the entire leasehold estate passed to the bona fide purchaser without reservation, so that the interests retained by the assignor could not be recovered and returned to Federal control, and the purchaser would have received more than bargained for. Such a result clearly is not what is contemplated by the statute.

The retained overriding royalty

interests are voidable and must be canceled. Where an offeror has filed a DEC which violates 43 CFR 3102.7 because it does not contain the names of all parties in interest; where BLM, not knowing of this defect, has issued a lease to the offeror; and where the lessee has assigned the lease to a bona fide purchaser and retained an overriding royalty interest, BLM, upon discovering the defect in the offer, properly cancels the overriding royalty interest retained by the offeror. *Wayne E. DeBord*, 50 IBLA 216 n.1, 87 I.D. 465 n.1 (1980) (appeal pending). It is entirely proper to deny both Pagedas (*et al.*) and Engle (RSC) a share in any benefit which may result from production on this lease. Pagedas failed to comply with the sole party in interest requirement, and Engle took an assignment of a portion of the interest which Pagedas retained with full knowledge of the defect in Pagedas' DEC, as Engle himself held the objectionable interest.

Engle and Pagedas challenge the Department's authority to cancel their overriding royalty interests. The regulations *require* that any underlying interest in a lease be canceled or forfeited to the Government where the interest was acquired in violation of governing provisions, notwithstanding the fact that there may be other valid interests in the same lease which are not subject to cancellation. 43 CFR 3102.1-2(b). This provision is adopted directly from the governing section of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 184

(h) (2) (1976), as part of the long-recognized Departmental authority to cancel leases administratively for violation of the Mineral Leasing Act. *Boesche v. Udall*, 373 U.S. 472 (1963). In *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), the Court held that the Secretary *must* cancel an oil and gas lease interest acquired in violation of a Departmental regulation.

Having canceled these overriding royalty interests, on remand, BLM should comply with the terms of 43 CFR 3102.1-2(b) and sell these interests as provided therein.

[7] Finally, we consider the status of the interest of Home to which Enserch apparently reassigned half of its interest on Nov. 3, 1978.¹⁰ In its decision, BLM questioned whether Home was a bona fide purchaser of this interest under *Winkler*, as by the time of assignment to Home in November 1978, BLM's records revealed that Geo-search had challenged the validity of Pagedas' offer. We conclude that it is irrelevant that Home may have known of the possibility of a defect in Pagedas' offer in November 1978. Home is a "remote purchaser" from Enserch, that is one entitled to protection as a bona fide purchaser and, as such, takes the same full title which Enserch had:

It is a general rule that a remote purchaser of real estate whose purchase does not fulfil all the requisites for protection due a bona fide purchaser may nevertheless be accorded protection be-

cause of his purchase from one who is entitled thereto. The purpose of this rule is to prevent a stagnation of property and to protect the first purchaser who, being entitled to hold and enjoy, must be equally entitled to sell. Otherwise, a bona fide purchaser might be prevented from selling his property for full value. In other words, the vendee of the bona fide purchaser is not favored on his own account, but for the sake of him from whom he purchased. It is wholly immaterial of what nature the outstanding interest is, whether it is a lien or encumbrance, or a trust, or any other claim. [Footnotes omitted.]

77 Am. Jur. 2d, *Vendor & Purchaser* § 718 (1975). It is appropriate to apply this rule to the Federal bona fide purchaser statutory provision as the announced intent of Congress in enacting these provisions was in part to encourage purchase of lease interests without hesitancy or reluctance. H.R. Rep. No. 1062, 86th Cong., 1st Sess. 2, reprinted in [1959] U.S. Code Cong. & Ad. News 2620, 2621.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for further proceedings in accordance therewith.

EDWARD W. STUEBING

Administrative Judge

WE CONCUR:

JAMES L. BURSKI

Administrative Judge

DOUGLAS E. HENRIQUES

Administrative Judge

¹⁰ We assume that this assignment was not completed until November 1978 in the absence of specific details about it in the record.

RICHARD J. LEAUMONT

54 IBLA 242

Decided *April 27, 1981*

Appeal from decision of the Montana State Director, Bureau of Land Management, dismissing appellant's protest against the State Director's determination not to designate four units of land as wilderness study areas.

Affirmed.

1. Administrative Procedure: Adjudication—Administrative Procedure: Administrative Review—Appeals—Federal Land Policy and Management Act of 1976: Wilderness—Wilderness Act

Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered, with due regard for the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.

APPEARANCES: Richard J. Leaumont, Slidell, Louisiana, pro se; Dale D. Gobel, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

*OPINION BY
ADMINISTRATIVE JUDGE
STUEBING*

*INTERIOR BOARD OF
LAND APPEALS*

Pursuant to its responsibilities under sec. 603 of the Federal Land

Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), and the Wilderness Act of 1964, 16 U.S.C. § 1131 (1976), the Montana State Office of the Bureau of Land Management (BLM) has conducted an inventory of certain identified units of public land in Montana in order to ascertain whether such units should be classified as wilderness study areas. In consequence of this effort, four such inventoried units were found not to meet the criteria established to qualify them as wilderness study areas, same being identified as Blacktail Mountains West (MT-076-003), Lima Reservoir (MT-076-011), McCartney Mountain/Sandy Hollow (MT-076-025), and Missouri River Island (MT-075-123).

Richard J. Leaumont filed a written protest from BLM's decision not to recommend these units for designation as wilderness study areas, listing his reasons why each should be included, rather than excluded, from further study.

By his letter decision of June 9, 1980, the BLM's State Director, Montana, rejected Leaumont's protest. In the decision, he cited each of Leaumont's reasons for recommending each of the units as a wilderness study area, and listed BLM's specific response to each reason as his basis for finding the protest to be without merit.

Leaumont filed a timely appeal to this Board. In his statement of reasons for appeal, appellant has offered his own point-by-point analysis of the wilderness characteristics of each unit and attempts to

refute the reasons given by BLM for its findings.

We will not undertake here a recital of all of the detailed assertions and rebuttals made, respectively, by appellant and BLM regarding each unit. However, in order that the reader may comprehend the nature of the controversy, we will describe generally a few of the issues asserted.

BLM's findings were, variously, that certain of the units had less than 5,000 acres (the Missouri River Island Unit is only 22 acres),¹ and were lacking in the outstanding wilderness qualities, public support for inclusion, and sufficient size to make practical their preservation and use in an unimpaired condition. Appellant disagrees, alluding to various attributes in each of these units which he feels are outstanding he denies that the lack of public support for inclusion of a unit should be a factor influencing the decision.

BLM found that the presence of roads, fences, travel ways, private inholdings, mining activities, junk and litter, developed springs, abandoned cabins, a transmission line, etc., constitute detractions from the unit's wilderness qualities. Appellant asserts that these are less significant than the ecological, geological, historical, zoological, botanical, and ornithological values which these units afford.

BLM found that certain units do not offer the visitor a great opportunity for solitude in isolation from man and his world. Appellant disagrees, pointing out that in some instances solitude and isolation is provided by terrain features despite the proximity of cultural influences, and adding that he "is sure the flat topography of Unit 011 would make the degree of solitude less than outstanding to a Montana rancher, but on the other hand an urban dweller from our east coast would experience an outstanding degree of solitude."

These evaluations are necessarily subjective and judgmental. BLM's efforts are guided by established procedures and criteria, and are conducted by teams of experienced personnel who are often specialists in their respective areas of inquiry. Their findings are subjected to higher-level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that such conclusions might reach a result over which reasonable men could differ. As we observed in *Rosita Trujillo*, 21 IBLA 289, 291 (1975):

Appellant's contentions are neither erroneous nor unreasonable. They represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of

¹ Areas of less than 5,000 acres may be considered, as may roadless islands of any size. However, the size of an area can influence its potential for enjoyment of solitude, isolation, and other wilderness values.

a showing of compelling reasons for modification or reversal.

That holding was echoed in *California Association of Four-Wheel Drive Clubs*, 38 IBLA 361, 367-68 (1978), wherein we said:

Where conflicting uses of the public lands are at issue and the matter has been committed to the discretion of the BLM, the Board will uphold the decision of the BLM unless appellant has shown that the BLM did not adequately consider all of the factors involved, including whether less stringent alternatives would accomplish the result. *Of. Questa Petroleum Co.*, 33 IBLA 116 (1977); *Rosita Trujillo* [supra].

We do not find that the instant case presents sufficiently compelling reasons to warrant alteration of the decision below.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

EDWARD W. STUEBING

Administrative Judge

WE CONCUR:

JAMES L. BURSKI

Administrative Judge

GAIL M. FRAZIER

Administrative Judge

RAYLE COAL CO.

3 IB SMA 111

Decided April 27, 1981

Petition by Rayle Coal Co. for review of the Aug. 7, 1980, decision of Admin-

istrative Law Judge Sheldon L. Shepherd, Docket No. CH 0-95-P, upholding a violation of the standards for road construction in 30 CFR 715.17(1)(2), alleged by the Office of Surface Mining Reclamation and Enforcement in Notice of Violation No. 79-I-38-60 and challenged by petitioner on the primary ground that the subject road is not covered by the cited regulation.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Roads maintained with public funds." Under an agreement with the West Virginia Department of Highways whereby the right-of-way for a secondary road has been reopened and maintained by a coal company for its use and that of the general public, the resulting road is not one "maintained with public funds" that is excluded from the definition of "roads" in 30 CFR 710.5 and, thus, the road is subject to the construction standards in 30 CFR 715.17 (1) (2).

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Because compliance with state mining permit conditions does not excuse non-compliance with the initial Federal performance requirements, a decision by a state regulatory authority not to include a haul road within the area under state permit does not preclude application of the Federal requirements to the road.

APPEARANCES: Neal S. Tostenson, Esq., Cambridge, Ohio, for Rayle Coal

April 27, 1981

Company; John R. Woodrum, Esq., Office of the Field Solicitor, Charleston, West Virginia, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Susan Shands, Esq., and Mark Squillace, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

Rayle Coal Co. (Rayle) has petitioned the Board to review a decision of the Hearings Division upholding a violation of the road construction standards in 30 CFR 715.17(l)(2) alleged by the Office of Surface Mining Reclamation and Enforcement (OSM) in Notice of Violation No. 79-I-38-60. Before the Hearings Division Rayle attempted to show that the subject road is excluded from the definition of "roads" in 30 CFR 710.5 and, therefore, is not covered by the construction standards for roads in 30 CFR 715.17(l)(2). The Administrative Law Judge held otherwise. In support of its petition to the Board Rayle has repeated its argument against OSM's asserted regulatory authority and further argued that, because the road is not part of its permit area, the company is in compliance with its state permit and, thus, not in violation of the Federal standards. For the reasons presented below, we reject both

arguments and affirm the decision under review.

*Factual and Procedural
Background*

Acting pursuant to the Surface Mining Control and Reclamation Act of 1977¹ OSM conducted inspections of Rayle's surface coal mining operation (State Permit No. 1-79) in Ohio County, West Virginia, and issued to Rayle Notice of Violation No. 79-I-38-60. In this notice OSM charged the company with a failure to construct a haul road in accordance with 30 CFR 715.17(l)(2). The haul road was identified in the notice as the section of West Virginia Secondary Route 4/1 between Rayle's access road and West Virginia State Route 2.

Rayle petitioned the Hearings Division for review of the notice on Feb. 22, 1980. The company did not allege that the haul road described in the notice was constructed in accordance with the cited regulation; rather, it challenged the notice on the ground that the haul road is a public road under the ultimate control of West Virginia. On Apr. 25, 1980, a hearing was conducted on Rayle's petition. The following statements of the Administrative Law Judge summarize the evidence adduced at the hearing.

There apparently was opposition from people living on the improved and maintained portion of Route 4/1 to the use of the road by the petitioner's coal hauling trucks. As a result, the petitioner entered

¹ Act of Aug. 3, 1977, 91 Stat. 445-532, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

into an agreement with the State of West Virginia (Respondent's Exhibit No. 4) whereby the petitioner obligated itself to reopen, grade and widen the unmaintained portion of Route 4/1 over the State-owned right of way to reconnect the same in a northerly direction with the State highway system. The petitioner was obligated to perform the necessary work on approximately 1.5 miles of County Route 4/1. The violations as to the haul road were described by Mr. Petitto beginning at page 25 of the transcript. The testimony of Mr. Petitto with the corroboration from Respondent's Exhibits Nos. 5a, 5c, 5d and 5f abundantly established that this subject road was not maintained as required by the interim regulations. Indeed, the petitioner put on no evidence to rebut the respondent's case (Tr. 91).

Further undisputed evidence was given by Mr. J. Darrell Bowen (Tr. 76) who was called by the respondent. Mr. Bowen is employed as a civil engineer for the West Virginia Department of Highways and testified that in 1933 at the time the State highway system came into existence that the portion of the road in question became part of the State highway system. Subsequently, between 1948 and 1950, the portion of the road in question apparently was dropped from the inventory log of the State of West Virginia (Tr. 81). Mr. Bowen further stated that his records did not indicate that any maintenance was performed since the time the subject road was dropped from the West Virginia highway map (Tr. 82). [Decision at 2.]

The Administrative Law Judge concluded on the basis of this evidence that Rayle's haul road "is not excluded from [OSM's] jurisdiction [under] the Act and that the notice of violation was properly issued." *Id.*²

² The Administrative Law Judge further assessed a civil penalty of \$2,000 (40 points) for the violation (Decision at 3). Because Rayle did not challenge the civil penalty amount in its petition to the Board, we do not review the penalty in our decision.

Discussion and Conclusion

[1] We agree that Rayle's haul road is not "maintained with public funds," so as to be excluded from the definition of "roads" at 30 CFR 710.5,³ and that the road is, therefore, subject to the construction standards at 30 CFR 715.17(7) (2).

The undisputed evidence shows that from approximately 1950 until 1978 the portion of Secondary Route 4/1 now used by Rayle as a haul road was not mentioned in West Virginia's road inventory log and was left in disrepair by the State (Tr. 80-84). In June 1978 Rayle entered into an agreement with the West Virginia Department of Highways giving Rayle temporary permission to reopen, grade and widen a 1.5-mile section of Route 4/1 for coal haulage (Exh. R-4). Rayle agreed to assume liability for any damage to persons or property from its work on the road, to maintain the road in a suitable condition for the traveling public who might use it, to restore the road at the completion of hauling to a condition better than that on the date of the agreement, and to post a bond securing the company's

³ This definition is:

"Roads means access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations, including use by coal-hauling vehicles leading to transfer, processing, or storage areas. The term includes any such road used and not graded to approximate original contour within 45 days of construction other than temporary roads used for topsoil removal and coal haulage roads within the pit area. *Roads maintained with public funds such as all Federal, State, county, or local roads are excluded.*" (Italics added.)

April 27, 1981

performance of the terms of the agreement (Exh. R-4).

No mention is made in the agreement of any financial responsibility on the part of West Virginia for maintenance of the road during its use by Rayle;⁴ rather, such responsibility clearly falls on Rayle under the agreement. The State merely has granted Rayle permission to develop and utilize a public right-of-way. Accordingly, we hold that the road is not excluded from the definition of "roads" at 30 CFR 710.5 and is subject to the construction standards of 30 CFR 715.17 (l) (2).

[2] The fact that Rayle's haul road may not be subject to the terms of the company's state mining permit (Tr. 61, 63, 76; Brief for Petitioner at 2) does not affect our holding. Compliance with the terms of its permit does not, per se, relieve Rayle of its obligations under the initial Federal performance standards. *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979). Correspondingly, the determination by the West Virginia Department of Natural Resources not to include the haul road within Rayle's permit area does not preclude application of the Federal performance standards to the road.

⁴ Rayle's propositions that the West Virginia Department of Highways has expended public funds in supervising and controlling the use of the haul road under its agreement with Rayle (Brief for Petitioner at 3), and that West Virginia's ownership of the road continues under the agreement (*id.*), do not show the kind of expenditures of public funds for maintenance of the road required under the exclusionary language of 30 CFR 710.5.

For the foregoing reasons, the decision below upholding violation 1 of Notice of Violation No. 79-I-38-60 is affirmed.

MELVIN J. MIRKIN

Administrative Judge

NEWTON FRISHBERG

Administrative Judge

WILL A. IRWIN

Chief Administrative Judge

RONALD W. JOHNSON

3 IBSMA 118

Decided April 27, 1981

Appeal by Ronald W. Johnson from the July 18, 1980, decision of Office of Surface Mining Reclamation and Enforcement Regional Director Edgar A. Imhoff, in Citizen's Complaint No. 3-II-4-80, holding that Peabody Coal Co. had valid existing rights to conduct surface coal mining operations within 300 feet of two occupied mobile homes on Mr. Johnson's property.

Remanded.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

During the initial regulatory program, OSM may defer to the state for an initial determination on valid existing rights, but when that determination is properly questioned, OSM has an independent responsibility to review it to ensure that it was made in compliance with the initial program regulations.

APPEARANCES: Ronald W. Johnson, Sparta, Illinois, pro se; Myra Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Arlene Robinson, Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

On Sept. 2, 1980, Ronald W. Johnson filed an appeal from a July 18, 1980, decision of Office of Surface Mining Reclamation and Enforcement (OSM) Regional Director Edgar A. Imhoff in Citizen's Complaint No. 3-IL-4-80.¹ This complaint had been filed under the provisions of the Surface Mining Control and Reclamation Act of 1977 (Act)² and its implementing regulations. The decision, based on a June 27, 1980, inspection of Peabody Coal Company's (Peabody) surface mining operation conducted under Illinois permit 980-82, issued on May 14, 1980, held that Peabody had valid existing rights under sec. 522(e) of the Act, 30 U.S.C. § 1272(e) (Supp. II 1978), to conduct surface coal mining operations within 300 feet of two occupied mobile homes on Mr. Johnson's property. For the reasons set forth below, we remand this case to OSM for further consideration.

Background

On Dec. 16, 1972, Mr. Johnson bought 4 acres and a residence from William Lamont. Mr. Lamont reserved the coal and other mineral rights in the 4 acres. On Dec. 29, 1975, Mr. Lamont and Peabody signed a "memorandum of agreement" under which Peabody was to purchase 406 acres adjoining Mr. Johnson's property and Mr. Lamont's reserved mineral rights in Mr. Johnson's property by July 1, 1977. Peabody received Illinois permit 560-79 sometime in 1976, covering this area. On July 14, 1977, Mr. Lamont deeded the property to Peabody.³ At that time, part of the property could not be mined because of a city ordinance prohibiting mining within certain areas.

On Feb. 27, 1978, the Sparta city council finalized action permitting mining within 1½ miles of the city limits, thus allowing Peabody to mine the entire property purchased from Mr. Lamont. Subsequently, Mr. Johnson filed an action in State court seeking invalidation of the new city ordinance. There is no indication in the record whether this case has been concluded.

On Jan. 2, 1980, Peabody applied for a new permit, which was issued on May 14, 1980. The permit prohibited mining within 300 feet of Mr. Johnson's house.

On May 9, 1980, Mr. Johnson moved a mobile home onto the

¹ Mr. Johnson was granted the right to appeal this decision on Aug. 12, 1980, by Acting Regional Director W. Russell Campbell.

² Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

³ According to a notation in the margin, the deed from Mr. Lamont to Peabody was not filed in the county clerk's office until Jan. 29, 1980.

northwest corner of his lot. On May 12, 1980, he requested OSM to monitor his property for several possible violations of the Act and initial program regulations by Peabody, including mining within 300 feet of occupied dwellings.⁴ Some time in late May, Mr. Johnson moved a second mobile home onto the southwest corner of his lot.

On June 4, 1980, OSM informed Mr. Johnson that the State regulatory authority would need to make a determination of whether Peabody had valid existing rights to mine the areas around the mobile homes. OSM inspected the site on June 27, 1980, and issued an inspection report stating that Peabody "can (probably) demonstrate to the regulatory authority that the coal is both needed for and immediately adjacent to an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977,"⁵ the effective date of the Act. No enforcement action was taken. On July 18, 1980, the OSM Regional Director affirmed the decision not to take action against Peabody. Subsequently, on Aug. 27, 1980, Illinois determined that Peabody had valid existing rights under OSM regulations.

⁴ Although it is not totally clear from the record, Mr. Johnson may not have informed Peabody that this mobile home was occupied until June 25, 1980. It is also not clear whether it was in fact occupied before that date.

⁵ This language is based on 30 CFR 761.5, a regulation written in terms of the permanent regulatory program under the Act, but made effective during the initial program by 44 FR 77446 (Dec. 31, 1979).

On Sept. 2, 1980, Mr. Johnson appealed the Regional Director's decision to the Board. After initial submissions concerning whether or not the appeal should be granted, the Board issued an order on Nov. 4, 1980, seeking briefs on whether OSM had authority to review a decision of a state regulatory authority on valid existing rights, and, if there were such authority, what procedures should be followed in conducting that review. Briefs were received from Mr. Johnson, OSM, and Peabody.

Discussion and Conclusions

[1] During the initial regulatory program sec. 522(e) of the Act, 30 U.S.C. § 1272(e) (Supp. II 1978), and 30 CFR 710.4 place the primary responsibility for determining whether a permittee has valid existing rights with the state regulatory authority for those areas over which the state has control. That responsibility, however, is not exercised totally independently of Federal oversight, because during the initial program, the Federal Government is an independent regulatory body. *Dayton Mining Co., Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979); S. Rep. No. 95-128, 95th Cong., 1st Sess. 57 (1977). Part of the purpose of this oversight role is to ensure that the states understand and properly apply the Federal regulations which serve as the basis for many state regulations. In this context we have held that compliance with state permit requirements does not excuse noncompliance with the Federal regulations. *Cedar Coal Co.*,

1 IBSMA 145, 86 I.D. 250 (1979). Thus, although OSM may defer to the state for an initial determination on valid existing rights, when that determination is properly questioned, OSM has an independent responsibility to review it to ensure that it was made in compliance with the initial program regulations.

In this case, OSM's decision was issued on the basis of an inspection report stating that Peabody could *probably* demonstrate that it had valid existing rights. It was also issued before Illinois had made a determination. OSM has not reviewed the State's determination in order to decide whether the regulations were properly applied.

Therefore, this case is remanded to OSM for further consideration consistent with this decision. The decision made following this consideration should clearly apprise both Mr. Johnson and Peabody of the reasons and basis for the decision.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

RUSSELL PRATER LAND CO., INC.

3 IBSMA 124

Decided *April 27, 1981*

Notice of appeal/petition for discretionary review filed by the Office of

Surface Mining Reclamation and Enforcement from the Aug. 21, 1980, decision of Administrative Law Judge Tom M. Allen in Docket Nos. CH 0-239-R, CH 0-182-P, and CH 0-200-P, dismissing the cases for failure to show authority to regulate the site.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally

Proof of the intention to mine coal and of a disturbance is sufficient to establish OSM's authority to regulate a site.

APPEARANCES: Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, James M. McElfish, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; David J. Hutton, Esq., Jones & Godfrey, Lebanon, Virginia, for Russell Prater Land Co., Inc.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of the Aug. 21, 1980, decision of Administrative Law Judge Tom M. Allen in Docket Nos. CH 0-239-R, CH 0-182-P, and CH 0-200-P. That decision dismissed the cases on the grounds that OSM had failed to show that it had authority to regu-

1 IBSMA 145, 86 I.D. 250 (1979). Thus, although OSM may defer to the state for an initial determination on valid existing rights, when that determination is properly questioned, OSM has an independent responsibility to review it to ensure that it was made in compliance with the initial program regulations.

In this case, OSM's decision was issued on the basis of an inspection report stating that Peabody could *probably* demonstrate that it had valid existing rights. It was also issued before Illinois had made a determination. OSM has not reviewed the State's determination in order to decide whether the regulations were properly applied.

Therefore, this case is remanded to OSM for further consideration consistent with this decision. The decision made following this consideration should clearly apprise both Mr. Johnson and Peabody of the reasons and basis for the decision.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

RUSSELL PRATER LAND CO., INC.

3 IBSMA 124

Decided *April 27, 1981*

Notice of appeal/petition for discretionary review filed by the Office of

Surface Mining Reclamation and Enforcement from the Aug. 21, 1980, decision of Administrative Law Judge Tom M. Allen in Docket Nos. CH 0-239-R, CH 0-182-P, and CH 0-200-P, dismissing the cases for failure to show authority to regulate the site.

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OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

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April 27, 1981

late Russell Prater Land Co., Inc.'s (Russell Prater), operations at the site in question. We reverse that decision and remand the case for further proceedings.

Background

OSM inspected Russell Prater's Mine #2 in Buchanan County, Virginia, on Jan. 16 and 24, 1980, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).¹ As a result of that inspection OSM issued Notice of Violation No. 80-I-83-2, alleging seven violations of the Act and regulations. A followup inspection on Apr. 3, 1980, resulted in the termination of violations 5 through 7 and the issuance of Cessation Order No. 80-I-83-1 for failure to abate violations 1 through 3.²

Russell Prater applied for review of the notice and order and prepaid the proposed civil penalty assessments. At the hearing on July 10, 1980, Russell Prater moved for summary decision at the conclusion of OSM's evidence on the grounds that OSM had failed to prove its authority to regulate the site because it had not shown that any coal had been removed. The Administrative Law Judge granted the motion. This decision was confirmed in a written decision issued on Aug. 21, 1980. OSM appealed from this decision and both parties filed briefs.

Discussion and Conclusions

[1] At the hearing the OSM inspector testified that two Russell Prater officials told him that they had intended to open a deep mine at this site.³ There was also evidence that the site had been disturbed by Russell Prater (Tr. 19-21). Proof of the intention to mine coal and of a disturbance is sufficient to establish OSM's authority to regulate the site. *Cf. Squire Baker*, 1 IBSMA 279, 86 I.D. 550 (1979). Neither the Act nor the regulations requires OSM to wait until coal has actually been removed from a site otherwise subject to regulation before it has authority to regulate that site.⁴ This is not to say that Russell Prater might not be able to adduce facts that would cause OSM to lose its authority or that it might not have valid defenses to the charges. It is to say that, at the stage the proceedings had reached below, OSM had established authority over this site, and the motion for sum-

³ For the use of statements by company officials in establishing OSM's prima facie case, see *Island Creek Coal Co.*, 1 IBSMA 316, 86 I.D. 724 (1979); *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 86 I.D. 656 (1979).

⁴ OSM also showed that there was black material spilled along the access road that was, in the inspector's opinion, part slag and part coal (Tr. 59). This evidence was intended to show that coal had been removed from the site. The OSM inspector attempted to relate what a landowner in the area had told him about coal removal, but this testimony was excluded, apparently on the grounds that it was hearsay (Tr. 92-93). We note that the rules of evidence are less restrictive in an administrative setting than in the courts. Hearsay testimony is especially subject to more lenient treatment and should not be excluded solely on the grounds that it is hearsay. See *Roberts Brothers Coal Co., Inc.*, 2 IBSMA 284, 285 n.8, 87 I.D. 439, 445 n.3 (1980).

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

² Violation 4 involved a topsoil removal problem. No remedial action was required because the topsoil could not be salvaged.

mary decision should not have been granted.

The Aug. 21, 1980, decision is reversed and the case is remanded to the Hearings Division for further proceedings not inconsistent with this decision.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

MARCO, INC.

3 IBSMA 128

Decided April 27, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement from the Sept. 16, 1980, decision of Administrative Law Judge David Torbett in Docket No. CH 0-200-R, vacating Notice of Violation No. 80-I-57-5 issued to Marco, Inc., on the grounds that the disturbance cited was caused by an independent third person.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

OSM may rely on state records to determine the permittee of an area.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and

Reclamation Act of 1977: Notices of Violation: Permittees

Competent evidence that the person listed in state records as permittee over an area had no legal right under state law to mine or reclaim that area and that the person was not conducting mining or reclamation operations there as contemplated in 30 CFR 700.5 (1978) is sufficient to rebut a prima facie showing that the person is the permittee.

APPEARANCES: Kevin M. O'Brien, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; James P. Jones, Esq., Penn, Stuart, Eskridge & Jones, Bristol, Virginia, for Marco, Inc.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Sept. 16, 1980, decision of Administrative Law Judge David Torbett in Docket No. CH 0-200-R. That decision vacated Notice of Violation No. 80-I-57-5, originally alleging three violations, on the grounds that Marco, Inc. (Marco), was not responsible for the mining in question. For the reasons set forth below, we affirm that decision as modified in this opinion.

Background

Sometime in 1974, Marco obtained Virginia permit 1356 cover-

ing 333 acres in Wise County. On July 25, 1975, Marco leased the mineral rights in that property from Virginia Iron, Coal and Coke Co. (Virginia Iron) and began mining operations.

In 1979 Marco officials were approached by S.R.M. Excavating, Inc. (S.R.M.), who tried to lease from them 4.8 acres that Marco had leased from Virginia Iron. Because Marco had decided not to mine the area S.R.M. sought to mine, it agreed to surrender that tract back to Virginia Iron, and on Sept. 5, 1979, it executed a "surrender" of that part of its lease to Virginia Iron.

S.R.M. submitted a permit application to the State on Sept. 6, 1979. After being informed that Marco would have to relinquish its permit on that area before a new permit could be issued, S.R.M. requested Marco to relinquish its permit. Marco executed a relinquishment on a form provided by the State on Oct. 8, 1979.

Although S.R.M. was not issued a permit until Mar. 7, 1980, it apparently entered the area and began mining sometime in late 1979 or early 1980. When OSM inspected the site on Feb. 11, 1980, the inspector found what he considered to be three violations of the Surface Mining Control and Reclamation Act of 1977 (Act).¹ Because his records showed Marco as the permittee, he issued Notice of Violation No. 80-I-57-5 to Marco as permittee,

and listed S.R.M. as the operator. Service was accepted by Steven R. Mullins, President of S.R.M.

Marco applied for review of the notice² and a hearing was held on July 16, 1980. At the conclusion of that hearing and in the Sept. 16, 1980, written confirmation of the decision issued from the bench, the Administrative Law Judge found that S.R.M. was a separate entity from Marco; had mined the area without Marco's knowledge, permission, or participation; and was nothing more than a wildcat miner. He further found that OSM had not established a prima facie case against Marco and that Marco had shown by a preponderance of the evidence that it was not responsible for the alleged violations.

OSM appealed from this decision and both parties filed briefs.

Discussion and Conclusions

Under sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. II 1978), a notice of violation may be issued "to the permittee or his agent." Permittee is defined in 30 CFR 700.5 (1978)³ to be

² The record does not show how the notice got from the president of S.R.M. to Marco. The notice did, however, list Marco as permittee and would have been counted against Marco as a history of previous violations. Marco, therefore, could seek review of the notice.

³ When final regulations for the permanent regulatory program were published in 44 FR 15311 (Mar. 13, 1979) and in the 1979 edition of CFR, the definition of permittee during the initial regulatory program was dropped without explanation, and a definition of permittee under the permanent regulatory program was added in 30 CFR 701.5. The Board sees no reason to assume that the definition

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

any individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization holding a permit to conduct surface coal mining and reclamation operations issued by a State regulatory authority pursuant to a State program or by the Secretary pursuant to a Federal program or a Federal lands program. During the initial regulatory program the term includes persons conducting surface coal mining and reclamation operations regulated by a State under State law or conducting such operations under a mining plan approved pursuant to Part 211 of this title. [Italics added.]

Thus, during the initial regulatory program, a person who either has been granted the right to mine or reclaim an area or who is mining or reclaiming an area that would otherwise be subject to regulation is a permittee. See *Delight Coal Corp.*, 1 IBSMA 186, 86 I.D. 321 (1979).

At the hearing in this case, the Virginia State inspector who was assigned to the Marco permit testified that once Marco had executed the form relinquishing part of its permit, it had no further rights under its permit to take any action in that area (Tr. 33). The State, however, would not send Marco any notice that the relinquishment had been approved (Tr. 33), and Marco would remain the permittee on State records until a new permit was issued (Tr. 36, 39). Despite

of permittee should be changed during the initial regulatory program. We reach this conclusion without regard to whether the lack of a definition in 30 CFR 700.5 is the result of editorial oversight or intentional deletion. See *Claypool Construction Co., Inc.*, 2 IBSMA 81, 86 n.9, 87 I.D. 168, 170 n.9 (1980).

Marco's apparent status as permittee, however, the inspector stated that he would have cited it for mining without a permit had it disturbed any part of the area covered by the relinquishment (Tr. 37-38).⁴

[1] In issuing the notice of violation to Marco, OSM relied on the records it had received from the State that listed Marco as permittee of this area. This reliance was entirely justified. The State records established a prima facie case that Marco was the permittee.⁵ We held in *Wilson Farms Coal Co.*, 2 IBSMA 118, 87 I.D. 245 (1980), that a permittee is a proper party to be issued a notice of violation. Therefore, OSM could properly issue the notice to Marco.

[2] Marco, however, presented competent evidence showing that, although it was nominally the permittee over this area, under State law it had no legal rights in this area.⁶ It furthermore showed that it had not disturbed the area, nor was it in any way associated with the person who had disturbed it. This evidence was sufficient to show that Marco neither held a permit

⁴ The State inspector indicated that he had not personally been aware of the relinquishment because it came into the office as part of S.R.M.'s application for a permit. That application was assigned to another inspector.

⁵ OSM's justified reliance on state records emphasizes the necessity for those records to be accurately maintained and for any changes to be recorded as soon as possible. Cf. *Grafton Coal Co., Inc.*, 2 IBSMA 316, 323 n.3, 87 I.D. 521, 525 n.3 (1980).

⁶ Marco's lack of legal right in this area is emphasized by the fact that it would also have had no right to take the action required to abate the alleged violation.

allowing it to conduct surface coal mining and reclamation operations in this area nor that it was conducting such operations. Therefore, Marco was not a permittee over this area as that term is defined in 30 CFR 700.5 (1978). Marco rebutted OSM's prima facie case that it was the proper party to be served with the notice.⁷

The Sept. 16, 1980, decision of the Hearings Division is affirmed as modified by this opinion.⁸

NEWTON FRISHBERG

Administrative Judge

WILL A. IRWIN

Chief Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

LITTLE BYRD COAL CO., INC.

3 IBSMA 136

Decided April 30, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement from the Aug. 20, 1980, decision of Administrative Law Judge Tom M. Allen in Docket Nos. CH 0-181-P and CH 0-238-R. The decision vacated one violation listed in Cessation Order No. 80-I-43-2 based on Little Byrd's fail-

ure to abate a sedimentation pond violation cited in Notice of Violation No. 79-I-43-4, affirmed a second violation for failure to abate a haul road maintenance violation alleged in Notice of Violation No. 80-I-43-2, and reduced the civil penalty assessments for Notice of Violation No. 80-I-43-2 and the cessation order.

Affirmed as modified in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions

A notice of violation requiring a permittee to submit a drainage design for regulatory authority approval is proper even when such a design might include disturbance of an area within 100 feet of an intermittent or perennial stream because the regulatory authority could grant an exemption for that area under either 30 CFR 717.17(a) or 715.17(d) (3).

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions

Under the circumstances of this case, the Board declines to uphold a cessation order that forces a permittee to take an illegal action.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

A civil penalty will not be disturbed when the person assessed does not seek review of the penalty amount, and the underlying violation is not vacated.

4. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Amount

A civil penalty assessment based on a part of a cessation order that is vacated

⁷ On the facts of record, it would appear that S.R.M. was the permittee over this area because it was "conducting surface coal mining and reclamation operations regulated by a State under State law." 30 CFR 700.5 (1978). See *Delight Coal Corp.*, *supra*.

⁸ This opinion should not be construed to relieve a person who is in fact a permittee of any responsibilities imposed by the Act and regulations.

after administrative review cannot be upheld whether or not review was sought of the penalty amount.

APPEARANCES: Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, John Pendergrass, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; David J. Hutton, Esq., Jones & Godfrey, Lebanon, Virginia, for Little Byrd Coal Co., Inc.

*OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of the Aug. 20, 1980, decision of Administrative Law Judge Tom M. Allen in this case. That decision affirmed one violation listed in Cessation Order No. 80-I-43-2, vacated a second violation in that order, and imposed a total of \$1,250 in civil penalties.

Background

Pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),¹ on Feb. 12 and 13, 1979, OSM inspected Little Byrd Coal Co., Inc.'s (Little Byrd) underground mining operation in Buchanan County, Virginia, conducted under Virginia mining per-

mit 2655-U. As a result of that inspection, OSM issued Notice of Violation (NOV) No. 79-I-43-4 to Little Byrd. Only one of the three violations alleged in that notice remains at issue. Violation 1 charged that, because Little Byrd had failed to install sedimentation ponds as required by 30 CFR 717.17(a), surface drainage from the entire disturbed area was not passing through sedimentation ponds before leaving the permit area. The notice required Little Byrd to "submit a design and obtain written approval from the regulatory authority for construction of a sedimentation pond or a series of sedimentation ponds."

OSM next inspected Little Byrd's operation on Aug. 23, 1979,² but took no enforcement action. During that inspection the inspector found that three sedimentation ponds had been installed, but that one area, which contained a spoil pile and was located within approximately 20 feet of a stream, had been surrounded with a straw bale barrier and that its drainage did not pass through a pond. Company officials informed the inspector that they were seeking a variance from the regulatory authority for that area under the small-area exemption provisions of 30 CFR 717.17(a)(3).

After a Feb. 1, 1980, inspection, OSM issued NOV No. 80-I-43-2 to Little Byrd. That notice alleged three violations, two of which re-

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

² From Feb. 14 through Aug. 10, 1979, OSM was prevented from enforcing the Act in Virginia because of an injunction issued in *Virginia Surface Mining and Reclamation Assoc., Inc. v. Andrus*, Civ. No. 78-0244-B (W.D. Va. Feb. 14, 1979).

main at issue: violation 1 charged failure to properly maintain a haul road as required by 30 CFR 717.17 (j)(3), and violation 3 alleged failure to monitor ground water under 30 CFR 717.17(h).

OSM inspected the site again on Apr. 9, 1980. No additional sedimentation ponds had been constructed since Aug. 23, 1979, and Little Byrd had not received a variance from the State for the spoil pile area. The inspector modified the remedial action required by NOV No. 79-I-43-4 to read: "Install sedimentation ponds, diversion channels, and other structures for sediment control in order to insure all surface runoff from the disturbed area is passed through a sedimentation pond or a series of sedimentation ponds." After the completion of the inspection, OSM issued Cessation Order No. 80-I-43-2, charging Little Byrd with failure to abate the sedimentation pond violation of the 1979 notice and failure to abate the haul road violation of the 1980 notice.

On May 5, 1980, Little Byrd filed for review of the cessation order and of the civil penalty assessment proposed for the 1980 notice of violation. A hearing was held and a decision was subsequently issued on Aug. 20, 1980. That decision vacated both the sedimentation pond violation in the 1979 notice and the cessation order as it related to failure to abate the sedimentation pond violation; vacated the ground water monitoring violation

of the 1980 notice; and upheld the haul road violation, although reducing the civil penalty for that violation to \$500. In addition, the decision found that the mandatory civil penalty for the cessation order³ should have been imposed for only 1 day⁴ and assessed a total of \$750. OSM appealed from this decision and both parties filed briefs.

Discussion and Conclusions

OSM argues that the ground water monitoring violation was improperly vacated on the basis of the decision in *In re: Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. May 16, 1980). We agree. That decision concerns 30 CFR 817.52(a), part of the permanent regulatory program. The violation alleged in this case was of 30 CFR 717.17(h), a completely separate regulation not before the court. Furthermore, Little Byrd had not challenged this violation and it was, therefore, not properly before the Administrative Law Judge. The decision below vacating violation 3 of NOV No. 80-I-43-2 is reversed and the violation is reinstated.⁵

OSM also argues that the sedimentation pond violation should

³ See sec. 518(h), 30 U.S.C. § 1268(h) (Supp. II 1978), and 30 CFR 723.15. (45 FR 58784 (Sept. 4, 1980)).

⁴ OSM had assessed \$750 for the 5 days that the cessation order was in effect for each of the two violations; i.e., \$3,750 for each violation, for a total of \$7,500. OSM response to Board order of Mar. 18, 1981.

⁵ No civil penalty was assessed for this violation.

not have been vacated. The portion of the permit area finally at issue was a spoil pile located near a stream at the edge of the permit area. The construction of a sedimentation pond to control surface drainage from this pile would disturb the area within 100 feet of the stream. The decision below vacated both the cessation order and notice of violation on the grounds that such disturbance would violate 30 CFR 715.17(d)(3), incorporated through 30 CFR 717.17(d), and that "an inspector may not require an operator to do an act which in itself is a violation of the regulations" (Decision at 5).

[1] 30 CFR 715.17(d)(3) states in pertinent part: "No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream." The initial notice of violation, which required Little Byrd to submit a drainage design to the State regulatory authority, was proper because the State could either have granted a variance for the spoil pile area under sec. 717.17(a)(3) or have permitted the construction of a pond within the 100-foot buffer zone under sec. 715.17(d)(3). The decision below vacating violation 2 of NOV No. 79-I-43-4 is, therefore, reversed and the violation is reinstated.

[2] That notice, however, was modified on the same day that the cessation order was issued so that

the order required Little Byrd to cease operations until the violation was abated by constructing a sedimentation pond, without first obtaining regulatory authority approval. Thus, the cessation order could be terminated only by Little Byrd's violating another regulation. Under the circumstances of this case, we decline to uphold a cessation order that forces the permittee to take an illegal action.⁶ Therefore, the decision below vacating violation 1 of Cessation Order No. 80-I-43-2 is affirmed as modified by this decision.

Finally, OSM argues that the Administrative Law Judge had no authority to reduce the amount of the civil penalty imposed for the cessation order because that amount was not contested. There was apparently some confusion below over what money Little Byrd had paid to the OSM Assessment Office. By letter dated Mar. 31, 1980, the OSM Division of Enforcement informed Little Byrd that \$1,400 had been assessed against it for the haul road violation of NOV No. 80-I-43-2.⁷ On May 5, 1980, Little Byrd paid that amount into escrow as required by 43 CFR 4.1152(b). By letter dated May 6, 1980, OSM informed Little Byrd that \$3,750 had been assessed for each of the two failures

⁶ There is no suggestion in this case that no alternative abatement could have remedied the cited violation without causing the permittee to violate another regulation and we expressly decline to state an opinion as to a notice or order in which such an allegation is made.

⁷ OSM response to Board order of Mar. 18, 1981.

April 30, 1981

to abate violations listed in Cessation Order No. 80-I-43-2.⁸ There is no indication in the record whether or not the total amount of \$7,500 for the cessation order, or any part of that amount, was paid.

The decision below reduced the haul road assessment from \$1,400 to \$500. This reduction was clearly within the authority of the Administrative Law Judge. OSM contested this reduction in its petition for discretionary review, but did not address it in its brief. Since we see no reason to alter the findings below, the assessment of \$500 for violation 1 of NOV No. 80-I-43-2 is affirmed, and \$900 must be returned to Little Byrd in accordance with the requirements of sec. 518(c) of the Act, 30 U.S.C. § 1268(c) (Supp. II 1978).

Even though Little Byrd did not seek administrative review of the civil penalty associated with the cessation order, the Administrative Law Judge established it at \$750 because he found that the inspector was dilatory in returning to the mine to terminate the order after he was notified that abatement had been completed.⁹ Although this finding was based on contradictory evidence, we need not examine it because of our disposition of this issue.

[3] OSM assessed \$3,750 under the cessation order for failure to abate the haul road violation. Little

Byrd did not seek review of this assessment, and the violation was not vacated. Since this penalty was not before the Administrative Law Judge, there was no basis for him to disturb it, and it remains as assessed.

[4] Another \$3,750 was assessed for failure to abate the sedimentation pond violation. Since the portion of the cessation order upon which this assessment was based was vacated after administrative review, a civil penalty assessment for that part of the order cannot be upheld. Therefore, even though the amount of the civil penalty assessed for Cessation Order No. 80-I-43-2 was not under review, we will reduce the penalty by the \$3,750 assessed for the sedimentation pond violation.

In summary, as to Notice of Violation No. 79-I-43-4, violation 2 is reinstated and upheld; as to Notice of Violation No. 80-I-43-2, violation 3 is reinstated and upheld, and the \$500 civil penalty found by the Administrative Law Judge for violation 1 is affirmed; and as to Cessation Order No. 80-I-43-2, violation 1 and its associated civil penalty are vacated, and the \$3,750 civil penalty assessed by OSM for violation 2 is upheld.

WILL A. IRWIN

Chief Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

NEWTON FRISHBERG

Administrative Judge

⁸ *Ibid.*

⁹ At that time the record did not indicate the amount of this proposed civil penalty. That information was introduced in response to the Board's Mar. 18, 1981, order. See text at n.8 *supra*.

**TENNESSEE CONSOLIDATED COAL
CO., INC.**

3 IBSMA 145

Decided *April 30, 1981*

Appeal by the Office of Surface Mining Reclamation and Enforcement from the July 28, 1980, decision of Administrative Law Judge David Torbett, Docket No. NX 0-190-R, vacating Notice of Violation Nos. 80-2-75-26 and 80-2-75-27, issued to Tennessee Consolidated Coal Co., Inc., for its failure to place excess rock and earth materials from an underground mine in surface disposal areas in accordance with 30 CFR 717.15.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Excess." When evidence does not support a finding that material removed from an underground mine is in excess of that which will be necessary to achieve approximately original contour, a violation of 30 CFR 717.15 cannot be upheld.

APPEARANCES: Michael W. Boehm, Esq., Gentry & Boehm, Chattanooga, Tennessee, for Tennessee Consolidated Coal Co., Inc.; John Philip Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

**OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS**

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of a decision of Administrative Law Judge David Torbett vacating Notice of Violation (NOV) Nos. 80-2-75-26 and 80-2-75-27, issued to Tennessee Consolidated Coal Co., Inc. (TCC), pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act),¹ and citing two violations of the initial program regulations. For the reasons discussed below, we affirm that decision as modified by this opinion.

*Factual and Procedural
Background*

On Mar. 26 and Apr. 22, 1980, OSM inspected two underground coal mines (Nos. 24 and 28) owned by TCC and located in Sequatchie County, Tennessee. Subsequently, on Apr. 22, 1980, TCC received virtually identical NOV's for each mine. The NOV's charged TCC with "failure to place excess rock and earth materials from an underground mine in surface disposal areas in accordance with section 715.15."²

¹ Act of Aug. 3, 1977. 91 Stat. 445, 30 U.S.C. § 1271(a)(3) (Supp. II 1978).

² The remedial actions required were (1) cease use of disposal area; (2) remove all organic material (trees in fill); (3) remove all waste earth materials from the area, or remove enough material and reconstruct to assure a static safety factor of 1.5, and have a static safety factor certified by a registered professional engineer; and (4) cover area with nontoxic/noncombustible material, seed, and mulch area.

April 30, 1981

On May 23, 1980, TCC filed applications for review of the notices and for temporary relief (Docket No. NX 0-190-R), pursuant to sec. 525 of the Act, 30 U.S.C. § 1275 (Supp. II 1978), 43 CFR 4.1162, and 43 CFR 4.1261. On July 14, 1980, a hearing was held and the Administrative Law Judge orally vacated the notices of violation on the basis that 30 CFR 715.15 did not apply because the regulation was meant to control the permanent disposal of excess rock and earth materials, and the materials described in the NOV's to TCC were not shown to be excess materials. He further concluded that the regulations were not specific enough to allow enforcement in that any decision by an inspector as to when an operator would have to permanently store excess material would be arbitrary and capricious as an operator would not be given sufficient notice of what he was required to do to comply with the regulations. On July 28, 1980, he issued a written confirmation of his oral decision. On Aug. 25, 1980, OSM filed a timely notice of appeal.

The disturbances at each mine-site inspected by OSM include three bench areas: The first is an operational bench on which are located the mine opening, shops and ventilation fans; the second is the product bench on which are located the coal pile and the material piles which are the subject of these violations; and the third is the loading bench on which is a haul road. Below the

third bench at each minesite are sediment basins which receive surface drainage (Tr. 14-18, 98, 103). The coal and other material are brought to the surface by means of a conveyor belt (Tr. 15, 16, 99). The coal proceeds to the end of the belt and falls into a stockpile on the product bench. The noncoal material is pushed by a bulldozer to the side of the beltline where it falls by gravity and comes to rest at its angle of repose (Tr. 15, 16).

Testimony by TCC's vice president indicates that TCC has no definite plans to use the materials in question to achieve approximate original contour (Tr. 113).³ He testified that TCC did not place the material in the fill in lifts, did not revegetate the slopes of the fill, did not install a rock toe buttress, but did dump material over standing trees (Tr. 120, 121). Nevertheless, TCC contends that the material piles in question are not permanent storage (Tr. 100, 104), are stable, have never been subject to slides (Tr. 42, 43, 104), and that there is insufficient material in the piles to achieve approximate original contour of the disturbed areas of the two mines, a contention supported by an outside engineering firm retained by OSM (Tr. 76-78, 122; Exh. R-6), and accepted by the Administrative Law Judge in his oral decision (Tr. 136, 139).

³ Applicant's exhibit A-3 reveals that TCC is in the process of negotiating a possible agreement for the sale of such materials, which if consummated would require TCC to use other materials to achieve approximate original contour of the mines in question.

Discussion

TCC is charged with violating 30 CFR 717.15, which provides that "*excess rock and earth materials produced from an underground mine and not disposed in underground workings or used in back-filling and grading operations shall be placed in surface disposal areas in accordance with requirements of § 715.15.*" (Italics supplied.) By alleging a violation of sec. 717.15 OSM implies that there is an excess of rock and earth materials. "Excess," however, is not expressly defined in the initial regulations. Reference to sec. 715.15 is therefore necessary to determine the intended meaning of this term.

Sec. 715.15 is concerned with "spoil." "Spoil" is defined in 30 CFR 710.5 as "overburden that has been removed during surface mining." Sec. 715.15 specifies that "[s]poil not required to achieve approximate original contour" must be handled in certain approved ways. From reading secs. 715.15 and 717.15 together, it appears that "excess" material from an underground mine is that which is not necessary to achieve the approxi-

mate original contour of disturbed surface areas. *See also* 30 CFR 717.14(a).

[1] When, as in this case, the evidence (Tr. 76-78, 122; Exh. R-6) does not support a finding that material removed from an underground mine is in excess of that which will be necessary to achieve approximate original contour, sec. 717.15 is not yet an applicable performance requirement. The notices of violation were therefore improperly issued to TCC.⁴

For the foregoing reasons, the July 28, 1980, decision of the Hearings Division vacating Notice of Violation Nos. 80-2-75-26 and 80-2-75-27 is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

⁴ Although TCC is held not to be subject yet to the requirements of sec. 717.15, this decision does not exempt TCC from compliance with any other environmental standards regarding the storage or disposal of such materials.

April 24, 1981

ALASKA PLACER CO.***5 ANCAB 260**Decided *April 24, 1981*

Appeal of Alaska Placer Company from the Decision of the Alaska State Director, Bureau of Land Management F-14955-A and F-14955-B.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

An appeal will be dismissed when an appellant has failed to file additional pleadings ordered by the Board pursuant to 43 CFR Part 4, Subpart J, 4.907, and further fails to comply with an order of the Board requiring a showing of cause.

APPEARANCES: George Trefry, Esq., Holland and Trefry, for Alaska Placer Company; Robert Charles Babson, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

**OPINION OF THE ALASKA
NATIVE CLAIMS APPEAL
BOARD**

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart

J, hereby makes the following findings, conclusions and order dismissing the appeal of Alaska Placer Company from the above-designated decision of the Bureau of Land Management.

On Oct. 3, 1980, George Trefry, Esq., Holland and Trefry, on behalf of Appellant, Alaska Placer Company (Alaska Placer), filed a Notice of Appeal from a Bureau of Land Management (BLM) decision dated Sept. 5, 1980, approving lands included in selection applications F-14955-A and F-14955-B for conveyance to Wales Native Corporation.

On Nov. 3, 1980, George Trefry, Esq., Holland and Trefry, on behalf of Appellant, Alaska Placer Company, filed a Statement of Lands in Dispute on Appeal and a Statement of Points on Appeal. The Board accepted said filings as framing issues being appealed by appellant pursuant to provisions of 43 CFR Part 4, Subpart J, 4.903(b).

On Dec. 4, 1980, Robert Charles Babson, Esq., Office of the Regional Solicitor, on behalf of the BLM, filed an Answer responding to appellant's brief on the merits as though the issue being raised questioned the effect of ANCSA on its prefected unpatented mining claims.

By order of the Board dated Dec. 17, 1980, additional information and clarification was sought from appellant to enable the Board

*Not in chronological order.

to make a determination of lands disputed in this appeal for segregation purposes and thus allow conveyance by BLM of lands unaffected by the appeal.

On Jan. 2, 1981, Alaska Placer moved the Board for a 30-day extension of time within which to file its brief in the appeal based on circumstances described in the Affidavit of George Trefry dated Jan. 2, 1981.

On Jan. 12, 1981, the Board granted appellant's motion to file a reply brief to BLM's answer within 30 days and also extended the filing date under order dated Dec. 17, 1980, for the same period. The Board found that although appellant's filing on Nov. 3, 1980 had been accepted pursuant to 43 CFR Part 4, Subpart J, 4.903(b), that additional briefing would be necessary to determine issues appealed to the Board for disposition and also to provide a description of disputed lands.

Order of the Board dated Mar. 10, 1981 informed the parties, *inter alia*, that "[o]n Feb. 13, 1981, the Board received a copy of a letter signed by George Trefry to Ms. Kay Kletka at BLM advising that an application for patent of certain lands within Mineral Survey No. 2199 had been placed in the U.S. Postal Service on Feb. 11, 1981."

The Board also stated that

[t]he copy of a letter addressed to Ms. Kay Kletka of BLM, noted above, does not meet requirements of a filing in this appeal pursuant to provisions of 43 CFR

4.903, et seq., and cannot constitute a filing in response to orders of the Board.

This Board therefore Orders Appellant, Alaska Placer Company, to show cause within fifteen (15) days from the date of this Order why this appeal should not be dismissed on the grounds that appellant has failed to file and to serve upon all persons required to be served pursuant to order of the Board for additional briefing under provisions of 43 CFR 4.907.

There has been no additional filing by Alaska Placer pursuant to order of the Board dated Dec. 17, 1980, or of order dated Jan. 12, 1981, nor has any request been made for further extension of time within which to make a filing.

Appellant has made no filed response to the above order to show cause why this appeal should not be dismissed for failure to comply with order of the Board pursuant to § 4.907 for filing of additional pleadings necessary for this appeal.

Based upon the above file record the Board finds that:

[1] An appeal will be dismissed when an appellant has failed to file additional pleadings ordered by the Board pursuant to 43 CFR Part 4, Subpart J, 4.907, and further fails to comply with an order of the Board requiring a showing of cause.

Therefore the appeal of Alaska Placer Company from decision of the BLM of Sept. 5, 1980, which approved lands included in selection applications F-14955-A and F-14955-B for conveyance to Wales Native Corporation is hereby dismissed.

April 28, 1981

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

**RAY DEVILBISS
(WOLVERINE GRAZING
ASSOCIATION)***

5 ANCAB 265

Decided April 28, 1981

Appeal from the Decision of the Alaska State Director, Bureau of Land Management AA-8489-A and AA-8489-EE.

Partial dismissal.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The appropriate test for determining standing to appeal a decision made pursuant to ANCSA is whether a party "claims a property interest in land affected by a determination" appealable to this Board.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where an assertion that a property interest is affected by a decision to convey is based on the effect of a possible future waiver of administration by the agency presently administering a lease, and such

waiver is discretionary with the agency under § 14(g) of ANCSA, the alleged effect on the property interest is too speculative to meet the requirement of 43 CFR 4.902.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

When a lease is identified in a Decision to Issue Conveyance as a § 14(g) interest, and the conveyance is made subject to such interest, then all rights the lessee holds under the terms of the lease, if valid, are protected and there remains no issue which the lessee may appeal as to the effect of the conveyance on the lease.

APPEARANCES: Ray DeVilbiss, pro se; Elizabeth J. Barry, Esq., Office of the Regional Solicitor, for Bureau of Land Management.

*OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD*

Summary of Appeal

The main issue before the Board is whether an appellant has standing to appeal the effect of a possible decision to waive administration of the lessor's interest after conveyance pursuant to § 14(g).

Appellant is holder of a grazing lease covering a portion of selected lands which is identified in the Decision to Issue Conveyance as a valid existing right under § 14(g) to which the conveyance of lands is subject.

The Board holds that, because the decision to waive administration of the lessor's interest is a discretionary decision which cannot be made

*Not in chronological order.

until after conveyance of lands to the selecting Native corporation, any assertion by appellant that his interest in the lease may be affected is too speculative to give standing to appeal the Bureau of Land Management's decision under terms of 43 CFR 4.902.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Sept. 30, 1980, the Bureau of Land Management (BLM) issued a Decision to Issue Conveyance (DIC) which approved conveyance of lands selected by Chickaloon Moose Creek Native Association, Inc. (Chickaloon) (Application AA-8489-A) pursuant to §§ 11(a) (1) and 11(a) (2) of ANCSA including those described as follows:

T. 18 N., R. 3 E., S.M.

Sec. 17

Sec. 18, excluding lot 1

and which provided:

The grant of the above-described lands shall be subject to:

* * * * *

3. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by Sec. 14(g) of ANCSA:

a. Grazing Leases

ADL 36587 located in Secs. 17 and 18, T. 18 N., R. 3 E., Seward Meridian, Alaska.

On Oct. 28, 1980, Appellant, Ray DeVilbiss, appearing *pro se*, and also on behalf of Wolverine Grazing Association, filed a statement accepted by the Board as a Notice of Appeal and gave reasons for appealing BLM's decision as it "affects my grazing lease," as follows:

1/This Decision represents a massive land classification without any public input from those private owners adjoining these lands.

2/This Decision would be a major setback to any longer-term development plans of agriculture which we might pursue.

3/This Decision of putting this land in private ownership would work contrary to the State of Alaska's goal of developing our renewable resources.

4/This Decision would jeopardize this lands' proven history of agricultural production and potential.

On Nov. 25, 1980, Elizabeth J. Barry, Esq., Office of the Regional Solicitor, on behalf of BLM, filed a Motion to Dismiss. Said motion asserts that the DIC "is made specifically subject to the lease. Therefore, appellant lacks standing to bring this appeal." BLM further states that the appealed issue as described by appellant is not within the jurisdiction of this Board.

On Nov. 28, 1980, appellant filed a reply to BLM's motion and stated that although the issued DIC provides that the conveyance of lands to Chickaloon was subject to appellant's grazing lease referred to as ADL 36587, the impact of change

of ownership under provisions of ANCSA can make said lease worthless or invalid.

On Dec. 23, 1980, based upon the file record and motion of BLM, the Board by order required:

[A]ppellant to show cause within thirty (30) days from the date of this Order, why this appeal should not be dismissed on the grounds and for the reason that the appellant has not asserted, and has no basis to assert, a claim of property interest sufficient to confer standing under 43 CFR 4.902.

On Dec. 23, 1980, BLM filed a response to appellant's reply which reiterated previous assertions that inasmuch as appellant's grazing lease was included in the DIC as a valid existing right under § 14(g) of ANCSA, there is no property interest "affected" which can confer standing under § 4.902.

In response to the Board's order to show cause, the appellant on Feb. 5, 1981, filed a brief which repeated the previously stated reasons for bringing this appeal that his interest was affected because of the uncertainty of administrative responsibilities of the lessor's interest after conveyance and that other lands which were unencumbered by this grazing lease were available for selection by Chickaloon.

The Board by order on Feb. 18, 1981, scheduled final briefing on issue of appellant's standing to bring this appeal under 43 CFR 4.902, pursuant to Order to Show Cause dated Dec. 23, 1980.

BLM filed a final brief on Mar. 9, 1981 contending that appellant's ex-

pressed concern regarding the administration of his grazing lease after conveyance cannot provide a basis for standing to appeal because any issue arising after conveyance is beyond the jurisdiction of the Board.

Authority of the Board to hear disputes from implementation of ANCSA is governed by regulations set forth in 43 CFR (Subpart J) 4.900, *et seq.*, which describes jurisdictional and procedural requirements which must be met in all appeals made to this Board.

Decision

The single issue raised by the Board's order to show cause is whether the appellant has satisfied the requirements of provisions of 43 CFR 4.902 to establish standing to bring an appeal of BLM's decision issued in the DIC.

Section 4.902 provides:

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

[1] The appropriate test for determining standing before this Board is whether a party "claims a property interest in land affected by a determination" appealable to this Board. *Appeal of Sam E. McDowell*, 2 ANCAB 350 (1978) [VLS 78-2].

Throughout this appeal the

Board has accepted filings of briefs regarding the lessee's interest in grazing lease (ADL 36587) made variously by Ray DeVilbiss as owner and as an appropriate representative of the Wolverine Grazing Association. Ray DeVilbiss has appeared *pro se* and no issue has been raised regarding any failure of compliance with provisions of 43 CFR Part 1, Subtitle A, 1.3.

The file record of this appeal discloses that a livestock grazing lease was entered into Jan. 1, 1964 with BLM on behalf of the United States as lessor and Ralph DeVilbiss as lessee (A-061296) of property described as follows:

Unsurveyed lands which when surveyed will be:

Township 18 North, Range 3 East, Seward Meridian

Section 17—That portion of the W½ north of Wolverine Creek

Section 18—That portion north of Wolverine Creek

The lessee and others, including Ray DeVilbiss, formed the Wolverine Grazing Association, to which the lease was assigned on Mar. 5, 1965. The lessor's interest in the lease is stated to have been transferred to the State of Alaska as of Apr. 30, 1969 and is thereafter referred to as ADL-36587—Grazing Lease.

As noted above, the issued DIC was made "subject to" various described interests "as provided in Sec. 14(g) of ANCSA." Under heading of "Grazing Leases" is listed the lease described as ADL 36587. The pertinent portion of § 14(g) is as follows:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Appellant acknowledges that, because the interest of the grazing lease was included in the DIC, the conveyance of lands to Chickaloon is subject to the terms of the lease itself. BLM contends that since the grazing lease (ADL 36587) is included in the DIC as a third-party interest within § 14(g) of ANCSA, all rights of appellant under terms of the lease are fully protected.

Appellant contends that even though the grazing lease is included in the DIC as an interest to which the conveyance to Chickaloon is subject, a valid basis of appeal exists because of language in § 14 (g) providing for a transfer of administrative responsibilities after conveyance. BLM's response to appellant's contention is that any controversy which may arise between parties to the grazing lease after conveyance is beyond the Board's jurisdiction.

Appellant's contention alludes to the portion of § 14(g) of ANCSA which contains the following provision:

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Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State.

The plain language of § 14(g) permits no question as to whether or not, upon conveyance, the patentee Native corporation "shall succeed and become entitled to any and all interests of the State or the United States" as lessor in any leases covered by land conveyed. The language is mandatory.

Conversely, the following language of § 14(g) referencing the administration of a lease or other valid existing right after conveyance to a patentee Native corporation is discretionary: "The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration."

The question presented is whether or not the appellant's lease is affected by conveyance of the underlying land, when the conveyance is specifically made subject to the lease under § 14(g) of ANCSA.

Appellant cannot assert that the act of conveyance will trigger a change in the administration of his lease which would adversely affect it. There is no requirement in ANCSA that a State or Federal

agency charged with administration of a lease or other § 14(g) interest must waive administration of the interest upon conveyance of the land to a Native corporation; there is simply the option to do so. Mr. DeVilbiss seeks to appeal an action that has not yet occurred, and which may never occur.

[2] Where an assertion that a property interest is affected by a decision to convey is based on the effect of a possible future waiver of administration by the agency presently administering a lease, and such waiver is discretionary with the agency under § 14(g) of ANCSA, the alleged effect on the property interest is too speculative to meet the requirement of 43 CFR 4.902.

The Board notes that appellant's lease is identified in the DIC as a State interest and aside from the standing question, the Board would lack jurisdiction to decide an issue related to the administration of a State-held lease after conveyance.

Appellant's interest in the lands described in the DIC and approved for conveyance to Chickaloon is limited by the terms of the grazing lease, and any appeal from BLM's decision must assert that the issued DIC affects that interest in such a manner that the Board has jurisdiction.

The Board agrees with BLM that all rights of the appellant in regard to his lease are protected. The corollary to this result is that since there remains no outstanding interest in

the grazing lease which is not protected as a valid existing right under § 14(g), there is no interest in lands which could be affected by the BLM decision. (*Stratman v. Andrus*, No. A76-132, U.S.D.C., D. Alaska.) (See Memorandum and Order, July 3, 1979.)

[3] The Board finds that when a lease is identified in a DIC as a § 14(g) interest, and the conveyance is made subject to such interest, then all rights the lessee holds under the terms of the lease, if valid, are protected and there remains no appealable issue which the lessee may appeal as to the effect of the conveyance on the lease.

In addition to his arguments concerning future administration of his lease, appellant makes a statement that BLM has erred in the DIC in that the easement identified as EIN 1a D9 is not in a location which possibly can serve the public in the manner intended as it would if placed in the appropriate location. While it is not certain from appellant's statement that an appeal of this easement decision is intended, assuming *arguendo* that it is, the Board notes that on Oct. 13, 1980 Chickaloon Moose Creek Native Association, Inc. filed a Notice of Appeal from BLM Decision AA-8489-A asserting that BLM erred by reserving various public easements in the DIC, including EIN 1a D9 (VLS 80-53). BLM has requested the Board to remand for possible relocation that portion of easement EIN 1a D9 within Secs. 18 and 19, T. 18 N., R. 3 E. Because

BLM may relocate portions of public easement EIN 1a D9 as reserved in the DIC, the Board will not address standing of appellant to bring an appeal of this issue at this time. Any decision by BLM which modifies the route of EIN 1a D9 will require publication and an appropriate appeal period. Such publication of a modified route would moot the issue in this appeal, while giving Mr. DeVilbiss an opportunity to appeal the new location, if necessary.

This represents a unanimous decision of the Board.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

APPEAL OF VALLEY STEEL BUILDERS, INC.*

IBCA-1275-6-79

Decided April 29, 1981

Contract No. YA-511-CT8-92, Bureau of Land Management.

Appeal denied.

Contracts: Construction and Operation: Allowable Costs

Where the invitation for bids instructs potential bidders to submit bids on each of three schedules independent of the other, and the bidder to whom the con-

*Not in chronological order.

April 29, 1981

tract was ultimately awarded incurs additional cost as a result of anticipation of award of one of the schedules not included in the contract awarded, the Board holds that such cost must be borne by the contractor.

APPEARANCES: Mr. Martin J. Durada, President, Valley Steel Builders, Inc., Boise, Idaho, for Appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY
ADMINISTRATIVE
JUDGE DOANE*

*INTERIOR BOARD OF
CONTRACT APPEALS*

Background

On Sept. 29, 1978, appellant was awarded a small business set aside contract by the Bureau of Land Management to construct two prefabricated metal buildings for warehousing and fire suppression and operations and shop facilities. The contract required the contractor to do all work and furnish all labor, supervision, equipment, supplies, and materials. The contract price was \$602,121.

The Invitation for Bid, dated Aug. 10, 1978, contained the following paragraph:

BASIS FOR AWARD: Only one award will be made. Bids will be received on Schedules A, B, and C. No bids will be considered for only part of a Schedule. Award will be made to the lowest qualified bidder based upon the total amount bid for either Schedule A, Schedule B, or Schedule C, depending upon availabil-

ity of funds. Bidders must bid on all Schedules. Bidders are cautioned to be sure that a price is shown for each item of each schedule. Failure to show a price for each item may result in rejection of the bid as non-responsive.

The contract award was made on the basis of appellant's bid for Schedule B which totaled \$602,121 and included the warehouse building under Schedule A. A duly executed contract modification increased the cost by \$11,389 and the completion time by 10 calendar days.

On Jan. 5, 1979, appellant apparently claimed an additional increase of \$5,801 as compensation for fill material in the dock area of the warehouse building which appellant alleged was included in the site grading portion of Schedule C. This claim was denied by the contracting officer on May 8, 1979, in his finding of fact and decision. The ground for denial was that the work required by Schedule B included a warehouse complete to a point 5 feet outside foundation lines and consisted of all fill material necessary for a complete warehouse including the loading dock.

In its complaint on appeal to the Board, appellant included among its allegations the following key paragraphs:

While it is apparent at this date that BLM intended to include the fill material in question in Schedule A of the bid, we contend that this requirement was never clearly stated in the bid documents. The lack of clarity and the way in which we estimated the project resulted in fill material for dock area being included in Schedule C-3, "Site grading."

We normally perform site grading on a project like this with one subcontractor who provides all the fill, excavation, compaction and paving. In this case, had Schedule C been used, we would have utilized fill material from the site (See 02221-1, para. A-2) to form a mound in the dock area which would then have been excavated as necessary for foundations. This system provides a simple method to fill and compact a relatively small area with large earth-moving equipment. It also means that all earth-fill operations can be completed early in the project and, in this case particularly, avoid inclement weather.

By its answer, the Government denied the material allegations of the complaint. Neither party requested a hearing. The appeal was submitted to the Board on the record without supplementation of the appeal file. Although the Board's order settling the record allowed the submission of briefs, only the Government submitted a brief.

Discussion

Government counsel, in his brief, argues in substance that appellant admitted in his complaint that appellant's claim was based solely on his failure to bid Schedules A and B independently from Schedule C, and that appellant's problem was that he bid on the subject project as though Schedule C was going to be awarded despite the warnings contained in the invitation for bids.

A pertinent section of the Specification, 02220, is headed, "Excavating and Backfilling (Building Only)" (App. File, Exhibit 2, Sec. 02220). Subparagraph b of that section states:

b—Do all backfilling and rough grading necessary to bring entire area outside of buildings to underside of respective surfacing.

(1)—Provide and place additional earth fill needed to bring existing grades to new grades indicated on the drawings.

Schedule A involved the construction of a warehouse complete to a point 5 feet outside foundation lines, including connections to utilities and site utilities (water, sewer, gas, electrical, and telephone). Schedule B included all of Schedule A together with a shop building complete to a point 5 feet outside foundation lines and including a vehicle wash rack and connections to utilities. Schedule C included all of Schedule B together with a gas and fuel oil facility and tanker loading facility plus site grading, paving, curbing, and fencing.

It is clear from the record that appellant contemplated using the fill material from the site grading for fill in the dock area of the warehouse building had the Schedule C bid, which included site grading, been awarded. However, as Government counsel pointed out, the site grading work was *not* included in the contract awarded, but the contract specifications, nevertheless, required appellant to provide the necessary fill in the dock area of the warehouse building. The cost of providing this fill should have been taken into account by appellant when submitting the bids for Schedule A and B in anticipation of Schedule C not being included in the contract award.

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The cost of such bidding error must be borne by appellant—not the Government.

Decision

Appellant having failed to sustain its burden of proof, the appeal is denied.

DAVID DOANE

Administrative Judge

I CONCUR:

RUSSELL C. LYNCH

Administrative Judge

APPEAL OF SYSTEMS TECHNOLOGY ASSOCIATES, INC.*

IBCA-1108-4-76

Decided April 30, 1981

Contract No. 68-01-2782, Environmental Protection Agency.

Reconsideration denied.

1. Rules of Practice: Appeals: Reconsideration

Upon a motion for reconsideration, the Board finds that the contentions of appellant challenging the principal decision are based on misstatements or misinterpretations of the principal decision or ask that the Board consider the merits of a claim deemed to have been properly dismissed for lack of proof of coercion or duress.

APPEARANCES: Edward F. Canfield, Attorney at Law, Casey, Scott & Canfield, Washington, D.C., for Appellant; Donnell L. Nantkes, Government Coun-

sel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant requests reconsideration of the Board's decision of Feb. 19, 1981, dismissing its appeal. The appeal sought to have a termination settlement agreement between the parties set aside on the grounds that appellant was compelled to enter the agreement by the Government's acts of coercion and duress. The Board found that appellant had failed to show that it entered the agreement because of duress.

In the reconsideration request, appellant asserts:

1. The Board erroneously concluded that STA caused a delay for 1 year and based its decision primarily on that finding;

2. The Board ignored the significance of appellant's precarious financial condition of which respondent obviously took advantage;

3. The Board attributed all symptoms of duress to STA's alleged "one year delay" in complying with the EPA request for job cost ledgers;

4. STA's reluctance to have job cost ledgers used as the basis of settlement was well founded;

5. The Board supported total cost basis for settlement but failed to

*Not in chronological order.

consider evidence that there was no negotiation;

6. The Board misstated the law of duress and misapplied the law to the facts of this case; and

7. The Board overlooked legitimate modifications in the contract and condoned EPA's failure to pay for work performed.

In support of the first assertion, appellant points to the Board's decision (15 IBCA 19, 88 I.D. 304 (1981)) as stating "1 year in refusing access to the contract records for audit," and contends that the records were actually denied the Government auditors only from June to October 1978. The Board's statement (15 IBCA 19, 88 I.D. 303, 304 (1981)) taken in context is as follows:

Appellant raised numerous other questions in the attempt to have the agreement set aside on grounds of duress, however, in view of our finding that appellant was *responsible for the delay of negotiations* for 1 year in refusing access to the contract records for audit, consideration of all the actions complained of during this period would serve no useful purpose. [Italics added.]

The record disclosed that the Government attempted to perform the audit on several occasions, but were prevented from doing so by the refusal of appellant to allow the review of the job cost ledgers. It is true that appellant finally acceded to the review of the ledgers in October of 1978. However, after such agreement to have the records available, time to perform the audit was required. The audit report by DCAA was provided to respondent

sometime after Jan. 15, 1979 (GE-J). Our finding was that appellant's refusal to allow access to the ledgers delayed negotiations, not that the refusal continued for 1 year.

Appellant contends the Board ignored the significance of STA's precarious financial condition of which respondent obviously took advantage. Appellant cites the testimony of D. Christensen, a small business financial expert, whose company had advanced \$560,000 to STA over the years, but had written the investment down to \$1 in December 1978. In our principal decision, the precarious financial condition of appellant and the knowledge of the Government of these difficulties were recognized. However, appellant failed to prove that the Government was responsible for its financial difficulties or that the Government used this knowledge to coerce agreement by wrongful actions. Had appellant not refused access to the job cost ledgers, the initial effort of the Government to audit should have produced a report which would have advanced the state of negotiations by December 1978, when the investment in STA was written off. Appellant contends its plight would have been alleviated had the Government settled partial claims or the Xerox claim for \$554,526. It is clear that the Government would have insisted, as it did, upon payment of the settlement amounts to the subcontractors. The money would not have been available to STA for

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payment of its expenses, and other than to resolve an uncertain obligation, the financial status of STA would have remained precarious. The Board did not overlook the significance of appellant's precarious financial condition, but rather found that appellant was responsible for increasing pressures of such condition by refusing access to its job cost records.

Appellant contends that the Board failed to consider any other actions claimed to have established a pattern of coercion based solely on our finding of appellant having delayed the negotiations. The principal decision lists the five central arguments made by appellant and considered each of them in detail. The other actions appellant would have us consider in the reconsideration request are a series of events said to have occurred during the contract performance period. After the Government had acted to terminate appellant's contract, an appeal to this Board resulted in our decision dated Jan. 19, 1978, IBCA-1108-4-76, 78-1 BCA 12,969, sustaining the appeal and remanding the case for an equitable adjustment. Appellant alleges that the actions complained of that resulted in overturning the termination decision continued in a pattern of coercion and duress during the time that it sought to negotiate an equitable adjustment with the same Government officials. In considering the specific Government actions occurring after the decision of Jan. 19, 1978, the Board found them to be

legal actions the Government was empowered to take, and that appellant had failed to prove that any of the actions amounted to duress or wrongful coercion. The record before us in the instant appeal does not show a pattern of coercion and duress as appellant urges. That record is recited in great detail in the principal decision because it reflects the normal exchanges of meetings and correspondence between the parties seeking to resolve the question of an equitable adjustment. The record does not reveal untimely and unreasonable responses to appellant's requests, but rather the insistence of appellant upon denying access to the job cost ledgers and on a settlement other than one based on total costs. Any actions of the Government that harmed appellant during contract performance were considered in the appeal that resulted in overturning the termination decision. A recitation of those actions is not relevant in this appeal, and absent proof that subsequent actions by the Government were wrongful, no inference of bias or antipathy to appellant is warranted.

Appellant claims that its reluctance to have the job cost ledgers used as the basis of settlement was well founded. Counsel argues that STA's records were calculated on a percentage of completion basis as appropriate for progress payments, that only such costs as were necessary to support vouchers, progress payments and similar claims were kept on this fixed price contract, and

that the job cost records did not contain many of the cost items not related to direct labor and material. The reconsideration request states that "(cost) explanations were provided to EPA but were rejected as unsatisfactory." No citations to the record are provided to support this statement. It is this argument by appellant that appears to be the focal point of disagreement with the Board's decision.

Appellant is a contractor with many Federal Government contracts, and counsel states that an audit was conducted almost continuously by DCAA for this reason. The books and records of the appellant were therefore the basis for recoupment of costs on other Government contracts. As a corporate entity, the books and records should reflect the actual costs of each major endeavor in order to distinguish profitable projects from loss projects, and to enable an accurate report to the stockholders. The Internal Revenue Service would be unlikely to accept costs of operation that are not recorded in appellant's own job cost ledgers. Our decision was limited to the question of whether appellant's agreement was prompted by coercion and duress of the Government. We did not reach the question of whether substantial unrecorded costs should have been allowed in the settlement agreement.

In contending that the Board supported the total cost basis for settlement, but failed to consider evidence that there was no negotia-

tion, the Board's reasoning is labeled circuitous and begging the question. Appellant may fail to see the distinction between the reluctance of Boards to accept the total cost method in determining an equitable adjustment caused by a contract change, and the propriety of the use of the total cost method in a termination settlement, but it should recognize that under any settlement method, there are limits to the Government's obligations to pay the contractor.

Appellant's exhibit 59 is the DCAA audit report dated Jan. 12, 1979. The auditors found no supporting documentation for amounts totalling over \$2,000,000 claimed by appellant, but not recorded as costs in the job cost ledgers. These amounts were estimates by the appellant. In the event of advance pricing of changes or of the entire contract performance costs, the use of estimated costs are necessary and proper. However, after performance has ceased and all costs are recorded, the use of estimates rather than recorded costs becomes difficult to justify. Had the Board found evidence of duress, the use of estimates over recorded costs would have been appellant's burden to prove in the consideration of the merits of the amount appellant should have recovered. We did not reach this question. No doubt appellant is disappointed that the Board could find no explanation in appellant's evidence of the disadvantages of the total cost method in the resultant impact on the settlement. The re-

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consideration request cites AX-25 as an example of the resultant impacts. This exhibit is STA's voucher of Sept. 29, 1978, for the proposed settlement with Xerox of \$554,526 and sheds no light on the desired explanation. The alleged failure of the Board to consider evidence that there was no negotiation is unpersuasive. Appellant's president did accept the proffered settlement pursuant to an authorization by the board of directors. Counsel argues that such approval is not material because it was required by the Government. However, the authorization was not an order to accept the settlement offered by the Government, and did not prohibit a refusal. The record does not show that appellant would have been in worse condition following a refusal to accept the settlement offer than it was on the day it was accepted. It is true that appellant may have been harder pressed by its creditors, and that the principal subcontractor, Xerox, would have insisted on a greater sum to settle its claim. However, the Government continued to be obliged to settle with appellant and the amounts of subcontractor claims and the costs of extended negotiations may well have increased the ultimate cost of the settlement to the Government.

Appellant contends that the principal decision misstated the law of duress and misapplied the law to the facts of this case. In appellant's reply brief (page 2), the Government position was challenged "be-

cause EPA has equated *illegal* acts with acts which are wrongful." Our reading of the Government brief disclosed that this was a distortion of the Government's position that acts it was legally empowered to take were not duress. Our decision addressed this misperception (page 17) and appellant now asserts we erred in failing to recognize its position that a coercive act need not be illegal to constitute duress. We recommend that appellant read more carefully the briefs and opinion for an understanding that our discussion dealt with appellant's misstatement of the Government's position, and not a disagreement with appellant's statement "that a coercive act need not be illegal to constitute duress." Appellant also contends that reference to the 1977 edition of Nash and Cibinic, *Federal Procurement Law* rather than the 1969 edition would have shown greater support for appellants claim of duress. We have consulted the later edition, which cites numerous cases to support the current rule that "a Government act or threat is wrongful if it involves something the Government has no right to do" (page 159). It is true that *Allied Materials & Equipment Co.*, ASBCA 17318, 75-1 BCA 11,150 (1975), is cited where a finding of a contracting officer's bad faith in insisting on a loss contract did establish duress, together with a projection that this decision could indicate that the motivation for an act or threat might become more important to a finding of duress than the legality

of the act. However, the evidence in the instant case does not support a finding of bad faith or malicious or unconscionable motives.

Appellant contends that the Board committed an error of law, rejecting equity and fair play, by eliminating all consideration of duress other than the right of the Government to perform the alleged coercive acts. Also appellant argues that appellant's agreement is presumed to be involuntary if it is found that he had no reasonable alternatives, and was vulnerable to the Government's pressure, citing *Aircraft Associates Manufacturing Co. v. United States*, 174 Ct. Cl. 886, 357 F. 2d 373 (1966). The principal decision found that appellant had failed to prove that any of the Government actions were coercive or constituted duress. We did not refer to the obvious alternative available to appellant of appealing to the Board in the event of undue delay or refusal of the contracting officer to make a decision. Appellant argues that the Boards have been reluctant to accept such appeals prior to the effective date of the Contract Disputes Act. However, appellant was aware of this alternative and did consider an appeal prior to the contracting officer's decision. By affidavit dated July 23, 1979, the Board Chairman, Chief Judge William F. McGraw relates the substance of a conversation with appellant's counsel in the late fall or early winter of 1978, in which he advised that an appeal could be taken to this Board should the con-

tracting officer refuse to issue a finding or undue delay making the findings. In view of the fact that the negotiations for an equitable adjustment were being conducted pursuant to a prior decision of this Board, and the fact that the Chairman so advised the appellant's counsel, there existed a stronger basis for the Board to accept an appeal without the findings of the contracting officer. The appellant chose not to appeal to the Board until after an agreement had been executed by both parties. Our findings in the principal decision that the delay in negotiations was caused by appellant's failure to disclose the job cost ledgers indicates a more logical reason for not seeking relief from the Board for the delay or failure of the contracting officer to render a decision. Appellant was aware of its own actions to delay the audit and can be presumed to be aware that an appeal to the Board would not have been accepted unless the delay could be shown to be the responsibility of the Government. This appellant could not do.

The final argument is that the Board overlooked legitimate modifications in the contract and condoned the Government's failure to pay for work performed. This argument presumes a consideration by the Board of the merits of the amounts claimed by appellant. We did not reach the merits of the claim, because of our finding that appellant did not enter into the settlement agreement because of coercion or duress on behalf of the Gov-

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ernment. If any items for which appellant should have been paid were overlooked, they were overlooked or conceded by appellant's president when he signed the settlement agreement. The equity and fairness asked of the Board appears to ask that we consider the merits of claims for unrecorded costs that were the subject of a binding agreement between the parties.

We find nothing in the motion for reconsideration to warrant a change in our finding that the appeal should be dismissed for lack of proof of acts of coercion or duress to compel appellant's execution of the settlement agreement.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF S & W CONTRACTING CO., INC.

IBCA-1307-10-79

Decided *May 6, 1981*

Contract No. H50C14200734, Bureau of Indian Affairs.

Sustained in part.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Construction Against Drafter

Where at least four of seven bidders shared the same interpretation of the method of construction required by a contract for the construction of a bridge and none of the bidders were shown to have a different interpretation, the Board finds the contractor's interpretation to be reasonable and further finds that the Government's insistence on a different and more costly method of construction was a constructive change for which the contractor is entitled to an equitable adjustment.

APPEARANCES: Edgar O. Willis, President, S & W Contracting Co., Inc., Phoenix, Arizona, for Appellant; Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
McGRAW*

INTERIOR BOARD OF CONTRACT APPEALS

The contractor has timely appealed the contracting officer's decision denying its defective specifications claim under the Changes Clause in the amount of \$43,672.27 and it claims for time extensions aggregating 91 days predicated upon (i) changes in the falsework plans, (ii) delays due to a cement shortage, and (iii) delays caused by weather.

Prepared on the standard forms for construction contracts,¹ Contract No. H50C14200734, in the amount of \$388,888 was awarded to

¹ Including the General Provisions set forth in Standard Form 23-A (Oct. 1969 ed.). The contractor's request for additional compensation and for time extensions are asserted under General Provision No. 3, "Changes" and General Provision No. 5, "Termination For Default—Damages For Delay—Time Extensions."

the contractor under date of Mar. 3, 1978.² The contract called for the construction of a reinforced concrete bridge and approaches on Route 3, Fort Apache Indian Reservation, Navajo County, Arizona. The bridge to be constructed traverses the Cibecue Creek and is sometimes referred to in the record as the Cibecue Creek Bridge. A preconstruction conference was held on Mar. 16, 1978, at which a number of matters of mutual interest to the parties³ were discussed.⁴

Notice to proceed with the work was received by the contractor on May 12, 1978, thereby establishing Sept. 9, 1978, as the scheduled date for completion of the contract work (AF 2, 3). The work was determined to be substantially complete as of Nov. 21, 1978, resulting in the assessment of liquidated damages⁵ for 73 days of delayed performance (AF 5-1).

² Appeal File 1. All references to exhibits are to those contained in the appeal file. Hereinafter appeal file exhibits will be referred to by AF followed by reference to the particular number or letter given to the exhibit in the appeal file.

³ Attending the conference as contractor representatives were Edgar O. Willis and Jack A. Willis. Government representatives at the preconstruction conference included H. E. McCutcheon (contracting officer), Charley E. Johnson (construction engineer), and Jack Lee (project engineer).

⁴ The minutes of the preconstruction conference record that when the contractor had no more technical questions, Mr. Charley Johnson (construction engineer) left the meeting. Thereafter, Mr. Edgar Willis is reported to have stated: "[R]ight now we are just figuring on bypassing all the water on one side while we work on the piers and abutment and turn it the other way and use the one expansion joint in the girders and scaffolding" (AF 7-12).

⁵ The contract provides for liquidated damages to be assessed at the rate of \$400 per day for each calendar day of delay in performance (AF A, the Contract, Special Provisions, Article 5).

As early as Apr. 26, 1978, the contractor anticipated difficulty in obtaining the cement required for the project on a timely basis, as is evidenced by the contractor's letter of that date to the contracting officer requesting a delay in the issuance of the notice to proceed by reason of its cement supplier Showlow Ready Mix having been notified that its cement allocation had been cut.⁶ In a letter to the contractor on the same date⁷ the contracting officer agreed to delay the issuance of the notice to proceed but only until May 11, 1978, noting that delay in starting the project beyond that date would jeopardize its successful completion during the summer months and would therefore not be in the best interest of the Government.

In mid-July of 1978, the contractor orally requested permission to use additional construction joints in the girders between the abutments and piers because of the length and number of girders in-

⁶ The contractor's letter was accompanied by a "To Whom It May Concern" statement dated Apr. 24, 1978, on the stationery of Phoenix Cement Company reading as follows:

"Due to increased levels of demand for Portland cement in the Southwest United States, a shortage of supply has developed in this area. This shortage has occasioned the need for Phoenix Cement Company to allocate cement to its customers on a reduced volume basis. This allocation program has resulted in reduced shipments of Portland cement to Show Low Ready Mix." (AF 8, 9).

⁷ With respect to the anticipated cement shortage, the contracting officer noted that in order for him to grant a time extension under Clause 5 of Standard Form 23-A, the delay in the completion of the work must arise from unforeseeable causes beyond the control and without the fault or negligence of the contractor, after which he stated: "[T]he cement shortage does not qualify as a justifiable delay under Clause 5 unless it is a direct result of Government imposed sanctions" (AF 10).

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volved in placing concrete and in order to avoid having cold joints when placing concrete (AF 14; Ia-2). The contractor's verbal request to place an additional girder construction joint in the end spans of the Cibecue Creek Bridge was approved by George S. Overby, Area Road Engineer, in a memorandum dated July 24, 1978,⁸ subject, however, to the following stated conditions:

1. The end span construction joint is placed 16'4" and 16'8" from the centerline of the hammerhead pier for girders B, C, D, E, and girder A, respectively.
2. The section of the girders over the two piers shall be poured first.
3. The period between the girder pours over to piers and end spans shall be at least 24 hours.

The memorandum which was addressed to the attention of Jack Lee (project engineer) concludes by stating: "This will confirm our telephone conversation where you were advised to instruct the contractor that the falsework must remain in place 14 days after the deck is poured" (AF III b).

In a discussion on the afternoon of Aug. 10, 1978, in which Messrs. Jack Lee, George Overby, Ed Willis, and Jack Willis participated, it was decided that Cibecue Creek would have to be rechanneled to accommodate the type of construc-

tion required by the Government (AF Ia-3).

By letter dated Aug. 12, 1978, the contractor advised the contracting officer that proceeding in the manner required by the Government would involve an extension of time and reimbursement for additional expenses. The contractor also stated that when the project was bid upon it was believed to be a standard girder type bridge construction permitting the contract operations to be performed in the following sequence: (i) Form and place concrete in certain sections of the girders; (ii) wait for the concrete to cure before removing scaffolding; (iii) rechannel the river flow; (iv) complete construction of the girders; and (v) then place the deck portion of the bridge (AF 16).

According to the contractor, its scaffolding supplier (Symons Corporation)⁹ and its reinforcing steel subcontractor (Reppel Steel & Supply Company, Inc.) had the same interpretation because there was nothing shown on the plans or in the specifications for a concrete

⁸ The Findings of Fact dated Aug. 13, 1979, states at page 5 that the Symons Corporation had advised a representative of the contracting officer that it had made no interpretation but had simply designed the falsework for the girders as instructed by the contractor.

After acknowledging that it had instructed Symons Corporation as to how the girders were to be formed and poured, the notice of appeal states at page 10:

"The Contractor's point is, if the plans were adequate for anyone knowledgeable in bridge construction to immediately recognize that the girders and deck would have to be poured and cured prior to falsework removal, then why didn't Symons Corp. call this to my attention. They are in business to rent scaffolding and have the knowledge to know how and where it should be used."

⁹ In a letter to the contracting officer dated Jan. 22, 1979, the contractor states:

"The false work plans and construction progress schedule (schedule submitted May 3, 1978), were submitted through Jack Lee to the contracting officer and were not disapproved until the contractor was directed, orally, on July 24, 1978 to revise false work plans and construction schedule. The letter to the contractor confirming this disapproval is dated September 22, 1978." (AF Ia-2).

placing sequence.¹⁰ The contractor notes that proceeding as the Government required would entail placing certain sections of the girders in sequence, leaving scaffolding under all the girders until the deck is placed and taking additional time for curing the deck. It was said that adhering to such a sequence would necessitate the following: (1) Re-channeling the river from under the bridge because of excessive runoff; (2) reinforcing the scaffolding under the girders already formed to support the additional weight of the deck; and (3) supplying enough scaffolding and materials to form the complete bridge (AF 16).

In a memorandum to the contracting officer under date of Sept. 7, 1978, Mr. George S. Overby (area road engineer) states:

The contractor stated that he believed this to be a standard girder type bridge construction.^[11] There are two types of

standard T girder cast-in-place design methods which may require different construction techniques. The Cibecue Bridge was designed continuous for live load which requires that the falsework remain under the structure until concrete for the deck is placed and allowed to cure. Removal of the falsework beneath the girders prior to placing the deck concrete would cause the girders to collapse.^[12] The other features which differentiates this type from the second type is the lack of an expansion and contraction joint or dam at the pier.^[13]

(AF 17-1).

In especially pertinent part a memorandum from the project engineer to the contracting officer under date of Sept. 22, 1978, states:

This bridge is designed with girders and deck as [an] integral unit, forming a T or a series of TTTT's for its strength. The girders must have support under them until after the deck is poured and cured out.

The contractor did not advise of his intention of pouring and stripping half the girders, pouring and stripping the other half and then forming and pouring the

¹⁰ Addressing this question in a memorandum to the contracting officer dated Sept. 7, 1978, Mr. George S. Overby (area road engineer) states: "The plans did not show a concrete placing diagram because of two optional girder construction joints shown" (AF 17-1). The contractor offers the following comment: "Because of the two optional construction joints shown, the more reason for a concrete placing diagram. Question: What if the Contractor elected to pour the girders from abutment No. 1 to the first construction joint? [T]he next pour would be from construction joint to construction joint" (Notice of Appeal at 11).

¹¹ "The second type of the cast-in-place T girder design is that of a simply supported structure. This is the type of structure which Mr. Willis is referring to as 'standard bridge type construction' and some of these can be constructed as he originally planned. In this type construction, some girders are able to support themselves without the deck while the first method required the deck as part of the structural section for support" (AF 17-1).

¹² "The falsework required reinforcing for the deck because the scaffolding supplier originally designed it to support only the girders. The additional scaffolding is required to adequately support the girders and deck" (AF 17-1).

¹³ The findings from which the instant appeal was taken states: "(6) the lack of an expansion or contraction dam or joint over the piers should have alerted the Contractor that his original falsework plan would not be acceptable" (Findings of Fact (8-13-79) at 6). By way of response the contractor states: "This assumption credits the Contractor with more engineering knowledge than the Project Engineer had. Falsework plans were submitted to Mr. Jack Lee and he was not aware of them being inadequate. He was aware of the Contractor's method of construction, but did not offer any corrective advice" (Notice of Appeal at 12).

deck at the preconstruction conference.^[14] His method was not discussed until Charlie Johnson visited the job site on July 17.^[15] He realized the contractor in error in his procedure, and the contractor was then informed that he must support the girders throughout their entire length until the deck was poured and cured.

It was not until some time after this date that the contractor supplied plans for the false work. These were forwarded to PAO where they were checked and found to be too weak to support both girders and deck, and additional bracing was needed to keep the scaffolding from deflecting and giving way. The contractor was informed of this August 17.^[16]

* * * * *

The re-channeling of the river around the bridge site was not a pay item and would be a legitimate claim for additional expenses.^[17] With this in mind, a

¹⁴ The contractor disagrees with appraisal, stating: "The conversation was not recorded but the plan was discussed between Jack Lee, Jack Willis (contractor's superintendent), Walt Wilson (corporate officer), and Edgar Willis (corporate officer)" (Notice of Appeal at 7).

¹⁵ Appropos of this comment, the contractor states:

"It seems incredible to assume that Mr. Lee, Project Engineer, could be on the project from May 13, 1978, until July 17, 1978, and not have any conversation with the Contractor as to his plans and phases of constructing the project. The feasibility was discussed, at one time, of placing part of the rock in the gabions between the girders before forming the ends of the deck. To accomplish this, all the falsework would need to be removed after the girders were cured." (Notice of Appeal at 7).

¹⁶ Immediately thereafter the project engineer states: "[T]hus on two different occasions, the contractor had to procure additional scaffolding and lumber, but it was his interpretation of the plans which caused the delays and additional costs" (AF 18; memorandum to contracting officer dated Sept. 22, 1978).

¹⁷ In recommending denial of the claims for time extension and for additional reimbursement, the area road engineer states:

"The weather has been typical for the summer and the run-off was normal for this time of year. Channelling and/or bridging the water would be anticipated when constructing the

BIA tractor and operator in the area was pressed into service and the by-pass was constructed at no expense to the contractor.

(AF 18).

Apparently, in anticipation of the contractor asserting a claim for having to leave the falsework in place until the deck slab was cured, Mr. Richard A. Lawrie, Director, Office of Western Bridge, Federal Highway Administration,¹⁸ wrote a letter to Mr. George Overby under date of Feb. 2, 1979, in which he stated:

In our opinion this is a highly unreasonable claim. Our office has been designing that type of bridge since the early 1930's. I am not aware of any claims or problems wherein the contractor was not aware that he would have to support the girders and slab on falsework until the tee-beam^[19] was cured sufficiently to support itself.

It should be pointed out that the main negative moment reinforcing is detailed

falsework. A qualified bidder should have recognized from the design the methods and type of falsework required to construct the bridge." (AF 17-1, 2).

¹⁸ Mr. Lawrie is shown to have approved the design of the Clbecue Bridge in his capacity of Director (see AF B, Sheet 5 of Contract Drawings).

¹⁹ At page 6, the findings state: "(2) [C]ast in place reinforced concrete tee-beams are not designated as 'T-girders' on bridge plans because anyone knowledgeable about bridge or bridge construction would recognize them." Addressing this finding, the contractor notes that three competent contractors who had bid on the project had basically the same interpretations of the plans and specifications after which the contractor states: "Also, the fact [is] that Mr. Lee (the Project Engineer) with two months on the project did not recognize the Contractor was wrong until Mr. Charley Johnson (a structural engineer) called it to his and the Contractor's attention" (Notice of Appeal at 11).

on the plans *in the deck*.^[20] This should provide anyone who is knowledgeable about bridges and bridge construction with the understanding that the main supporting members for this structure are reinforced concrete tee-beams and that the entire top flange of this tee-beam^[21] must be in place and bonded to the negative moment reinforcing before this bridge is able to stand under its own weight.

(AF 25-1).

Claim "A"—Claim for Additional Scaffolding (Falsework)—
\$43,672.27

The claim as presented in a letter to the contracting officer under date Jan. 22, 1979, is in the amount of \$43,672.27.²² The basis for the claim, as set forth therein, is as follows:

[T]he Construction Contract General Provisions, Standard Form 23-A, paragraph 3, Changes, authorizes this claim for reimbursement of costs as a result of

²⁰ Commenting on reference to this aspect in the findings, the contractor states: "A note on the plans would have alerted one to investigate further. Otherwise, only the structural designer knows, and certainly a structural engineer would have to make the necessary computations to arrive at the conclusion that the girders were, or were not, self-supporting" (Notice of Appeal at 13).

²¹ "Reimbursement for additional expenses is requested in the amount of \$43,672.27 as documented in Exhibit V. The extra work, represented by the recorded costs of materials, rentals, owned equipment, labor, and overhead, is described above, in the log of extra working time resulting from the changes required by direction of the contracting officer" (AF Ia-4).

²² "The Contractor * * * in preparing a bid for this project did take into consideration methods of construction, and other factors that are necessary to do a project of this type, i.e., weather conditions, traffic control, control of water, excavation, forming, reinforcing steel, concrete placement, grading, borrow materials, bank protection, (gabions), guard rails, bridge rails, asphaltic materials, etc. With the aforementioned items, and the ever changing costs of same, the Contractor did get quotations from suppliers to compile his bid for the project" (Notice of Appeal at 3).

the special provisions added to complete the specifications which were defective by reason of omission of specific designation of the type of girder designed, and the dependent concrete pouring sequence required.

(AF Ia-4).

Among the principal arguments advanced in support of the appeal are the following:

[T]he method of construction required by direction of the Government, in the field, was not contained in the Contract Documents; was not foreseen by the Contractor;^[23] and did result in additional cost to the Contractor in the amount claimed. * * *

* * * * *

* * * [O]ne of the suppliers was the Symons Corporation who supplied the scaffolding (falsework) for the girders. The Contractor did instruct Symons as to how he intended to form and pour the girders. Working from the plans Symons Corporation did detail the scaffolding, and submitted them to the Contractor, April 11, 1978, as noted on their detail sheets. I am sure this firm, which is expert in their field, would have recognized that the scaffolding would have to support the girders and the deck, if it was obvious on the plans.

* * * [T]he Contractor's method of construction, i.e. to form and pour girders to a construction joint, then strip and use the same material for the next phase. This method was determined by notes on the plans which would indicate his method was not only permissible, but perhaps anticipated. Example: Sheet 5 of 20 center left, note A; Optional girder construction joint (either or both may be used). Sheet 9 of 20 lower right, De-

²³ The "To Whom It May Concern" statements submitted by three other bidders that had bid on the project were included as enclosures to the Contractor's claim letter of Jan. 22, 1979 (see AF Ib, Ic, and Id).

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deflection. Ordinate=Immediate deflection and long term deflection. This note would have no Justification for use by anyone in the field unless the girders had been poured and cured, and scaffolding removed, prior to setting and pouring the deck.

* * * [B]ased on the Contractor's knowledge, his proposed method of construction was acceptable. This is supported by letters from three other competent contractors who submitted bids on the project. They stated that their method of construction was basically the same. This would bring one to the conclusion that the information in the plans and specifications was inadequate, or that none of the contractors that bid the project were knowledgeable bridge people. This refers to a statement by Mr. Richard A. Lawrie, paragraph 3, in his letter dated February 2, 1979, Exhibit No. 25.

(Notice of Appeal at 1, 3-4).

The Government's principal defenses against the claims asserted are: (i) Cast-in-place reinforced concrete tee-beams are not designated as "T-girders" on bridge plans because anyone knowledgeable about bridge construction would recognize them; (ii) the plans did not show a concrete placing diagram because two *optional* girder construction joints were shown; (iii) the contractor was advised verbally in the initial stage of placing the falsework that it was structurally inadequate; (iv) the lack of an expansion or contraction dam or joint over the piers should have alerted the contractor to the fact that his original falsework plans would not be acceptable; (v) the main negative moment reinforcement is detailed on the plans

in the deck; and (vi) the tee-beam has been designed by the Federal Highway Administration since the early 1930's and they are not aware of any claims or problems developing as a result of a contractor not being aware that he would have to support the girders and slab on falsework until the tee-beam was cured sufficiently to support itself (Findings of Fact and Decision by the contracting officer dated Aug. 13, 1979, at 6).

The Board has examined the foregoing contentions in the light of the evidence of record. As to item (i) it notes that the Government has not denied that three other bidders on the project apparently interpreted the plans and specifications in essentially the same manner as did the contractor.²⁴ Also noted is the fact that there were only seven contractors responding to the invitation for bids and that, consequently, at least over half of them viewed the requirements for the project in the same light as did the contractor.²⁵ While with respect to item (ii) the Government has stated that its failure to show a concrete placing diagram was because two optional-

²⁴ The record is devoid of any evidence as to what construction was placed upon the plans and specifications by the remaining three bidders.

²⁵ Notice of Appeal at 10. Although the contracting officer indicates that only 15 percent of the falsework had been completed by the end of July of 1978 (Findings at 5), the progress report of July 31, 1978 (AF 15), to which the findings refer does not show a percentage of completion figure for the falsework at the end of the reporting period; nor is the source of the 15 percent figure used by the contracting officer disclosed elsewhere in the record.

girder construction joints were shown, it has not even addressed the appellant's argument that the showing of the two optional-girder construction joints made the inclusion of a concrete placing diagram in the plans of even greater importance (n.10, *supra*, and accompanying text).

With respect to item (iii) the contractor flatly denies that in the initial stage of placing the falsework it had been advised verbally that it was structurally inadequate. According to the contractor, at the time such advice was given approximately 65 percent of the falsework had been completed as shown by photos. As to item (iv) (the lack of an expansion on contraction dam or joint over the piers) and item (v) (the main negative moment reinforcement being detailed on the plans), the appellant asserts that while these items would be significant to a structural engineer, they would not alert contractors to the type of bridge construction desired by the Government (nn.13 & 20, *supra*, and accompanying text).

Concerning item (vi) (the use of the tee-beam in design since the early 1930's and the absence of any evidence that the contractors concerned were not aware of the necessity of supporting the girders and slab on falsework until the tee-beam was cured sufficiently to support itself), the appellant notes the absence of any statement as to whether the contract documents, plans, and specifications involved in such contracts are comparable to

the plans and specifications for the instant project. This question was not addressed by Richard A. Lawrie, Director, Office of Western Bridge, Federal Highway Administration (*see* text accompanying n.18, *supra*); nor has it been addressed by either the contracting officer or other Government personnel.

In an apparent effort to bolster the Government's position, the Department counsel quotes passages from FP-74²⁶ (Government Brief at 3-4). While FP-74 was incorporated in the contract by reference, the passages in question were not adverted to by the Government engineers who expressed an opinion concerning the merits of claim A; nor were they referred to by the contracting officer in the findings from which the instant appeal was taken. Absent any references by the Government personnel concerned with drafting the plans or administering the contract to the quoted passages from FP-74, it does not appear that any of them thought the provisions of those paragraphs would materially assist in the resolution of the disputed questions; nor do we.

Decision

The principal question raised by this record is whether the plans and specifications with which we are

²⁶ "Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects." FP-74 was not submitted by the contracting officer as part of the appeal file; nor was it submitted as a supplement to the appeal file at the time the Order Settling Record was issued on Apr. 21, 1980.

here concerned can be said to be ambiguous. A related question is whether the contractor's interpretation of the plans and specifications can be said to be reasonable. Addressing these questions in the case of *Brezina Construction Co., Inc. v. United States*, 196 Ct. Cl. 29 (1971), the Court of Claims stated at page 33: "The rule, often repeated by this court, is that if a Government contract is ambiguous and if the construction placed upon it by the contractor is reasonable, the contractor's construction will be adopted, unless the parties' intention is otherwise affirmatively revealed." [Citing cases.]

In the case at hand the appellant appears to concede that a structural engineer reading the plans and specifications for the instant project would be likely to conclude that the bridge called for by the contract should be constructed by employing techniques designed continuous for live load which requires that the falsework remain under the structure until concrete for the deck is placed and allowed to cure. The heart of the appellant's case, however, is that neither it nor three other concerns who bid on the project construed the invitation to require that the bridge be constructed in that manner. Referring to various portions of the contract plans and emphasizing the absence of a concrete placing diagram, the contractor asserts that the method of construction it contemplated was to

form and pour the girders to a construction joint, then strip and use the same material for the next phase.

The strongest evidence for proof of the ambiguity of the terms of the contract, as well as the reasonableness of the contractor's construction of them, is the undisputed fact that three other concerns who bid on the project apparently construed the terms of the invitation in essentially the same manner as did the contractor. The reasonableness of the contractor's interpretation is also supported to some extent at least by the fact that the scaffolding supplier who had access to the plans raised no question with the contractor as to the propriety of the contractor proceeding in the manner he did. While the contractor has also asserted that it notified the project engineer of its plans, we do not consider that there is sufficient evidence in the record to make a finding on this question. We note, however, that for over 2 months (from May 13 to July 17, 1978), the contractor apparently proceeded with bridge construction in the manner it had contemplated and that on one occasion during that period the contractor discussed with the project engineer the feasibility of placing part of the rock in the gabions between the girders before forming the ends of the deck and that this would entail removing all of the falsework after the girders were cured (n.15, *supra*).

For the reason stated and under the authority cited, the Board finds that the contract terms were ambiguous, insofar as the construction methods and sequences to be employed in constructing the Cibecue Bridge was concerned; that the contractor's interpretation of the ambiguous contract terms was reasonable; that the Government's action in requiring the contractor to construct the bridge in accordance with its interpretation of the contract constituted a constructive change; and that by reason of the constructive change order the contractor incurred costs for which it has made claim in the amount of \$43,672.27. The Government having neither submitted evidence to show that the costs claimed for are unreasonable nor having otherwise questioned them, the Board finds that the equitable adjustment to which the appellant is entitled for Claim A is in the amount of \$43,672.27.

*Claim B—Time Extension
Requests—91 days*

The contractor has requested that the time for performing the contract be extended by 91 days by reason of what it terms excusable delays. The time extension request is comprised of (a) delays due to the additional scaffolding (falsework) required; (b) delays due to a cement shortage and (c) delays caused by weather. Each of these causes of delay are considered separately below.

(1) Delay due to additional scaffolding (falsework) required

The contractor has requested a time extension of 50 days by reason of the additional scaffolding (falsework) required as a result of the Government interpreting the specifications in the manner it did. Since the contracting officer denied the claim for additional compensation with respect to this item (Claim A, *supra*) on the ground that the contractor was simply being required to perform the contract in accordance with its terms, there was no basis for him granting a time extension for this work. As we have found that the instructions the Government gave to the contractor with respect to Claim A constituted a constructive change, we must now determine the extent to which the issuance of the constructive change order delayed the completion of the contract work.

The contracting officer appears to have questioned, however, whether the contractor was, in fact, delayed by the change in the falsework plans in any event. In this connection he emphasizes the extent of the work performed by Bureau of Indian Affairs personnel and asserts that the deletion of a number of contract items reduced the contractor's schedule by a total of 35 days. He also finds that the falsework construction did not delay the overall progress of constructing the approaches (Findings at 9). The contractor vigorously contests this analysis, asserting that it is point-

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less to accumulate four concurrent 7-day schedules, plus 1 week on another schedule to a total of 35 days. Commenting further on this point the contractor states: "[T]he deletion of these items are fact. But the deletion of these items did not reduce the Contractor's schedule 35 days. As here-to-fore stated, using the same formula the figure would be 7 days" (Notice of Appeal at 19-21).

The Board has previously noted that although the contracting officer indicates that only 15 percent of the falsework was completed when the instruction to change the falsework plan was issued, the progress report apparently cited as authority for the statement does not support the use of that figure. We have also noted the contractor's estimate that as of that time approximately 65 percent of the falsework had been completed. Since this very substantial difference in the estimate of the amount of the falsework done at the time the change in the plan occurred may account for much of the difference in the appraisal of the parties respecting the extent to which the change in the plan for the falsework delayed the completion of that work, since the 15 percent figure used by the contracting officer is not supported by the record before us and since the contractor apparently concedes that deletion of certain items reduced its performance time by 7 days, the Board finds that by reason of the change

in the falsework plans ordered by the Government, the contractor was delayed by 43 days for which it is entitled to a time extension.

(2) *Time extension for cement shortage*

The 21-day time extension requested by the contractor for a cement shortage which developed during the course of contract performance covers the period from Aug. 11 to Aug. 31, 1978, when the contractor was without cement for concrete. Although the contractor makes a considerable effort to show that the cement shortage was due to Government imposed sanctions, it has made no effort and offered no evidence to show what effort it made to get cement from other sources either immediately prior to or during the period of the cement shortage.

An appellant seeking to prove an excusable cause of delay must show, however, that it was not reasonably possible to secure the needed material from any source. *Aerosonic Corp.*, ASBCA No. 9332 (May 14, 1964), 1964 BCA par. 4,243. As no such showing has been made in this case, the contractor's request for a 21-day time extension for a cement shortage is hereby denied.

(3) *Time extension for weather*

The contractor has requested a 20-day time extension due to weather. The contracting officer found the contractor was entitled to a time extension of 12 days. The difference in their respective apprais-

als may be due to the fact that the contractor's request for time extension is based on weather which either stopped work or seriously interfered with it proceeding while the contracting officer appears to have applied the standard for unusually severe weather cases.

Clause 5, Termination For Default—Damages For Delay—Time Extensions (Standard Form 23-A) only entitles a contractor to a time extension for bad weather if it is shown to be unusually severe. The contractor has made no effort to show that the weather for which it is claiming relief was unusually severe within the meaning of Clause 5, *supra*. The claim for time extension for weather (over and above that allowed by the contracting officer) is therefore denied.

Summary

1. Claim A is allowed in the amount claimed of \$43,672.27.

2. Claim B is granted to the extent the contractor is found to be entitled to a time extension of 55 days comprised of time extension for falsework (43 days) and a time extension for unusually severe weather as allowed by the contracting officer (12 days).

WILLIAM F. MCGRAW

Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD

Administrative Judge

OWNERSHIP OF AND RIGHT TO EXTRACT COALBED GAS IN FEDERAL COAL DEPOSITS

M-36935

May 12, 1981

Act of March 3, 1909—Act of June 22, 1910—Patents of Public Lands: Reservations

Patents issued pursuant to the Act of Mar. 3, 1909, or the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976) reserved to the United States "all coal" and the right to prospect for, mine and remove the "coal deposits" underlying the patented lands. Congress in the 1909 and 1910 Acts intended to, and did, reserve only the coal and not other minerals found in association with coal. Accordingly, all minerals other than coal, including coalbed gas, passed to the surface owner at the time a patent was issued pursuant to the 1909 or 1910 Acts.

Act of July 17, 1914—Patents of Public Lands: Reservations

Should coalbed gas occur in lands in which "oil and gas" were reserved to the United States in agricultural patents issued under the Act of July 17, 1914, 30 U.S.C. § 121 (1976), that coalbed gas is reserved to the United States.

Mineral Leasing Act: Methods of Development—Oil and Gas Leases: Generally

The MLA refers only to "gas" or "natural gas" without any qualifying adjectives, thus supporting a nonrestrictive reading of those terms to include coalbed gas. Coalbed gas is leasable under the oil and gas leasing provision of the MLA, 30 U.S.C. § 226 (1976).

Coal Leases and Permits: Leases—Mineral Leasing Act: Methods of Development

Coalbed gas is not included in a coal lease under the MLA. In the coal leasing

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provision of the MLA, Congress did not provide for a coal lessee's extraction of minerals related to or associated with coal. 30 U.S.C. § 201 (Supp. II 1978). This provision does not authorize a coal lessee's extraction of coalbed gas, other than the venting of the gas required by mine health and safety laws and regulations.

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: OWNERSHIP OF AND RIGHT
TO EXTRACT COALBED GAS IN
FEDERAL COAL DEPOSITS

Federal coal deposits may contain large quantities of recoverable coalbed gas. Due to its flammability and to the danger it poses to underground mining, this gas,¹ often referred to as methane,² has long been feared by the coal mining industry.³

¹ Coalbed gas is a byproduct of coalification, the process through which plant material buried in sediments is successively transformed from peat into lignite, subbituminous coal, bituminous coal and finally anthracite. E. Craig and M. Myers, *Ownership of Methane Gas in Coalbeds*, 24 Rocky Mtn. Mineral Law Institute 767-68 (1978) (hereinafter cited as "Craig and Myers").

² Methane (CH₄), a colorless, odorless, flammable gas, is the primary component of coalbed gas. A. Kim, *Estimating Methane Content of Bituminous Coalbeds from Adsorption Data*, U.S. Department of the Interior, Bureau of Mines, Report of Investigations (USBM RI) 8245 L (1977). "During the biogenic stage of coal formation, methane is the predominant gas produced. * * * During the diagenetic stage of coalification, methane and other hydrocarbons are produced." A. Kim, *Experimental Studies on the Origin and Accumulation of Coalbed Gas*, USBM RI 8317, at 16 (1978).

³ See U.S. Bureau of Mines Information Circular No. 7900 (1963); M. Irani, C. Timmons, T. Bobbick, M. Deul and M. Zabetakis, *Methane Emission from United States Coal Mines, A Survey*, Bureau of Mines Information Circular No. 8558 (1972); M. Zabetakis, M. Deul and

Although traditionally coal mining practices have wasted the gas by venting it into the atmosphere, there is currently a great deal of interest in developing coalbed gas as an energy source in its own right.⁴

Deep coalbeds in the Appalachian region are the most likely source of commercially marketable gas, but preliminary studies show that deep coalbeds in the West may also contain recoverable gas.⁵ A number of studies, including research by the Department of Energy, have concluded that recovery of coalbed gas is commercially and technically feasible.⁶ However, the unresolved legal status of coalbed gas on federal lands and in federal coal has hindered any decision on how, and under what right of extraction, it can be developed. In order to expedite development of this energy source, the Department must resolve two issues: (1) who owns the coalbed gas in land where the coal or oil and gas was reserved to the United States; and (2) whether the coal or the oil and gas leasing provisions of the Mineral Lands Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1976) (Mineral Leasing Act or MLA) apply to

M. Skow, *Methane Control in United States Mines*, Bureau of Mines, Circular No. 8600 (1973).

⁴ See Office of the White House Press Secretary, "Fact Sheet on the President's Import Reduction Program II" (July 16, 1979).

⁵ P. McGinley, *Legal Problems Relating to Ownership of Gas Found in Coal Deposits*, 80 W. Va. L. Rev. 369, 372-73 (1978) (hereinafter referred to as "McGinley").

⁶ See McGinley, *supra* note 5, at 375-77.

the leasing of coalbed gas for commercial development.

For the reasons set forth below, I conclude that: (1) the reservation of coal to the United States in the Act of Mar. 3, 1909 and the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976), did not include the coalbed gas found in the reserved coal; (2) the reservation of oil and gas to the United States in the Act of July 17, 1914, 30 U.S.C. §§ 121-123 (1976) included coalbed gas found in the lands patented subject to such a reservation; and (3) coalbed gas is disposable under sec. 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976), the oil and gas leasing provision.

I. Ownership of Coalbed Gas

Coalbed methane is both scientifically defined⁷ and legally regarded⁸ as a gas.⁹ The relationship of

coalbed methane to coal is described in a Bureau of Mines Report:

Methane is always present in coal * * *. It occurs admixed with other hydrocarbons, CO₂ N₂ O₂, H₂ and He. It is a normal byproduct of the coal-forming process. Although much of the gas formed during coalification migrates away from the coal, a significant portion is retained in the coal and adjacent rocks. Some free gas is present in cracks and fractures, but most is adsorbed on the internal surface of micropores within the coal. The amount of gas that the coal contains depends primarily upon pressure, temperature, adsorptive capacity, and moisture content of the coal.^[10]

Thus, although coalbed gas exists in coal deposits,¹¹ the two resources are distinct, and are potentially severable. In order to determine the ownership of coalbed gas in federal mineral deposits, it is necessary first to examine the various statutes in which rights to mineral deposits have been reserved to the Federal Government.

A. Coal Land Withdrawals and Coal Reservations

Beginning in 1906, President Roosevelt withdrew over 75 million acres of western land containing known "workable coal" from all

⁷ A. Kim, *Estimating Methane Content of Bituminous Coalbeds*, *supra* note 2.

⁸ Several courts, addressing the question of what constitutes "gas" or "natural gas," have defined those terms to comprehend coalbed methane. See, e.g., *McCoy v. United Gas Public Service Co.*, 57 F. Supp. 444, 445 (W.D. La. 1932) (gas "consists of invisible vapors which are produced from the earth, containing varying amounts of hydrocarbon"). See also *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 715 (10th Cir. 1971), *aff'd* 292 F. Supp. 619 D. Kan. 1968), where the court held that a grant of "oil and gas" included not only the hydrocarbon gases (such as methane) but also the helium extracted with them. The court approved the trial court's definition of gas as "any naturally-formed aeriform substance indigenous in the underlying reservoir * * * ." 441 F.2d at 711, *citing* 292 F. Supp. at 686.

⁹ By contrast coal is defined as: "[a] solid, brittle, more or less distinctly stratified, combustible carbonaceous rock, formed by partial to complete decomposition of vegetation; not fusible without decomposition and very insoluble. The boundary line between peat and coal is hazy * * * as is the boundary line

between coal and graphite and the boundary line between carbonaceous rock and coal." U.S. Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 222 (1968).

¹⁰ A. Kim, *Estimating Methane Content of Bituminous Coalbeds*, *supra* note 2.

¹¹ See Deul, *Methane Drainage from Coal Beds, A Program of Applied Research*, 60 Rocky Mtn. Coal Mining Inst. 13 (1964), describing coal as a "porous * * * solid with two distinct pore systems * * * [in which] gas can exist as free gas in cracks and fractures (macropores) or be adsorbed on the internal surface of the micropores."

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forms of entry (i.e. homestead, agriculture). The purpose of these withdrawals was to prevent the continued loss, by the United States, of lands valuable for coal. However, by February of 1909, there were 11,688 original homestead and desert land entries of record in lands which had been withdrawn as valuable for coal, and the issuance of final certificates on 2,771 homestead and desert land entries had been suspended pending classification of the lands for coal. H.R. Rep. No. 2019, 60th Cong., 2d Sess. 2, 5-7 (Feb. 2, 1909).

Congress, spurred by the desire to re-open these lands to entry, passed the Act of Mar. 3, 1909, 30 U.S.C. § 81 (1976), and the Act of June 22, 1910, 30 U.S.C. §§ 83-85 (1976). The Act of 1909 provided relief for entrymen who in good faith had occupied lands for agricultural purposes and then, before patent, suffered withdrawal of that land from entry on the basis that it was coal land. The 1909 Act allowed the entryman to perfect his entry, but he received a patent reserving to the United States "all coal * * * and the right to prospect for, mine, and remove the * * * coal deposits." 30 U.S.C. § 81 (1976).

The 1910 Act provided alternate relief by opening withdrawn coal lands to agricultural entry subject to a reservation to the United States of "all the coal in the lands so patented, together with the right to prospect for, mine, and remove the

* * * coal deposits." 30 U.S.C. § 85 (1976).¹²

It is a well-established principle that nothing passes in a public land grant by implication and that such grants should be interpreted in favor of the government. *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978). However, public land grants "are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication * * *." *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979), quoting *United States v. Denver & Rio Grande R. Co.*, 150 U.S. 1, 14 (1893). When coal was reserved by the United States under the 1909 and 1910 Acts, coalbed gas was viewed not as a valuable resource, but as a nuisance, and an acknowledgement of its hazardous qualities is found in the legislative history of the Act of June 22, 1910. 45 Cong. Rec. Appendix 156 (Speech of Rep. John K. Tenner (May 10, 1910)). Although there was no affirmative Congressional policy enunciated toward the disposition or ownership of coalbed gas, it is apparent from the legislative history of both the 1909 and 1910 Acts that Congress was aware of the narrow scope of

¹² By the Act of Apr. 23, 1912, 30 U.S.C. § 77 (1976), Congress allowed entry under the homestead laws on unreserved public lands in Alabama containing coal deposits, subject to the provisions of the 1910 Act, 30 U.S.C. §§ 83-85 (1976). The 1912 Act incorporates sec. 3 of the 1910 Act by reference. See 1 American Law of Mining §§ 2.17 and 3.24B (1960).

the proposed reservation of "coal." Explaining the effect of H.R. 24834,¹³ Honorable F. W. Mondell, Chairman of the House Committee on Public Lands, engaged in the following colloquy:

Mr. STEPHENS of Texas. Is it not a fact that valuable minerals are reserved now to the Government?

Mr. MONDELL. No; that is not true. The patent having issued, the patent carries everything in the land with it. * * *

Mr. STEPHENS of Texas. That applies also to oil and coal?

Mr. MONDELL. It applies to all kinds of minerals. In other words, the patents issued by the Government of the United States heretofore have been patents in fee.

Mr. STEPHENS of Texas. *Could the gentleman better arrive at what he desires by only patenting the surface of the land and reserving all minerals, precious and otherwise?*

Mr. MONDELL. That has been discussed at some length, and the Committee on Public Lands is not of the opinion that that ought to be done. *We believe this is quite a sufficient departure from the past practice of the Government. The lands which this legislation will affect are lands which the department has claimed contain some coals of value.*

Mr. STEPHENS of Texas. Is not this a step in that direction of issuing limited patents?

Mr. MONDELL. It is; and I trust it is as far as we will go in that direction.

43 Cong. Rec. 2504 (1909) (italics added).

Similarly, during debate on the 1910 legislation, Representative Mondell emphasized that the proposed legislation reserved to the Federal Government only the coal,

and not other minerals, such as gas and oil.¹⁴

See 45 Cong. Rec. 6044 (1910). The statutory language and the legislative history belie the argument that Congress intended to reserve any mineral other than coal in the 1909 and 1910 Acts.

The conclusion that Congress in the 1909 and 1910 Acts reserved only coal, and not other minerals found in association with coal, is supported by the Act of Aug. 11, 1955, 30 U.S.C. § 541 (1976). This Act, known as the Uraniferous Lignite Act, authorized the location of mining claims and the removal of uranium-bearing lignite from the public lands classified as coal lands, and from entered, granted, or patented lands in which the coal deposits were reserved to the United States.¹⁵

The intent of the law was to permit development of newly-discovered uranium-bearing lignite seams in federally-owned coal deposits, including coal reserved under the 1909 and 1910 Acts.¹⁶ The

¹⁴ Secretary of the Interior Ballinger, commenting on the proposed 1910 legislation, observed that it "relate[s] only to lands which have been classified as, or are known to be, valuable for coal. In my judgment it would be well to extend its provisions to lands containing oil and natural gas." H. R. Rep. No. 377, 61st Cong., 2nd Sess. 4 (1910).

¹⁵ The Multiple Mineral Development Act of 1954, 30 U.S.C. § 521 *et seq.* (1976), opened public lands known to be valuable for leasable minerals (*e.g.* coal) to location and patent of mining claims for locatable minerals (*e.g.* uranium). However, the 1954 Act did not provide for the location and extraction of a locatable mineral (uranium) occurring within a deposit of a Leasing Act Mineral (coal).

¹⁶ See 101 Cong. Rec. 12300, 84th Cong., 1st Sess. (1955).

¹³ H.R. 24834, with amendments not relevant to this discussion, was enacted as the Act of Mar. 3, 1909, 30 U.S.C. § 81 (1976).

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uranium contained in the coal was a locatable mineral under the mining laws, and the locator of a uranium claim had "an absolute right to mine and remove [it]." H.R. Rep. No. 1478, 84th Cong., 1st Sess. 4 (1955). However, it was impossible to remove the uranium without removing the federally-owned lignite. Congress acknowledged that the entryman of land in which coal deposits were reserved to the United States has "*fee simple title to all other minerals in the land, including valuable source materials [uranium], regardless of the host material or the mode of occurrence.*" *Id.* at 5. (italics added). Accordingly, sec. 4 of the Act provides the entryman of such lands with the right to "mine, remove, and dispose of lignite containing [uranium] and lignite necessary to be stripped or mined in the recovery of [the uranium] * * *." 30 U.S.C. § 541c (1976).

To Congress in 1955, then, the title of an entryman under the 1909 and 1910 Acts to all minerals in his land other than federally reserved lignite was not in dispute. The Uraniferous Lignite Act was both a recognition of this ownership, and a partial solution¹⁷ to the prob-

lems of extracting and disposing of uranium occurring in direct association with federal lignite.

Our conclusion is further supported by the background to and enactment of the Act of Mar. 4, 1933, 30 U.S.C. § 124 (1976), in which Congress confronted the related problem of commingled deposits of potash and sodium. The Act of July 17, 1914, 30 U.S.C. § 121-123 (1976) (discussed further in part IB *infra*), authorized agricultural entries on lands withdrawn for potash, reserving to the United States the potash deposits. However, in New Mexico, valuable deposits of potash occurred in association with valuable sodium, a leasable mineral under the Mineral Leasing Act. Despite the Mineral Leasing Act's authorization of leases for sodium "and other related products," 30 U.S.C. § 262 (1976), and for potash "and other related products," 30 U.S.C. § 282 (1976), the Department took the position that the reserved potash in New Mexico and the sodium associated with it were not disposable under a single lease. Where patents had been issued under the 1914 Act reserving the potash, the surface owner had title to the sodium, "thus creating a *dual ownership* of

¹⁷ Congress chose not to resolve such conflicts between surface entrymen and their grantees or lessees and federal coal lessees:

"Secs. 4 and 5 of the bill take cognizance of conflicting interests between the *entryman or owner [of entered, granted, or patented lands] who has title to any valuable source material contained in lignite* occurring in his lands and the lessee who has acquired the right to mine and dispose of such lignite through a lease

agreement with the United States which reserved the coal in such lands at the time the lands were entered, granted, or patented.

"The committee feels that such conflict of interests should be resolved by the parties concerned or, failing that, by the local courts and not through legislation." H.R. Rep. No. 1478, 84th Cong., 1st Sess. 5 (1955). (italics added.)

the same deposit made up of both potash and sodium." H.R. Rep. No. 1938, 72nd Cong., 2d Sess. 2 (1933) (views of the Department of the Interior) (*italics added*). In response to this situation, Congress provide for agricultural entry on lands withdrawn or classified as valuable for sodium and/or sulphur, thereby consolidating in the United States for all future entries the mineral ownership for such commingled leasable deposits, 30 U.S.C. § 124 (1976).

A recent trial court decision,¹⁸ based on common law principles, concluded that coalbed gas was not conveyed in a grant of "coal," and that the seller retained control over the gas, except for the right of the coal owner to vent it in the course of mining. The court cautioned, however, that the coalbed gas could not be extracted in any manner which would violate or diminish the property value of the coal. While the case is not controlling on the issue of ownership of coalbed gas in coal deposits reserved to the Federal Government in a federal land grant, the discussion of common law principles applicable to those private transactions lends further support to the conclusion that coalbed gas was not reserved with federal coal in nonmineral patents issued subject to the 1909 and 1910 Acts.

B. Reservation of Oil and Gas

Aside from coal lands, Congress continued the general policy of

unity of surface and mineral estates in the disposition of public lands until 1914. By the Act of July 17, 1914, 30 U.S.C. §§ 121-123 (1976), Congress permitted nonmineral entry of lands withdrawn or classified as valuable for certain minerals including phosphate, nitrate, potash, oil and gas, reserving to the United States any and all of those minerals for which the lands were withdrawn or classified as valuable. As it had done in the 1910 Act for coal, Congress provided that patents issued under the 1914 Act "*contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same.*" (*italics added.*) 30 U.S.C. § 121 (1976).

As it had done in the 1909 and 1910 statutes, Congress reserved *only* the minerals identified in the 1914 Act, allowing all other minerals in the affected lands to pass with the surface. Again, the legislative history is instructive of Congress' view of the scope of the reservation:

MR. MANN. [*w*]hy should not the Government reserve all of the minerals under the surface? * * *

MR. MONDELL. [*t*he gentleman's suggestion relates to a general mineral reservation. Of course that is not what this bill provides. * * * The moment you depart from the kind of reservation that we have heretofore provided for in the case of coal, and which we are now extending to these other minerals * * * you must logically go to the extreme of withholding all minerals. * * * Of

¹⁸ *United States Steel Corp. v. Hoge*, No. 78-682 (Pa. Ct. C. P., Greene County, Mar. 24, 1980), *appeal filed*, Oct. 22, 1980.

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course it is barely possible that *some other minerals might some time be found* than those for which the land is withdrawn, but it is not at all likely, and if in the far distant future some minerals should be found in the possession of farmers and others, I do not believe any public interest would be injured thereby.

51 Cong. Rec. 10493-94, 63rd Cong., 2nd Sess. (1914) (*italics added*).

Thus, Rep. Mondell, the Chairman of the House Committee on Public Lands, expressly acknowledged that the 1914 Act's mineral reservations, like the prior coal reservations, were specific, and were limited to the named minerals.

If any coal rights passed into private ownership under an agricultural entry subject to the 1914 Act with a reservation to the United States of "gas," then the gas and the right "to prospect for, mine, and remove the same," including coalbed gas, is reserved to the United States where the lands were withdrawn or classified as oil and gas lands, or were reported as valuable for oil and gas deposits. *Cf. Brennan v. Udall*, 251 F. Supp. 12, 25 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967) ("oil" reservation in the 1914 Act is generic and includes oil shale).

Like "oil," "gas" is a term of art, and the courts have interpreted gas broadly to include both fuel and non-fuel gases. *See cases cited at note 8, supra*. Therefore, should coalbed gas occur in the lands in which "oil and gas" were reserved to the United States under the 1914

Act, that coalbed gas would be retained under the Act.

II. Coalbed Gas is Leasable Under the Gas Leasing Provisions of the Mineral Leasing Act.

A. Coalbed Gas is a "Gas" within the Meaning of the MLA and Applicable Regulations

Sec. 1 of the MLA, *as amended*, 30 U.S.C. § 181 (1976), provides that:

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this chapter * * *.

The MLA neither distinguishes coalbed gas nor provides any definition of "gas" or "natural gas."¹⁹ Thus, there is a definitional question raised by the MLA relating to the treatment of coalbed gas, similar to the question raised in the statutory reservations of 1909, 1910, and 1914.²⁰ The Mineral Leasing

¹⁹ Since the MLA uses "gas" in conjunction with "oil" and other fuels, the doctrine of *ejusdem generis* could arguably lead to a reading of the term restricted to hydrocarbon gas suitable for fuel. Since methane, the major component of coalbed gas, is a hydrocarbon gas suitable for fuel, even this restrictive interpretation would include coalbed gas.

²⁰ Based on a broad definition of "gas," and on the general intent of Congress to retain named mineral resources, this office has expressed the opinion that carbon dioxide gas is included in the reservation of oil and gas in a land patent under the Act of July 17, 1914, 30 U.S.C. § 121 (1976). "Reservation of Carbon Dioxide Gas in Land Patent," Memorandum to the Colorado State Director, BLM, from the Regional Solicitor, Denver (July 12, 1979).

Act refers only to "gas" or "natural gas" without any qualifying adjectives, thus supporting a nonrestrictive reading of both terms.²¹

The legislative history of the MLA sheds little light on this subject. However, the regulations implementing the oil and gas leasing provisions of the MLA refer, and have uniformly over the life of the MLA referred to gas in general terms, leaving little doubt that coalbed gas is included in the meaning of the term "gas." Even where certain differences appear between coalbed gas and other mixtures or forms of hydrocarbon gas, the regulations, like the statute, do not distinguish them.

In Part 221 of the oil and gas operating regulations, gas is defined as "[a]ny fluid, either combustible or noncombustible, which is produced in a natural state from the

earth and which maintains a gaseous or rarified state at ordinary temperature and pressure conditions."²² 30 C.F.R. § 221.2(o).

While the regulations acknowledge that gas comes from various fields and deposits at varying pressures, they do not distinguish between types of gases based on pressure or formations. Coalbed gas often comes from the wellhead at pressures below those of gas found in oil-bearing formations, but variances in pressure make no difference in the legal and regulatory treatment of the disposition of the gas. 30 CFR 221.44 provides that:

*Gas of all kinds * * ** is subject to royalty, and all gas shall be measured by meter * * *. For computing the volume of all gas produced * * * the standard of pressure shall be ten ounces above an atmospheric pressure of 14.4 pounds * * *. All measurements of gas shall be adjusted by computation to these standards regardless of the pressure * * * at which the gas was actually measured. (italics added.)

Under this regulation, therefore, the volume of gas sold or produced is determined by a standard which disregards differences in wellhead pressure.

The only type of gas specifically mentioned in the MLA—helium—is also the only wellhead constituent of gas that Congress has deemed separable and reserved for specific

²¹ The only apparent restrictive definition of gas appears in the Geothermal Steam Act of 1970, 30 U.S.C. § 1001 *et seq.* (1976). Sec. 27 of the Geothermal Steam Act, 30 U.S.C. § 1025 (1976) provides that in the leasing of geothermal resources, "[t]he United States reserves the ownership of and the right to extract * * * oil, hydrocarbon gas, and helium from all geothermal steam and associated geothermal resources produced from lands leased under this chapter in accordance with presently applicable laws * * *." (italics added.)

Even if a limited definition of gas was intended, coalbed gas would still qualify as a reservable gas under the Geothermal Steam Act. Since steam is commonly referred to as a gas, Congress probably limited the definition in this statute only to avoid confusion about which substances found in association with geothermal resources are properly extracted and exploited under a geothermal resource lease. In any event, this usage does not alter the use of the term "gas" in the Mineral Leasing Act, in the instant context.

²² This definition is unchanged since its adoption in 1942, 7 Fed. Reg. 4133 (1942). As noted at note 20, *supra*, this office has read this definition to encompass carbon dioxide gas.

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governmental purposes.²³ Even helium, a nonhydrocarbon, is within the meaning of "gas" as used in the MLA, or else it would not have been necessary expressly to exclude the right to extract helium under federal oil and gas leases.²⁴

The meaning of gas in the MLA, therefore, has the same scope as that established for oil in *Brennan v. Udall*, *supra* and for gas under private lease in *Northern Natural Gas Co. v. Grounds*, *supra*—gas is to be defined broadly.

B. Coalbed Gas is not Included in a Coal Lease under the MLA

The Mineral Leasing Act provides distinct leasing requirements for coal and for gas. Gas deposits are leasable under sec. 17 of the MLA, 30 U.S.C. § 226 (1976), while coal leasing is covered in sec. 2, *as amended*, 30 U.S.C. § 201 (Supp. II 1978.) Departmental regulations likewise contain distinct provisions for leasing and mining

the two resources. Coal is governed by regulations at 43 CFR Part 3400 and CFR Part 211, while gas is covered by regulations at 43 CFR Part 3100 and 30 CFR Part 221.

From a resource recovery standpoint, coalbed gas is extractable during or in advance of the mining of underground coal by techniques very similar to those for recovering other commercial gases. Currently, coalbed gas may be drained from coalbeds in either of two ways, both involving vertical wells connected to horizontal holes or cracks in the coal that encourage passage of the gas to the well.²⁵ Because it is recoverable by gas recovery methods, coalbed gas is easily regulable as a gas.

Moreover, the coal leasing provisions of the MLA do not appear to provide for recovery of anything other than coal.²⁶ Nothing in existing coal leases or in the current coal

²³ Sec. 1 of the MLA, 30 U.S.C. § 181 (1976), provides: "[t]he United States reserves the ownership of and the right to extract helium from all gas produced from lands leased or otherwise granted under the provisions of this chapter."

²⁴ The Department has interpreted the helium reservation consistently with this conclusion. Sec. 1 of the current federal oil and gas lease form, Form 3110-2 (1977), gives the oil and gas lessee the "exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased. * * *" The form thus includes all types of gas—even nonhydrocarbon gases such as helium—within the meaning of "gas deposits." Except for the language excluding helium, this section of the lease form has remained essentially unchanged since its adoption in 1920. 47 L.D. 437, 447 (1920).

²⁵ According to one study, a single coalbed well can drain between 20 and 30 acres. M. Deul, A. Kim, *Coal Beds: A Source of Natural Gas*, *The Oil and Gas Journal* 49 (June 16, 1979). However, one method of extraction, hydraulic stimulation, reportedly has the potential of creating a safety hazard to coal mining by causing harm to the coal seam and the roof strata overlying the coal. See *United States Steel Corp. v. Hoge*, *supra*, slip op. at 7-12.

²⁶ Sec. 2 of the MLA, 30 U.S.C. § 201 (Supp. II 1978), authorizes leases granting the right to extract coal, and in 1920 required royalty payments on a per ton basis. Such a lease scheme was clearly not designed by Congress to encompass beneficial extraction of coalbed gas. Sec. 8A, 30 U.S.C. § 203-1(a), authorizes government exploration for "coal resources" recoverable by deep or surface mining methods. Other references to "deposits of coal" and "coal-field[s]" indicate that the statute's coal provisions do not contemplate gas extraction. 30 U.S.C. §§ 201(a), 208-1 (Supp. II 1978).

lease form authorizes commercial extraction of coalbed gas or provides for the assessment of a royalty for its recovery. The fact that the Mineral Leasing Act includes rights to related minerals in the grant of rights under certain specific leases (other than coal) indicates an intention *not* to lease related minerals along with coal. The sodium, phosphate, and oil shale leasing sections of the MLA allow or require a lessee to extract certain minerals related to, or co-existing with, the principal leased mineral. The sodium leasing provisions in secs. 23 and 24 of the MLA, 30 U.S.C. §§ 261-262 (1976), authorize the Secretary to lease "chlorides, [etc.] of sodium," and require him to collect royalties on "sodium compounds and other related products." Similarly, 30 U.S.C. §§ 281-82 (1976) authorize the leasing of potassium, and require royalty collection on "potassium compounds and other related products." Sec. 9 of the MLA, 30 U.S.C. § 211 (1976), authorizes the Secretary to lease and collect royalty on phosphate deposits "including associated and related minerals." The oil shale leasing provisions in sec. 21(a) of the MLA, 30 U.S.C. § 241(a) (1976), provide that "deposits" of oil shale are subject to lease, and that royalties are required "[f]or the privilege of mining, extracting, and disposing of oil or other minerals covered by a lease under this section. * * *" (*italics added*).

Congress inclusion of associated and related mineral products in

these sections of the MLA stands in clear contrast to the absence of such language in the coal leasing provisions.²⁷ Indeed, the present coal leasing system appears only to grant the federal coal lessee the right to vent the gas for safety purposes.²⁸ Federal Coal Mine Health and Safety Act of 1977, 30 U.S.C. §§ 863, 877(h) (Supp. II 1978). *Cf. United States Steel Corp. v. Hoge, supra*. Analysis of the Mineral Leasing Act's provisions for leasing coal and oil and gas shows that a lease for "coal" does not include the right to extract gas, including methane,²⁹ and that coalbed gas is subject to disposition as a gas under

²⁷ As discussed in part IA, *supra*, even though the leasing provisions for both potash and sodium authorized leasing "other related products," 30 U.S.C. §§ 262, 282 (1976), when those two minerals had not been reserved together, the Department took the position that potash and associated sodium were not disposable under a single lease for potash. It is clear, then, that the coal leasing provision of the MLA, 30 U.S.C. § 201 (Supp. II 1978), which does not encompass "related" or "associated" minerals, does not authorize extraction of coalbed gas under a coal lease.

²⁸ The coal miner's expulsion of coalbed gas from mine tunnels is an exercise of an obligation distinct from the right of capture or ownership. The obligation to remove methane through ventilation or drainage is a safety precaution without which coal would not be mineable. See *Op. Att'y Gen.* No. 53, at 3-4 (Pa. 1974).

²⁹ While courts have held in cases involving private leases that a lease of "coal and other minerals" may include the right to extract oil and gas deposits, where only coal is granted (*i.e.*, not "coal and other minerals") the courts do not strain definitions to include other minerals. *E.g. Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 A. 597 (1893). The court discussed the extent of the coal lease, concluding that "the grantee of the coal owns the coal but nothing else, save the right of access to it and the right to take it away." *Id.* at 296, 25 A. at 598-99. See also, *Op. Att'y Gen.* No. 53 *supra*, note 28, concluding that a coal lease does not convey the coalbed gas in the deposit.

GAS IN FEDERAL COAL DEPOSITS

May 12, 1981

Sec. 17 of the MLA, 30 U.S.C. § 226 (1976).

Several companies holding federal oil and gas leases have inquired whether coalbed gas is covered by their leases, and have filed applications to drill for coalbed gas. Since existing oil and gas leases do not specifically reserve coalbed gas from the granting clause, it must be considered as leased. *See, e.g.,* Non-competitive Oil and Gas Lease Form 3110-1 (March 1977). Sec. 2(d) of this form authorizes the Secretary to set minimum values for royalty computation purposes "on *any or all* oil, *gas*, natural gasoline, and other products obtained from gas," (italics added) and sec. 2(j) requires the lessee "[t]o exercise reasonable diligence in drilling and producing, * * * having due regard for the prevention of waste of oil or gas. * * *"

It must be noted that an oil and gas lessee does not have a license to develop the coalbed gas resource in any manner. The lease and Departmental regulations prohibit damage to coal or other mineral deposits. *See* Noncompetitive Oil and Gas Lease Form 3110-1, § 2j; Coal Lease Form 3130-1, § 3(e); and 30 CFR § 221.9. Should the lessee propose any drilling which would in the judgment of the Geological Survey cause damage to the coal deposit or create a safety hazard for subsequent coal mining, the application to drill may be denied. If there is an outstanding coal lease,

the Department's authority to grant the gas drilling permit is restricted by the rights previously granted to the coal lessee. *Cf. United States Steel Corp. v. Hoge, supra*, (surface owner with gas reservation may not infringe upon coal owner's estate to recover coalbed gas beyond normal oil and gas recovery techniques).

III. Conclusion

Since Congress has never specifically addressed the question of whether the right to extract coalbed gas is part of a coal lease or part of an oil and gas lease, the question of coalbed gas ownership must be resolved by construction of the statutes which provide for the reservation of resources to the United States, and which authorize the leasing of those resources. This analysis leads to the conclusions: (1) that a reservation of "coal" does not include coalbed gas; and (2) that a reservation of "gas" encompasses coalbed gas. Furthermore, in our opinion, coalbed gas is disposable as a gas under sec. 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976). However, nothing in this opinion warrants title to any oil and gas deposit nor detracts from any coal lessee's obligation to comply with the coalbed gas ventilation provisions of the Mine Health and Safety laws.

We are prepared to render any further advice you may deem appropriate regarding legal issues raised by the potential conflict between an oil and gas lessee and a

coal lessee or by the possibility that coalbed gas development could harm or preclude subsequent recovery of the coal.

WILLIAM H. COLDIRON
Solicitor

JACK J. BENDER

54 IBLA 375

Decided *May 19, 1981*

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer. NM 30069. Exceptions filed to the recommended decision of Administrative Law Judge Robert W. Mesch.

Affirmed.

1. Oil and Gas Leases: Generally—Oil and Gas Leases: Discovery—Oil and Gas Leases: Known Geologic Structure

A determination by the Geological Survey of the known geologic structure of a producing oil and gas field will not be disturbed in the absence of a clear and definite showing that the determination was improperly made.

APPEARANCES: John F. Welborn, Esq., and Phillip Barber, Esq., Denver, Colorado, for appellant.

*OPINION BY
ADMINISTRATIVE
JUDGE HARRIS*

INTERIOR BOARD OF LAND APPEALS

Jack J. Bender has appealed from a decision of the New Mexico State

Office, Bureau of Land Management (BLM), dated July 13, 1977, rejecting his noncompetitive oil and gas lease offer, NM 30069, because the land was determined to be within an undefined known geologic structure (KGS) of a producing oil or gas field, based on a determination by the Geological Survey (Survey).¹

Under 30 U.S.C. § 226(b) (1976), land within the KGS of a producing oil or gas field may only be leased by competitive bidding. When land is determined to be within a KGS either before a noncompetitive offer was filed or while such an offer is pending, the noncompetitive offer must be rejected. *Richard J. DiMarco*, 53 IBLA 130 (1981), and cases cited therein.

In his statement of reasons for appeal, appellant challenged Survey's determination that the land was within an undefined KGS. He also presented data from which we concluded in *Jack J. Bender*, 40 IBLA 26, 29 (1979), that "it is not clear whether the land herein should be classified KGS." Accordingly, we granted appellant's request for a hearing in order "to resolve the issue as to whether this land was properly included within a known geologic structure." *Jack J. Bender*, *supra* at 29. The case was referred to the Hearings Division, Office of

¹ "Known geologic structure" is defined in Departmental regulation 43 CFR 3100.0-5(a): "A known geologic structure is technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is *presumptively productive*." (Italics added.)

Hearings and Appeals, for a hearing and recommended decision.

On Aug. 15, 1979, Administrative Law Judge Robert W. Mesch held a hearing. On Dec. 3, 1979, he transmitted his recommended decision to the Board. In the decision he held that appellant had failed to make a clear and definite showing of error in Survey's determination that the land was within an undefined KGS and, accordingly, dismissed the appeal. By order dated Jan. 15, 1980, the Board transmitted the recommended decision to the parties and established time periods for submission of exceptions to it.

[1] An applicant for an oil and gas lease who challenges a determination by Survey that land is situated within the KGS of a producing oil or gas field has the burden of showing that the determination is in error. The determination will not be disturbed in the absence of a clear and definite showing of error. *Donnie R. Clouse*, 51 IBLA 221 (1980); *United States v. Alexander*, 41 IBLA 1, 11 (1979).

Judge Mesch described the basis for Survey's determination as follows:

The land in question is lots 1 and 2 or the west half of the northwest quarter of section 30, Township 20 South, Range 29 East, New Mexico Principal Meridian, Eddy County, New Mexico. This land, together with other land, was determined to be within an undefined KGS addition to what has been designated as the Scanlon KGS. The determination was effective January 24, 1977, and was triggered when a producing gas well was completed

on that date in the northeast quarter of section 20. The well produced gas from the Pennsylvania Morrow formation. When production was established, at least some of the lands surrounding the well had to be included in a KGS. Accordingly, geologists in the Office of the Area Geologist of the Conservation Division of the GS studied the logs of all wells in the immediate area that had penetrated the Morrow formation in order to determine what, in their opinion, would be a reasonable area that could be considered presumptively productive. As a result of their interpretation of the logs and based on other information relating to the Morrow wells, the approximately 80 acres in question, together with an additional approximately 1440 acres, were included within the undefined KGS addition to the Scanlon KGS.

(Recommended Decision at 3-4).

At the hearing the Government offered the testimony of Donald M. Van Sickel, area geologist for the Conservation Division, Survey, who testified that Survey's determination was based on the fact that "all [seven] wells that have tested the Morrow in this area and within a two-mile radius of these lands tested some gas" (Tr. 25). Van Sickel presented a "cross-section" of the area and attempted to "correlate potential reservoirs" within each of three wells by placing the results of vertical logs taken in each of the three drilling holes side by side (Tr. 18-20; Exh. 2 and 3).²

² From north to south the three wells used by Survey were the Yates Federal No. 2 located in sec. 18, the Stebbins Federal Deep No. 1 located in sec. 30, and the Fannie Lou Federal No. 1 in sec. 31. All three wells are located in T. 20 S., R. 29 E., New Mexico principal meridian, Eddy County, New Mexico (Tr. 18-19).

By placing the logs side by side, Survey determined that potentially productive intervals continued stratigraphically between the three wells, along the line of the "cross-section." Survey concluded that there were "three possible productive intervals across the area" (Tr. 38). The line of Survey's "cross-section goes within less than a quarter of a mile from the lots in question" (Tr. 38). With reference to the cross section, he explained:

When we looked at all these—well, after this well was completed and we studied this area to see which would be the lands which would be properly brought into the KGS, we naturally looked at all of the wells in this area that penetrated the Morrow formation and drew some, well, we put them on up on the wall and looked to see if we could correlate potential reservoirs or reservoirs where the wells were perforated. You will notice we have limited our cross-section to just two, Line A-A prime. Yet the well we based our undefined addition is way over in Section 20. The only reason we limited it to this was because the two lots that were under question are more nearly related to these three wells (indicating) than the wells over in this area (indicating). If the contest had been over in this (indicating) area, we would have naturally used a different cross-section showing well closer to the land under appeal.

The basis of our correlations, on the basis of the fact that all the Pennsylvanian test drills in this area had gas shows, all but one was completed as a gas well, our cross-section shows that we can correlate three sands across there or three possible productive intervals across this area. It became clear to us that this acreage in Section 19, 20, 29 and 30 should be included in the KGS because of the overwhelming evidence of produc-

tive sands or productive reservoirs in the Morrow.

(Tr. 37-38).

Van Sickle noted that the distance between the Fannie Lou Federal No. 1 well and the Stebbins Federal Deep No. 1 well is 1 mile, and the distance between the Stebbins Federal Deep No. 1 well and the Yates Federal No. 2 well is 2 miles (Tr. 21).³ Nevertheless, he stated that it was possible in this case to correlate potential reservoirs between these three wells, despite the distance involved (Tr. 23).

He also testified that records provided by the operator of the Stebbins Federal Deep No. 1 well, the closest well to the subject land, indicated "a substantial amount of gas" (Tr. 82). Although subsequently shut-in, the well was recompleted for production Mar. 26, 1971, and at that time the well was tested at an "absolute open flow of 1,400,000 cubic feet of gas a day" (Tr. 82). The well was, therefore, considered "capable of producing" (Tr. 68).

Finally, he stated that Survey's KGS determination did not indicate that any one particular productive interval of the Morrow formation would be situated under each area but that one or more "will be located under all of this acreage" (Tr. 42-43).

Appellant presented the testimony of Jack Grynberg, a petroleum and geophysical engineer with extensive experience in oil and gas

³ The Stebbins Federal Deep No. 1 well is located approximately one-half mile from the lots in question (Tr. 82).

development. Grynberg testified that Survey's "cross-section" of the area did "not correctly show what is happening with the Morrow reservoirs in the direction that we are most interested," because it was not run perpendicular to the dip in the Morrow formation (Tr. 110). He believed that it did not indicate to what extent potential reservoirs continued along the course of the dip or "pinched out" (Tr. 111). Furthermore, he stated that because of the lenticular nature of the Morrow sands, "over a two-mile distance, it has been my experience in southeastern New Mexico, that you simply cannot correlate that far a distance" (Tr. 119).

Grynberg also testified that the three potentially productive intervals identified by Survey as continuing along the line of its "cross-section" were not perforated and tested in the Stebbins Federal Deep No. 1 well (Tr. 122). He felt that those intervals would be "water productive," being below the producing interval which he had identified on Exhibit B (Tr. 123).

Grynberg indicated that the Yates Federal No. 2 well, used by Survey as the northern point of its "cross-section," was "a completely different reservoir" and could not be used to determine potential reservoirs for the lots in question (Tr. 124). Grynberg characterized Survey's cross section as a "qualitative, visual comparison" rather than a quantitative study, taking into account calculated porosity and

hydrocarbon saturation (Tr. 120, 123).

Grynberg stated that he had undertaken a "cross-section" of the area perpendicular to the dip, running in an updip northwest direction from the Pennzoil Federal No. 1 well, situated in sec. 32, T. 20 S., R. 29 E., New Mexico principal meridian, Eddy County, New Mexico, to the Stebbins Federal Deep No. 1 well. The lots in question were further updip from the Stebbins Federal Deep No. 1 well, along the line of the cross section (Tr. 110-112; Exh. B). Vertical logs were taken in each of the two drilling holes and placed side by side (Exh. B). Grynberg concluded that only one potentially productive interval in the Morrow formation continued between the two wells; however, due to the rate of disappearance of that interval it pinches out northwest of the Stebbins Federal Deep No. 1 well and does not reach the lots in question (Tr. 111-114). Grynberg stated that part of Survey's error was due to its failure to determine this rate of disappearance (Tr. 141).

Based on a set of "control wells," Grynberg established a line indicating the "up-dip pinchout" of the Morrow formation, running in a northeast direction through the area (Tr. 96; Exh. A). The Fannie Lou Federal No. 1 well and the Stebbins "GQ" community well, situated in sec. 20, T. 20 S., R. 29 E. (both producing), were located southeast of the pinchout line (Tr.

113). The "Monsanto" well, situated in sec. 26, T. 20 S., R. 28 E., considered a "dry hole" well, was placed northwest of the pinchout line, and according to Grynberg, confirmed the location of the pinchout line (Tr. 117-118).⁴

Grynberg also challenged Survey's classification of the Stebbins Federal Deep No. 1 well. He contended that it was a "dry hole" well, having been shut in for 10 years despite the rise in the price of gas and the availability of pipeline hookups (Tr. 98-101, 103-104, 110). Furthermore, he contended that the calculation of "absolute open flow" in that well could be off substantially because "the word 'absolute' means calculated, that's what it is in reservoir engineering—it is nearly a total extrapolation with an error factor of several thousand per cent to try and predict what a potential well might flow as an open flow" Tr. 103).

On appeal appellant argues that the recommended decision contains a number of errors. Specifically, he states:

⁴ The "Monsanto" well was one of the seven included by Survey within a 2-mile radius of the lots in question. Concerning the significance of the 2-mile radius, Van Sickle testified:

"It is just an arbitrary distance to encompass a number of wells and to illustrate that of the seven wells that were drilled through the Pennsylvanian system in this area all were productive in the Pennsylvanian except one, a well in Section 26 of 20 south 28 east. It only had gas shows in the Morrow and the well was not completed. It was plugged and abandoned. However, when gas shows, it shows there is Morrow reservoir there, not commercial, but it had gas shows and therefore there was reservoir present. So that of all wells that have tested the Morrow in this area and within a two-mile radius of these lands tested some gas." (Tr. 25).

1. The burdens of proof and of production in the case were improperly allocated and create error as a matter of law.

2. The allocation of burdens deprives appellant of due process of law.

3. The Decision does not address a fundamental issue of the case: Whether a KGS determination is valid if the U.S.G.S. fails to follow its own internal guidelines and procedures for determining a KGS.

4. The Decision is not supported by substantial evidence on the record as a whole.

(Exceptions to Recommended Decision at 2).

Appellant's claim that the burden of proof and burden of production were improperly allocated is unfounded. At the hearing there was a discussion of the burdens and Judge Mesch made it clear that he felt that Survey should have the burden of going forward in order to narrow the issues concerning the basis for the KGS determination (Tr. 8). Appellant correctly understood that he had the ultimate burden of showing that there was clear and definite error in the Survey determination (Tr. 7). Following the discussion, Survey presented its evidence. Therefore, appellant's claim that the Judge incorrectly found that Survey had no initial burden to produce its reasons for the KGS determination is inapplicable in this case.

Survey satisfied its burden of going forward to establish a prima facie case by presenting evidence at the hearing. Contrary to appellant's assertion, we do not believe that the basis for Survey's KGS

determination is uncertain. Admittedly, the basis is not set forth with specificity; however, Survey's evidence, as a whole, did establish a basis for the determination and also served to provide appellant with evidence which it could, and did, attack. Under the facts of this case it can hardly be claimed that appellant was denied due process of law.

Appellant also charges that Survey erroneously failed to consider "all controlling factors" in making its determination. It states that Geological Survey Circular 419 at page 1 (Exh. 6) requires such consideration. Even assuming the circular was more than a guideline for Survey, further examination of that exhibit indicates that Survey did all that was necessary for determination of an undefined KGS. The following appears at page 5 of Exhibit 6:

Undefined known geologic structures are of two types, namely:

1. An area where discovery necessitates the defining of a new productive area, and revisions thereof.
2. An area where development around a previously established defined structure warrants an extension of the established known geologic structure.

In connection with undefined geologic structures, available information, generally consisting of data relating to a single well or a few wells, together with available geologic information, is reviewed by geologists; and a memorandum is sent to the manager of the appropriate land office making a determination that certain lands are as of a certain date "on structure" or within an undefined addition to a previously defined structure.

Appellant claims that the recommended decision was not supported by the evidence of record. We disagree. Despite the unpredictable nature of natural gas reservoirs in the area of the lots in question, Survey presented evidence to establish that the subject lands "were presumptively productive."

Such a determination does not guarantee the productive quality of the land but, rather, indicates the "existence of a continuous entrapping structure on some part of which there is production." *James Muslow, Sr.*, 51 IBLA 19, 23 (1980). We note, in this regard, that the Morrow formation underlies the lots in question and that all wells drilled in this formation, within a 2-mile radius, have had production or, at least, shows of gas.

The fact that the Stebbins Federal Deep No. 1 well was shut in does not constitute a clear and definite showing of error in Survey's conclusion that the well was capable of production. Records provided by the owner indicated a substantial amount of gas. Furthermore, cessation of production or abandonment of wells in a given field are not conclusive evidence that the land is not productive. *James Muslow, Sr., supra*.

Appellant further contends that the lots in question were beyond the edge of potentially productive reservoirs in the Morrow formation; however, we agree with Judge Mesch when he stated:

The [only potentially productive] reservoir [extending between the Pennzoil

Federal No. 1 and the Stebbins Federal Deep No. 1 wells] thinned 5 feet over a distance of some 5900 feet or approximately 1 foot every 1200 feet.[⁵] At the rate of thinning, it would seem that the reservoir would still be in existence and approximately 4 feet thick in the neighborhood of the land in question. The appellant's witness, however, concluded that the reservoir thinned from 7 feet to 0 feet over a distance of some 500 feet and abruptly pinched out immediately west of the Stebbins well. He arrived at this conclusion, not by considering the thinning rate of the one remaining reservoir but, by adding up the thicknesses of 8 separate reservoirs or bodies of sand found in the Pennzoil well, for a total thickness of about 50 feet, and then found a decrease in the total thickness of the 8 separate reservoirs from 50 feet to the 7 feet representing the one remaining reservoir. This gives a thinning rate of about one foot every 140 feet for the 7 minor and 1 major beds of sand as opposed to 1 foot every 1200 feet for the one major bed. I am not willing, without some justification, which is not apparent in the record, to accept the proposition that the thinning rate of the one major bed should be determined, not on the basis of the thinning rate of that bed but, by reference to other minor beds that were found in the Pennzoil well, but not in the Stebbins well.

Furthermore, I cannot reconcile the appellant's evidence and conclusion that there are no producing Morrow reservoirs, or no geologic likelihood of such reservoirs, within lots 1 and 2 with the evidence presented by the GS relating to the establishment of the KGS. The Area Geologist stated that the reservoirs or sand bodies are very unpredictable. He said, "[y]ou can have sand there 20 feet thick in one well and you might drill a well 200 feet from it and * * * not even

find that sand" (Tr. 42). He testified that because of the unpredictable nature of the lenticular beds of sand "we have to assume that even though any one of these individual sands may not be situated under each one of the areas we included in the known geologic structure, we have to assume that one or more sands containing gas will be located under all of this acreage" (Tr. 42, 43). He explained that the assumption was made because "the overwhelming evidence * * * shows that all the wells in the area * * * were completed in the Morrow or tested gas from some sand interval or some productive interval in the Morrow [with the exception of one dry hole in the southeast quarter of section 32]" (Tr. 43). He further stated that they "looked at all of the wells in this area * * * to see if we could correlate potential reservoirs or reservoirs where the wells were perforated" (Tr. 37). One of the wells they relied on was a producing gas well in the northwest quarter of section 18, the Yates Federal No. 2. This well is over two miles north and west of the Stebbins well and about two miles due north of lots 1 and 2. The appellant's witness recognized that this well was producing from the Morrow formation and that if his cross section was continued in a straight line to the north and west it would encounter this well and the producing Morrow reservoirs in the well. He did not feel, however, that the well had any bearing on his conclusion that the producing Morrow reservoirs pinched out immediately to the north and west of the Stebbins well because, in his opinion, the well some two miles further north and west was producing from a different zone in the Morrow formation.

(Recommended Decision at 10-13).

Appellant did not present specific evidence to establish that it was improper for Survey to presume that the producing reservoirs in the Yates Federal No. 2 extended under the lots in question, nor did appel-

⁵ Grynberg testified that the reservoir thinned from 12 feet to 7 feet between the Pennzoil Federal No. 1 and the Stebbins Federal Deep No. 1 wells.

May 20, 1981

lant adequately explain why those same reservoirs should not be considered in establishing the KGS merely because they were allegedly in a different zone in the Morrow formation.

We cannot conclude that appellant has made a clear and definite showing of error in either Survey's methods or its conclusions regarding its KGS determination.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

BRUCE R. HARRIS

Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES

Administrative Judge

ANNE POINDEXTER LEWIS

Administrative Judge

INSPIRATION DEVELOPMENT CO.

54 IBLA 390

Decided May 20, 1981

Appeal from decision of Alaska State Office, Bureau of Land Management, declaring lode and placer mining claims abandoned and void in full and in part. F-57497, et al.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining

Claims: Abandonment—Mining Claims: Recordation

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2(a), the owner of an unpatented mining claim located before Oct. 21, 1976, must file on or before Oct. 22, 1979, in the proper BLM office, a copy of the notice of location or the claim will be conclusively deemed to have been abandoned and declared void.

Where an unpatented mining claim is located in Alaska near the dividing line separating the Anchorage and Fairbanks districts, indicated on the map in 43 CFR 1821.2-1, such that it is virtually impossible from the map to determine with substantial accuracy in which district the mining claim lies, the timely filing of the location notice by the owner of the claim in either the Alaska State Office or the Fairbanks District Office will be considered as satisfying the requirement of 43 CFR 3833.1-2(a) of filing in the proper BLM office.

APPEARANCES: Stephen M. Ellis, Esq., Anchorage, Alaska, for appellant.

OPINION BY
ADMINISTRATIVE JUDGE
HARRIS

INTERIOR BOARD OF LAND
APPEALS

Inspiration Development Co.¹ has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated

¹ On Oct. 10, 1980, BLM was notified pursuant to 43 CFR 3833.3 that appellant had conveyed its interest in various lode mining claims, involved herein, situated in T. 5 N., R. 14 E., Copper River meridian, Alaska, to Pacific Coast Mines, Inc. This conveyance, however, does not affect the result in this case.

Mar. 26, 1980, declaring certain lode and placer mining claims abandoned and void for failure to file copies of notices of location in the proper BLM office pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and its implementing regulations, 43 CFR 3833.

All of appellant's mining claims were located between May 4, 1970, and June 17, 1972, and copies of the notices of location were filed for recordation with the Fairbanks District Office on Aug. 30, 1979.

The record indicates that some or all of the copies of the notices of location were forwarded to the Alaska State Office, Anchorage, but were received after the filing deadline. The claims listed in Appendix A* were located within Ts. 5 and 6 N., R. 14 E., Copper River meridian, Alaska, and the claims listed in Appendix B* were located partially within T. 5 N., R. 14 E., Copper River meridian, Alaska, and partially within T. 5 N., R. 15 E., Copper River meridian, Alaska.

Relying on 43 CFR 1821.2-1(d), which states that claims located in "Southern Alaska" should be filed for recordation with the Alaska State Office in Anchorage, Alaska, and providing a map indicating the boundary line between "Southern Alaska" and "Northern Alaska," BLM concluded that appellant should have filed in the Alaska

State Office.² BLM noted that "[b]oth T. 5 N., R. 14 E., and T. 6 N., R. 14 E., Copper River Meridian lie within the Anchorage district of BLM." Accordingly, (153) claims located entirely within those townships were deemed abandoned and declared void in full. *See* Appendix A. However, (11) claims located partially within T. 5 N., R. 14 E., Copper River meridian, and partially within T. 5 N., R. 15 E., Copper River meridian, were "deemed abandoned and declared void *in part*, to the extent that they lie within T. 5 N., R. 14 E., Copper River Meridian (Anchorage District)." (*Italics in original*). *See* Appendix B.

[1] The applicable regulation, 43 CFR 3833.1-2(a) provides in relevant part:

The owner of an unpatented mining claim, mill site or tunnel site located on or before October 21, 1976, on Federal lands * * * shall file (file shall mean being received and date stamped by the proper BLM Office) on or before October 22, 1979, *in the proper BLM Office*, a copy of the official record of the notice or certificate of location of the claim or site filed under state law. [*Italics added.*]

43 CFR 3833.4(a) specifies the penalty for failure to satisfy the filing requirements of 3833.1-2(a): "The failure to file an instrument required by §§ 3833.1-2(a), (b), and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute an aban-

² Reference to 43 CFR 1821.2-1(d) reveals that Alaska is unique in that it is the only State in which more than one BLM office has jurisdiction to receive mining claim recordation filings.

* Appendices A and B may be found at 54 IBLA 398, 402.

May 20, 1981

donment of the mining claim, mill or tunnel site and it shall be void."

In its statement of reasons for appeal, appellant contends that it was fully aware of the filing requirement and of the distinction between "Northern Alaska" and "Southern Alaska" for purposes of filing copies of notices of location, but that, "it was impossible to ascertain that fact [*i.e.*, that the dividing line between 'Northern Alaska' and 'Southern Alaska' bisects the subject claims between T. 5 N., R. 14 E., and T. 5 N., R. 15 E.] from the map set forth in 43 CFR § 1821.2-1 * * *. Indeed, the dividing line depicted on the map carves out a path approximately 20 miles wide." Accordingly, appellant sent a representative to Alaska with instructions to file in the appropriate BLM office. This representative traveled to both the Anchorage and Fairbanks offices, filing the subject claims (known as the Bond Creek Project) with the Fairbanks office "53 days prior to the October 22, 1979 deadline" and filing other claims (not relevant here) with the Anchorage office. In an affidavit submitted by appellant, dated May 15, 1980, its representative indicates the nature of the filing in the Fairbanks office: "I submitted all of the Certificates of Location for the Bond Creek Claims to BLM personnel in Fairbanks for their review. * * * Fairbanks BLM personnel then personally inspected each such Certificate of Location as well as the maps which were filed

therewith. * * * All of the documents were accepted as filed."

Appellant makes three principal arguments, namely: (1) It is entitled to equitable adjudication pursuant to 43 CFR 1871.1-1 because it has satisfied all of the prerequisites therefor; (2) BLM is estopped to deny that appellant filed in the proper BLM office because it has satisfied all of the prerequisites therefor; and (3) 43 CFR 1821.2-1 (d), as it pertains to Alaska, is ambiguous and unreasonable and, therefore, void or, in the alternative, timely filing in the Fairbanks office must be deemed to have been full compliance with the filing requirements of FLPMA and its implementing regulations.³

Under the circumstances of this case, appellant's filing in the Fairbanks District Office is deemed to constitute timely compliance with the filing requirement of 43 CFR 3833.1-2(a) for notices of location. *See Richard E. Forsgren*, 54 IBLA 362 (1981) (Judge Burski concurring). The regulation, 43 CFR 1821.2-1(d), which appellant relied on is inherently ambiguous in certain respects. The map indicating the dividing line between "Northern Alaska" and "Southern Alaska" for purposes of filing in either the Fairbanks or Anchorage offices is approximately 4 inches by 5 inches with only the barest minimum of

³ Appellant indicates that the subject land was withdrawn in part from the location of mining claims pursuant to Public Land Order No. 5654 (Nov. 17, 1978), 43 FR 59756 (Dec. 21, 1978).

reference points and with no indication of scale.⁴ It results in a gross division of Alaska into two districts. Appellant's problem of determining in which district its claims lay was compounded by the fact that some of its claims straddle the dividing line. There is no possibility that a mining claimant with claims near this line could determine with substantial accuracy, from the map published in 43 CFR, in which district filing should be made.

The Administrative Procedure Act (APA), 5 U.S.C. § 552(a) (1976), provides that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner * * * be adversely affected by, a matter required to be published in the Federal Register and not so published." Matters required to be published include "descriptions of * * * the established places at which * * * the public may * * * make submittals." 5 U.S.C. § 552(a) (1) (A) (1976).

⁴ The map was changed to its present form by publication in the *Federal Register*, 39 FR 5633 (Feb. 14, 1974), effective Mar. 4, 1974. The purpose of the change was stated to be:

"[T]o make the boundaries of the Bureau of Land Management Land districts in Alaska correspond with the Bureau of Land Management's administrative districts. The administrative boundaries conform to natural topographic features which influence the travel and trade patterns of Alaskans. The Administrative boundary will facilitate filing of selection applications pursuant to the Alaska Native Claims Settlement Act. The change will therefore better serve the convenience of the Alaskan public as well as promote administrative efficiency."

This requirement of publication has not been adequately satisfied with regard to mining claimants whose claims are near the dividing line between "Northern" and "Southern" Alaska, such that it is virtually impossible to determine with substantial accuracy in which district to file location notices. Accordingly, pursuant to the APA, *supra*, appellant cannot be adversely affected by BLM's failure to publish a map of sufficient detail to allow such a claimant to determine the correct office in which to file. This inherent ambiguity of the regulation must be construed in appellant's favor. *See generally Wallace S. Bingham*, 21 IBLA 266, 282, 82 I.D. 377, 384 (1975); *A. M. Shaffer*, 73 I.D. 293 (1966).⁵

It could be argued that appellant, in order to protect its interests, should have filed in both offices. We do not agree. Appellant made a good faith effort to comply with the filing requirements in this instance. Moreover, the Fairbanks District Office received appellant's notices of location well before the filing deadline (53 days). Arguably that office should have either returned the notices of location to appellant for filing in the proper BLM office or forwarded them to the Alaska State Office before the filing deadline. *See Richard L. Rosenthal*, 45 IBLA 146

⁵ The fact that appellant cannot be adversely affected does not absolve it completely from complying with the filing requirements of FLPMA and its implementing regulations. If appellant had not bothered to file timely in the Fairbanks office, its claims would properly have been deemed abandoned and declared void.

(1980). However, we do not so hold because of our discussion, *supra*.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded to BLM for further action not inconsistent herewith.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

JAMES L. BURSKI
Administrative Judge

ESTATE OF JOSEPH WILLESSI

8 IBIA 295

Decided May 28, 1981

Appeal from order by Administrative Law Judge Robert C. Snashall approving will and ordering distribution.

Reversed.

1. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4—Indian Probate: Wills: Construction of

Jurisdiction of Indian tribe over Quinault Reservation where estate trust property was located being material to a decision concerning the eligibility of a devisee to take property under an Indian will, it was error to hold that the General Allotment Act conferred jurisdiction over the reservation upon the tribes of persons allotted on the reservation without re-

gard to the historical development of the reservation and the actual implementation of the treaty rights of the tribes concerned. The record demonstrates that since acceptance of the Indian Reorganization Act of 1934 (IRA) the Quinault Tribe exercised exclusive jurisdiction over the Quinault Reservation, and that the Quileute Tribe (one of the tribes whose hereditary members accepted Quinault allotments) had earlier elected to forego any treaty rights it may have claimed in the Quinault Reservation in order to retain its ancestral village at LaPush. The record establishes jurisdiction over the Quinault Reservation to be in the Quinault Tribe, an IRA tribe.

2. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4—Indian Probate: Wills: Construction of

Sec. 4 of the Indian Reorganization Act of 1934 prior to amendment in 1980 did not permit devises of trust property found on reservations subject to the Act to persons who were neither heirs of the decedent allottee nor members of the tribe having jurisdiction over the reservation where the trust land is located. Thus, since appellee was neither a member of the Quinault tribe nor an heir of decedent, he was barred from taking trust property on the Quinault Reservation under the decedent's will.

APPEARANCES: Frederick L. Noland, Esq., for appellants Esther Elvrum, Irene Soeneke, Phillip C. Hanson, Philip S. Talbot, Alice Manes, Pearl Cousens, Dorothy Murray, Ira Talbot, Jacqueline Jauhola, Dorothy Nelson, Edward Verney, Patrick Verney, Bertha Bousley, Audrey Beaston, Delmar Gagnon, Ruby McCovey, Gwendolyn Sanchez, Donna Grosz, Marlene Thweatt, Clarence Colby, Robin Halstead, Charles Talbot, Charles Williams, Estate of Patrick Wilkie, Jr.,

Estate of Edward (Edison) Talbot, Estate of Bruce Wilkie; Jon Marvin Jonsson, Esq., for appellee Leo Williams; Carl V. Ullman, Esq., for Intervenor Quinault Indian Nation; Robert S. Thompson, Esq., on behalf of the Solicitor of the Department of the Interior.

*OPINION BY
ADMINISTRATIVE
JUDGE ARNESS*

*INTERIOR BOARD OF
INDIAN APPEALS*

On Sept. 21, 1970, decedent Joseph Willessi died testate at Forks, Washington, at the age of 77 years. At his death decedent was a member of the Quileute Indian Tribe holding allotment No. 1432 of trust lands on the Quinault Reservation; was beneficial owner of a village lot on the Quileute Reservation at LaPush; and also held a partial interest in trust lands located on the Makah Reservation. Decedent's will, signed on Jan. 12, 1968, devised his trust property on the Quinault and Makah Reservations to appellee Leo Williams, also a member of the Quileute Tribe. Decedent's will devised the LaPush property to Nellie W. Richards, decedent's cousin, who is Leo Williams' mother. The value of the estate in 1970 when probate was commenced was estimated at \$151,750. During the course of probate, however, it became apparent that the true value of the trust property, of which the Quinault allotment

comprises the most valuable part, is in excess of \$1,100,000.

*Procedural and Factual
Background*

On Feb. 10, 1972, decedent's 1968 will was approved and distribution of the trust estate ordered in conformity to the terms of the will to the two named devisees, Nellie W. Richards and appellee, Leo Williams, both members of the Quileute Tribe. As a result of this order, Mrs. Richards took the property on the Quileute Reservation, while appellee received the Quinault and Makah trust lands. An appeal was taken from the February 10 order by eight of decedent's heirs at law who appeared in the initial proceeding. On Aug. 8, 1974, this Board ordered a rehearing of the matter. *Estate of Joseph Willessi*, 3 IBIA 24 (1974).

On Jan. 6, 1977, following an evidentiary hearing on contest of the 1968 will, where evidence which exclusively concerned decedent's competence to execute a will was offered, another order issued, approving decedent's will and decreeing distribution as before to appellee and his mother. On Apr. 5, 1978, however, the agency superintendent charged with administration of the probate orders petitioned to reopen decedent's estate alleging discovery of a mistake of law.¹ According to the petition to reopen, both the Quinault and Makah Reservations were organized under the Act of June 18,

¹ The Apr. 5 petition to reopen also notes, for the first recorded time, that the value of the estate exceeds \$1,100,000.

1934, 48 Stat. 984, 25 U.S.C. §§ 461-79 (1976) (hereafter the Indian Reorganization Act of 1934, or IRA). The petition alleges appellee is neither a member of the Quinault or Makah Tribes nor an heir of decedent (since appellee's mother, through whom he traces his relationship to decedent, survived decedent), and concludes appellee is therefore barred from receiving an interest in trust lands on either reservation by sec. 4, IRA (25 U.S.C. § 464 (1976)).²

On July 19, 1978, appellants, 26 heirs at law of decedent, in response to a notice from the Indian Probate Administrative Law Judge dated Apr. 13, 1978, denominated "Notice to Show Cause" also petitioned to reopen alleging the same mistake of law as had the superintendent. On Nov. 6, 1978, an order issued reopening the estate and ordering distribution to the heirs, citing *Estate of Dewey Cleveland*, 5 IBIA 72, 83 I.D. 170 (1976), as authority for the action taken reversing the previous orders of distribution. On Nov. 14, 1968, appellants

petitioned to modify the November 6 order to correct a claimed mistaken classification of heirs. On Nov. 17, 1968, appellee, Leo Williams, appealed to this Board from the order of Nov. 6, 1978, seeking reversal of the November 6 order and reinstatement of the prior orders which had approved the will and ordered distribution of the Quinault property to appellee.

On Apr. 3, 1979 (following an amendatory order entered Feb. 8, 1979), the Administrative Law Judge notified the parties that based upon "documents" which had come to his attention, he proposed to seek return of the probate of decedent's estate from this Board where appellee's appeal from the November 6 order was pending, to reverse the order decreeing distribution to the heirs.

On Nov. 16, 1979, the Administrative Law Judge again reversed himself. Finding the Quinault Tribe lacked exclusive jurisdiction over the Quinault Reservation, he held the Quinault Reservation is a "joint jurisdictional area" where tribal jurisdiction resides "in all tribes who have been allotted on the reservation and all 'fish-eating Indians' of the Northwest." The order directs distribution of the Quinault property according to the terms of the 1968 will to appellee, commenting as follows that the IRA is not relevant to the determination so made:

I do not find it necessary to reach the question of the applicability of the In-

² The statute provides, in pertinent part, a restriction on devises limiting them so that: "[R]estricted Indian lands * * * [may] be * * * devised * * * to the Indian tribe in which the lands * * * are located * * * and, in all instances such lands * * * shall descend or be devised * * * to any member of such tribe * * * or any heirs of such member." (Sec. 4 of the IRA was amended by the Act of Sept. 26, 1980, P.L. 96-363, 94 Stat. 1207, which relaxed the restricting classification to permit devises to "lineal descendants" or "any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust," a change not material to this decision.)

dian Reorganization Act of 1934 (25 USC 464), assuming its adoption by and compliance with by the Quinault Tribe since there is no indication in the inventory of this estate allotments originally allotted to Quinaults are involved. However, in passing, I merely note as dicta that since there is joint jurisdiction over the total reservation by the various and sundry tribes included within the provision "fish-eating Indians of the Pacific Northwest", any adoption of the Indian Reorganization Act by the Quinaults would appear to only affect their interest as it appears on the reservation and could not affect in toto the total allotments.

(Order dated Nov. 16, 1979, p. 2).

Appellants, 26 heirs of decedent, now seek review of the order decreeing distribution of the Quinault property to appellee.³ On Aug. 28, 1980, the Quinault Indian Nation was permitted to intervene to brief the finding below that tribal sovereignty over the reservation was not exclusively vested in the Quinault Tribe. At the invitation of the Board, the Solicitor of the Department filed a brief on behalf of the Department of the Interior addressing the jurisdictional issues raised by the Nov. 16, 1979, order of distribution.⁴ Appellee has objected that the matter is properly before the Board for decision for the

reason Departmental regulations bar reopening under the circumstances of this case. The contention that the reopening was irregular is found to be without merit; the matter is properly before this Board for final decision.⁵

Oral Argument Denied

Appellee has requested oral argument before the Board. Appellants,

⁵ The regulation in effect at the time reopening was sought and ordered, 43 CFR 4.242, permits petition for reopening within 3 years from date of a final decision or after a longer period of time upon showing that "manifest injustice" will result as a consequence of claimed error. Reopening was sought well within that time. Appellee also argues that principles of estoppel and res judicata bar this appeal, and that due process considerations of constitutional magnitude would be involved in an order setting aside the devise in this case. With respect to estoppel, appellee contends that since the agency drew decedent's will, it was improper to permit the superintendent to complain about the effect of agency action. This argument has been rejected in past Indian probates; the Government is not bound by acts of its agents which are contrary to law. *Estate of Lucinda Shelton Joe*, 5 IBIA 20 (1976). Similarly, res judicata is not a bar here, for the parties and the issues on reopening are not the same as they were at the outset of this proceeding. In the initial hearing and at the 1976 rehearing, the competence of decedent was challenged by eight of his heirs at law: on reopening, the eligibility of appellee to take as a devisee under the will is disputed by 26 heirs (the original eight are, it is true, included as parties). Appellee also urges that section 4 of the IRA (prior to amendment) was unconstitutional if construed so as to defeat his claim. Although such an argument cannot be effectively addressed by the Board (*Estate of William Konoa Jackson*, 6 IBIA 52 (1977)), it is noted that statutes more restrictive of individual claims than is (or was) section 4 of IRA have withstood attacks upon constitutional theories of infirmity similar to those here offered by appellee, *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

³ The Nov. 16, 1979, order correctly found appellee to be ineligible to inherit property on the Makah Reservation, since, presumably, he is ineligible as a non-Makah to inherit, not being an heir of decedent, on a reservation which is organized under IRA. The only issue on appeal concerns the finding below that Quinault property could pass to appellee.

⁴ See 43 CFR 4.3(c) (1980); 46 FR 7334, 7336 (Jan. 23, 1981).

the Quinault Tribe, and the Solicitor's Office oppose the request for the stated reason the expense of an oral presentation is not justified by the circumstances of the case on appeal, which they contend is fully and adequately presented by written briefs filed by all the appearing parties. The record on appeal indicates the matter has been fully and ably presented by the parties' briefs and does not require further argument. The record sufficiently presents the matter so as to permit decision. Accordingly, oral argument is denied.

Preliminary Findings

Though much of the record on appeal is a transcript of evidence gathered at the 1976 rehearing concerning decedent's competence to make a will in 1968, his competence as a testator is no longer an issue. The relevant facts on appeal are confined to matters concerning the tribal affiliation of appellee and the status of the reservations where the trust property held by decedent is located. It is undisputed that decedent, a Quileute, was allotted land on the Quinault Reservation, and that he devised trust property on the Quinault Reservation to appellee, who is not a member of the Quinault Tribe. Also, since appellee's mother survived decedent, appellee is not, under the law of the State of Washington, an heir at law of decedent since he could not in-

herit from decedent under the State scheme for intestate succession while his mother lived. The Quinault Tribe voted to organize pursuant to provisions of the IRA on Apr. 13, 1935, as did the Makah and Quileute Tribes.⁶ The Quileute Tribe adopted a constitution which was approved by the Secretary on Nov. 11, 1936, providing that Quileute tribal jurisdiction is limited to the tribal reservation.⁷

Historical Background

The history of the Quinault Reservation is set out by a recent Board decision construing secs. 5 and 19 of the IRA:⁸

By the Treaty of Olympia, the Quinault and Quileute Tribes ceded to the United States almost all of the lands they claimed. A provision of that treaty allowed the United States to later remove these tribes from their original reservation or reservations and consolidate them with "other friendly tribes or bands." In 1873 President Grant signed an Executive order setting the boundaries of the present Quinault Reservation for the benefit of the Quinault, Quileute, Hoh, Quilt, and "other tribes of fish-eating Indians on the Pacific coast."

⁶ Appellee suggests these political acts by the tribes may not have been sufficiently proved by appellants. However, the status of the various tribes is a matter of which the Department takes official notice, 44 FR 7235 (Feb. 6, 1979). See Pamphlet, Haas, *Ten Years of Tribal Government Under I.R.A.* (U.S. Indian Service 1947).

⁷ Article I, Constitution and Bylaws of the Quileute Tribe of the Quileute Reservation (1936), as amended.

⁸ *Brown v. Commissioner of Indian Affairs*, 8 IBIA 183, 193-94, 87 I.D. 507, 512-13 (1980).

Following passage of the General Allotment Act, allotments were made to individual Indians on the Quinault Reservation. In 1911 Congress directed the Secretary of the Interior to make allotments on the Quinault Reservation to "all members of the Hoh, Quileute, Ozette, and other tribes of Indians in Washington who are affiliated with the Quinaielt [a.k.a. Quinault] and Quileute Tribes * * * and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." Act of Mar. 4, 1911, 36 Stat. 1345.

Following the 1911 Allotment Act, several court decisions were rendered interpreting the law. In *United States v. Paync*, 264 U.S. 446 (1924), the Court disapproved of the refusal by the Bureau of Indian Affairs to make allotments of timberland, after the available grazing and agriculture land on the reservation had been allotted. In 1931 the Supreme Court held as too restrictive the Secretary's interpretation concerning which Indians were entitled to an allotment under the 1911 Act. *Halbert v. United States*, 283 U.S. 753 (1931). The Court there found that the Chehalis, Chinook, and Cowlitz Tribes were among those referred to by Congress in the Act as affiliated with the Quinault and Quileute Tribes. Further, the Court held that personal residence on the Quinault Reservation was not required to obtain an allotment.

After the *Halbert* decision the Department resumed the allotment process on the Quinault Reservation. With passage of the Indian Reorganization Act in 1934 the allotment of Indian reservation land in severalty to any Indian was ended. [Citations and footnotes omitted.]

In 1922 the Quinault tribe adopted bylaws which provided that membership in the tribe should be

limited to Quinault or Queets persons of at least one-quarter blood. Hereditary members of other tribes, including the Quileute, could become "affiliated members" if they resided on the reservation. This limitation upon tribal membership was later liberalized to permit "affiliated" members to enroll as members of the tribe.⁹

It is apparent that official and legislative references to the "affiliation" of the Quileute and Quinault Tribes describe the affiliation of those tribes contemplated by the 1855 treaty. The history of the two tribes demonstrates, however, that their "affiliation" failed to occur in fact. It appears the Quileute Tribe refused to remove to the territory designated by the 1873 Executive Order establishing the Quinault Reservation and insisted upon retaining the traditional Quileute tribal village and fishing area at Lapush. The position of the Quileute Tribe is described in the court's opinion in *United States v. Moore*, 62 F. Supp. 660, 668-669 (W.D. Wash. 1945), *aff'd*, 157 F.2d 760 (9th Cir. 1946):

An abortive effort was made to establish [the Quileute Tribe] on the Quinaielt Reservation, which was created by presidential proclamation by president U.S.

⁹ Article II of the Constitution of the Quinault Indian Nation (1975) permits persons of Queets, Quileute, Hoh, Chinook, Chehalis, or Cowlitz descent to be admitted to tribal membership. Although the Quinault Tribe did not adopt a formal constitution immediately upon acceptance of the IRA in 1935, nothing in the Act requires such action. See 25 U.S.C. § 476 (1976) (sec. 16, IRA).

Grant. They declined to accept this as a reservation, even though some of them did take allotments on the Quinalt Reservation. Their reason for not accepting the government's offer to go upon the Quinalt Reservation was that the Quinalts and Quillehutes for hundreds of years had been enemies, and the Quinalts did not welcome them. An effort was then made to remove them from their village at the mouth of the Quillehute River to the Makah Indian Reservation, some forty miles to the north, and this again they refused, for the reason that their interpretation of the treaty was that they were to be given a reservation where they had always lived at the mouth of the Quillehute River.

* * * * *

* * * We must presume that President Cleveland, in promulgating the order creating the [Quilleute] reservation, did so with an intent to carry out the provisions of the [1855] treaty [of Olympia]. This is more conclusively established when we note that the proclamation itself was drafted by the Indian Service, who, for thirty-five years, had been endeavoring to secure for this tribe of Indians a reservation "sufficient for their wants," and who, as evidenced by the numerous documents in this record, repeatedly called to the attention of the Commissioner of Indian Affairs and the Secretary of the Interior that these Indians were "fish eating Indians" and their sole means of subsistence depended upon a continued use of the waters from which they caught their fish.

Discussion and Decision

[1] The Administrative Law Judge's November 16 order assumes as the legal basis for his decision that the allotment on the Quinalt Reservation to individual Indians conferred jurisdiction over the res-

ervation upon the tribes in which the allottees were members or to which they had hereditary affiliations. This thesis of allotment as a jurisdictional act, buttressed by an old probate opinion, *Estate of Mary Sailto*, Probate 41969-39,¹⁰ becomes the legal foundation for his later approval of the devise of Quinalt trust property to an individual who is neither an heir of the decedent allottee nor a member of the Quinalt Tribe. While the approach taken permits avoidance of consideration of sec. 4 of the IRA, it is not permissible, under the circumstances of this case, to avoid analysis of the effect of sec. 4 upon the will in probate.

The General Allotment Act, the Act of Feb. 8, 1887, 24 Stat. 388, was envisioned as a means to assimilate the Indian into the general American society. Contrary to the assumption in the order under review, the allotment to individuals was done in derogation of tribal sovereignty, and was intended to dismantle tribal government rather than to extend it. *Hopkins v. United States*, 414 F.2d 464, 467 (9th Cir. 1969). The antithesis to the Allotment Acts is the Indian Reorganization Act of 1934 which ends the allotment process and seeks to revitalize and strengthen tribal self-

¹⁰ Two other decisions are cited: *Estate of Tommy Brown*, Probate 8859-35 and *Estate of Mary Wheeler*, Probate 6679-35. Neither of these cases, however, has any applicability to this matter since they involve the probate of estates not affected by the IRA.

government.¹¹ The allotment of the Quinault Reservation which began in 1887 and continued under the 1911 Allotment Act, was ended in 1935 when allotments to individuals were prohibited by sec. 1 of the IRA. The jurisdictional basis for the exercise of tribal sovereignty over the reservation is properly traced, thus, not to the allotment acts, but rather through the treaty rights conferred by the 1855 treaty and the executive orders establishing the Quinault and Quileute Reservations to the action taken by the Quinault Tribe to organize under the IRA.

In *Halbert v. United States*, 283 U.S. 753 (1931), the Court determined that allotment on the Quinault Reservation could, under the 1855 treaty, properly be made to tribes affiliated with the Quinault and Quileute Tribes without regard to individual residence. It was not suggested by the Court, however, that allotment might confer jurisdiction over the Quinault Reservation upon the tribes of allotted individuals. That argument was expressly rejected by the Court of Appeals in *Moore v. United States*, *supra* at 157 F.2d 764.

Appellants contend that because in 1910, over 20 years after the reservation was made, certain members of the Quillayute Tribe received allotments of land in another reservation, the Quinalt, we must assume that the President in 1889

did not intend to reserve the tide lands and river waters in the 500 acres occupied by the two hundred persons of the Quillayute Tribe. The Quinalt reservation was made to include the Quillayute Indians, but it was created in 1873. The 1855 treaty with the Quillayutes provided that tribe "agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them." At this later date, 18 years after the time for removal, the Quillayutes declined to move away from their ancestral home and immemorably established maritime industries on the Quillayute River. The government acquiesced and they remained in La Push. We are unable to see any relevance of the 1910 allotments in determining the intent of the President in the reservation of 1889. [Footnote omitted.]

The Administrative Law Judge compounded his error when he relied upon an obscure 1939 Departmental opinion, the *Estate of Mary Sailto*, Probate 41969-39, which he quotes in his order of November 16 to find: "No single or particular tribe or band of Indians can be said to have exclusive jurisdiction over the Quinault Reservation. Such jurisdiction as does exist appears to be a concurrent one vested in the tribes or bands of Indians whose members have been allotted on said reservation." Both quoted conclusions stated are incorrect. Immediately after the creation of the Quinault Reservation, while the Quileute Tribe might have sought to relocate with the Quinalts, a joint jurisdiction over the reservation may have been possible. In fact it never occurred. The second suggestion that

¹¹ *Fisher v. District Court*, 424 U.S. 382, 387 (1976); and see Cohen, *Handbook of Federal Indian Law* (1941), pp. 84-87.

tribal organization is limited by hereditary affiliations is simply wrong.

Under the circumstances of this case, the *Sailto* decision, relied upon by the Administrative Law Judge does not support his conclusion. First, it is clear that the Quileute Tribe has not asserted jurisdiction over the Quinault Reservation, but elected to keep the tribal land at LaPush instead of accepting an affiliated status with the Quinault Tribe. *Sailto* notes this fact. Second, it is also historically clear that the Quinault Tribe has, since adoption of the IRA, continuously exerted claim to exclusive jurisdiction over the Quinault Reservation.¹² *Sailto* considers the historical record of the tribal organizations involved, finds the Quileute Tribe is limited to its own reservation at LaPush, but misconstrues *Solicitor's Opinion*, M-27796 (Nov. 7, 1934) to permit a finding that the Quileute devisee may take Quinault property, based in part upon a determination that the Quinault Tribe is not a single

tribe having political powers but a mere collection of hereditary groups. The opinion is internally inconsistent, fragmentary, and poorly reasoned. It fails to recognize that the Quinault Tribe is a unitary political body although it is composed of members who have hereditary connections with other tribes. *Sailto* represents an anomaly in Departmental decisionmaking in this area, and has not been followed. It has no value as precedent.¹³ Analysis of sec. 4 of the IRA is required in order to decide this appeal.

[2] Sec. 4 of the IRA, prior to its amendment in 1980, restricted the alienation of Indian trust lands to three classes of devisees: The tribe upon whose reservation the lands are located; members of the tribe; and legal heirs of the testator. The restriction does not apply to reservations which did not adopt the IRA, nor does it apply to lands outside Indian reservations. Trust lands unrestricted by the IRA may be devised to anyone named by the testator, subject only to Departmental approval. Under sec. 4 of the Act, a devisee of trust property who is not a member of the tribe on whose reservation the land is located may take by devise from an Indian will only if the devisee is a

¹² Congress recognized the Quinault Tribe to be the proper party plaintiff to represent all Indian claims arising in the Quinault Reservation by the Act of July 24, 1947, 61 Stat. 416. See also Act of Aug. 25, 1959, 73 Stat. 427. The Secretary of the Interior, by communication to Congress dated May 22, 1947, described the status and composition of the tribe as "[c]ollectively the Indians having an interest in that reservation, including those of the blood of other tribes consolidated with the Quinaielts pursuant to the treaty, Executive order, and act of Congress [who] may be regarded as one tribe," a position consistent with prior Departmental statements concerning the issue (see Op. Sol. M-27796 cited in n.13).

¹³ *Solicitor's Opinion*, M-27796 (Nov. 7, 1934), 1 Op. Sol. on Indian Affairs 478 (1979), was apparently the basis for the "concurrent" jurisdiction language appearing in *Sailto*. The conclusion stated is, however, an erroneous application of the Solicitor's opinion.

legal heir of the testator who would inherit according to the inheritance scheme of the applicable state probate code.¹⁴ Since this restriction on the class of devisee is well established, the only possible avoidance of the limitation upon a nonmember devisee is through a finding that the trust land is not located on an IRA reservation or, as was done below in this case, through a finding that the devisee's tribe has jurisdiction over the reservation where the trust land is located.¹⁵

The record establishes that appellee, neither a member of the Quinault Tribe nor an heir of decedent, is ineligible under sec. 4 of the IRA, to take trust property devised to him which is located on the Quinault Reservation, since that reservation is under the jurisdiction of the Quinault Tribe which adopted IRA organization in 1935. The

order appealed from must be reversed.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order dated Nov. 16, 1979, approving the devise of trust property to appellee of Quinault trust lands is set aside. The Administrative Law Judge is directed to prepare an order of distribution of the Quinault trust property to decedent's heirs at law.

This decision is final for the Department.

FRANKLIN D. ARNESS

Administrative Judge

I CONCUR:

WM. PHILIP HORTON

Chief Administrative Judge

THE WEST VIRGINIA HIGHLANDS CONSERVANCY

3 IBSMA 154

Decided *May 28, 1981*

Appeal by The West Virginia Highlands Conservancy from the decision of the Acting Director of the Office of Surface Mining Reclamation and Enforcement that Mower Lumber Co. had valid existing rights to conduct underground mining operations in certain areas of the Upper Shavers Fork Sub-Unit of the Monongahela National Forest in Randolph County, West Virginia.

Dismissed.

¹⁴ Since *Solicitor's Opinion*, M-27776, 54 I.D. 584 (Aug. 17, 1934), the Department has consistently followed the stated principles in construing sec. 4 of the IRA. *Estate of Cleveland Iron Shooter*, 7 IBIA 212 (1979), on appeal as *Ramirez v. Andrus*, CA 79-L-79 (D.C. Neb.); *Estate of Dewey Cleveland*, 7 IBIA 72, 83 I.D. 170 (1976); *Estate of Rose LaRose*, 2 IBIA 60, 80 I.D. 620 (1973); *Estate of Emma Blowsnake Goodbear Mike*, IA-916 (Oct. 26, 1960). Contrary to the assertions of appellee, the meaning of the word "heirs" as used in sec. 4 is not ambiguous. As the Aug. 1934 Solicitor's opinion observes (54 I.D. 586-587), "It requires no strained construction of language to interpret the phrase 'or any heirs of such member' * * *. * * * the phrase * * * should properly be construed to mean 'heirs of the testator.'"

¹⁵ *Solicitor's Opinion*, M-27796, n.12, *supra*, discusses several possible jurisdictional situations. The Quinault Tribe's situation is described at I Op. Sol. 479: "(c) A group of Indians residing on a single reservation, who may be recognized as a 'tribe' for purposes of the Wheeler-Howard Act regardless of former affiliations."

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Once a right to appeal a decision of an OSM official has been granted, that right cannot be revoked without some express statement of and explanation for the revocation.

2. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Under 48 CFR 4.1282(b), an appeal of a decision of an OSM official must be filed within 30 days of the date of the decision, if the person filing the appeal did not receive a copy of the decision.

APPEARANCES: Patrick C. McGinley, Esq., Robert Manetta, Esq., Morgantown, West Virginia, and Robert J. Shostak, Esq., Pittsburgh, Pennsylvania, for The West Virginia Highlands Conservancy; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Marianne D. O'Brien, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Richard A. Flye, Esq., and Christian Volz, Esq., Sellers, Conner & Cuneo, Washington, D.C., for Mower Lumber Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The West Virginia Highlands Conservancy (Conservancy) has sought review of a decision of the Acting Director of the Office of

Surface Mining Reclamation and Enforcement (OSM). That decision held that Mower Lumber Co. (Mower) had valid existing rights to conduct underground coal mining operations in the Upper Shavers Fork Sub-Unit of the Monongahela National Forest in Randolph County, West Virginia. The decision was made under sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977¹ and regulations in 30 CFR Part 761, as modified by subsequent court rulings. For the reasons set forth below we dismiss the appeal.

Background

On Mar. 14, 1980, Mower filed a petition with OSM seeking a determination under sec. 522(e) of the Act that it had valid existing rights to conduct underground coal mining operations in a portion of the Monongahela National Forest. Although not required to do so, OSM chose to publish its preliminary finding in the *Federal Register*. That decision, dated July 31, 1980, and published in the Aug. 7, 1980, *Federal Register*, found that Mower did have valid existing rights. 45 FR 52467 (Aug. 7, 1980). The decision stated: "Following the close of the comment period, a final decision will be issued * * *. The Director's final decision will be administratively reviewable under 30 CFR 787.11." 45 FR at 52469.

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1272(e) (Supp. II 1978).

In a letter dated Sept. 5, 1980, OSM made its final decision granting Mower's petition. The letter was published in the Sept. 17, 1980, *Federal Register*. 45 FR 61799 (Sept. 17, 1980). Neither the letter nor the *Federal Register* publication mentioned appeal rights.

The Conservancy filed a notice of appeal of that decision on Oct. 14, 1980, and sought to have the decision stayed pending appeal as provided under 43 CFR 4.21(a). Mower filed a motion to intervene and to dismiss the appeal on Oct 17, 1980. OSM responded to the notice of appeal and moved for an expedited order on Oct. 22, 1980. On Oct. 23, 1980, the Board granted Mower's motion to intervene and ordered that the Acting Director's decision be given immediate full force and effect.

Following further briefing by all parties, the Conservancy filed a petition for reconsideration of the Board's Oct. 23, 1980, order on Nov. 3, 1980. On Nov. 5, 1980, the Board granted reconsideration and ordered oral argument. A footnote to that order stated: "The granting of the petition does not affect the status of the October 23 order; it remains in effect unless otherwise specifically ordered by the Board." Oral argument was held on Nov. 12, 1980.

Discussion and Conclusions

[1] The first issue before the Board is whether there is a right to

appeal the Acting Director's decision. Such a decision may be appealed when "the decision specifically grants such right of appeal." 43 CFR 4.1281. Although the proposed decision stated that the final decision would "be administratively reviewable under 30 CFR 787.11," 45 FR 52469 (Aug. 7, 1980), this language was omitted from the final decision without comment or explanation. The Board does not decide if and under what circumstances a right of appeal may be revoked once it has been granted. It does hold, however, that once a right of appeal has been granted, it cannot be revoked without some express statement of and explanation for the revocation. Therefore, the absence of any statement relating to a right of appeal in the final decision does not revoke the right expressly granted in the *Federal Register* publication of the proposed decision.

Having concluded that there was a right to appeal this decision, the next issue is whether the Conservancy's appeal was timely taken. The appeal was filed on Oct. 14, 1980. Under 43 CFR 4.1282(b), the Conservancy had 30 days from the date of the decision in which to file its notice of appeal.² The question,

² 43 CFR 4.1282(b) reads:

"The notice of appeal shall be filed within 20 days from the date of receipt of the decision. If the person appealing has not been served with a copy of the decision, such appeal must be filed within 30 days of the date of the decision."

May 28, 1981

therefore, is what was the date of the decision.

Mower argues that the date of the decision was Sept. 5, 1980, the date on which the Acting Director signed the letter that was later published in the *Federal Register*. OSM asserts that the date of the decision was Sept. 16, 1980, the date on which the letter and accompanying explanatory material were filed with the Office of the Federal Register for publication and thereby made available to the public. The Conservancy urges that the crucial date was Sept. 17, 1980, the date the decision was actually published in the *Federal Register*.

A decision of the Director of OSM on the existence of valid existing rights to conduct coal mining operations is not required by the Act, regulations, or 44 U.S.C. § 1505 (a) (1976) to be published in the *Federal Register*. In fact, there is no requirement to notify anyone other than the applicant for a determination and any other party to the proceeding that a determination has been made. Publication in the *Federal Register* is thus a superfluous act, which neither creates nor enlarges rights.

[2] Were this controversy solely between OSM and the Conservancy, we might be inclined to hold that the publication would prevent OSM from arguing that the Conservancy had filed its appeal late. See *Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980). Here, however,

Mower is also involved. Mower received a decision that was rendered on Sept. 5, 1980. By reading 43 CFR 4.1282(b) and 4.22(e), Mower could determine that any appeal of that decision by an outside person would have to be filed by Oct. 6, 1980. When no appeal was filed by that date, Mower could legitimately conclude that the decision was final.³ Consequently, because the Conservancy's notice of appeal was not filed within 30 days of the date of the decision, it was untimely.

This does not preclude the Conservancy or any other similarly situated person from filing a timely notice of appeal. It does, however, require that a person concerned with a particular matter pending before OSM monitor its status. Such vigilance was anticipated under 43 CFR 4.1282(b).⁴

In this case, the *Federal Register* publication of the final decision showed the date of the letter setting out the final decision to have been Sept. 5, 1980. If the Conservancy had been watching the *Federal Register* for notice of the final deci-

³ There is no evidence in this case that Mower agreed to the *Federal Register* publication, or in any other way acted to suggest that it consented to a date other than the date of the decision being used to determine the appeal period for other persons. Were there such evidence, Mower might also be prevented from arguing lateness of filing.

⁴ The requirement is not unreasonable in view of the fact that a notice of appeal, as evidenced by 43 CFR 4.1282(c) and (d), is merely a statement of intent to appeal; a brief or statement of reasons for the appeal need not be filed for an additional 20 days.

sion, it would have had 19 days from that publication in which to file its appeal. In addition, it still had 7 days to file from the date it alleges that it received actual knowledge of the decision.⁵

⁵ According to an affidavit signed by Robert Manetta, the Conservancy received actual knowledge of the final decision on Sept. 29, 1980, when it received a letter dated Sept. 26, 1980, from OSM to interested parties informing them of the Sept. 17 publication of the determination in the *Federal Register*.

Because the notice of appeal was filed 39 days after the decision, this case is dismissed as untimely filed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

June 11, 1981

**CORINNE MAE HOWELL AND HER
MINOR CHILDREN, GARY AR-
NOLD HOWELL, RICHARD DE-
WAYNE HOWELL, AND DARCY
LYNN HOWELL v. UNITED
STATES**

*OPINION BY
ADMINISTRATIVE JUDGE
ARNESS*

*INTERIOR BOARD OF
INDIAN APPEALS*

9 IBIA 3

*Procedural and Factual
Background*

Decided June 11, 1981

Appeal from order by Administrative Judge John R. Rampton in Alaska Native Disenrollment contest requiring the Bureau of Indian Affairs to disenroll appellants from the roll of beneficiaries of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977).

Affirmed.

**1. Indian Tribes: Alaskan Groups—
Alaska Native Claims Settlement Act:
Disenrollment: Metlakatla Natives**

The provisions of the Alaska Native Claims Settlement Act specifically exclude members of the Metlakatla Tribe of the Annette Islands Reserve from benefits under the Act. Where appellant and her children periodically resided at Metlakatla, accepted benefits from the Metlakatla Tribe as tribal members, were enrolled members since 1968, and did not initiate efforts to terminate tribal membership until 1974, appellants were enrolled members of Metlakatla within the meaning of the Alaska Native Claims Settlement Act and were properly excluded from enrollment under the Act.

APPEARANCES: Robert Blasco, Esq., for appellants Corinne Mae Howell, Gary Arnold Howell, Richard Dewayne Howell, and Darcy Lynn Howell; Bruce Schultheis, Esq., Anchorage Solicitor's Office, for appellee.

On May 1, 1980, appellants sought relief from a determination by an Administrative Law Judge in a disenrollment contest in which it was held they should be disenrolled as Alaska Natives under the Alaska Native Claims Settlement Act of Dec. 18, 1971, 85 Stat. 688 (hereafter ANCSA), 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (further references to U.S.C. are to 1976 and 1977 editions).

In 1942 appellant Corinne Mae Howell was born in Metlakatla, Alaska. In 1956 she moved to Sitka, Alaska, where she attended school, while at the same time, her parents moved to Oakland, California. In 1961 appellant joined her parents in California where she subsequently married. In 1963 following the birth of appellant Richard Dewayne Howell, appellant Corinne Mae Howell and her husband and son moved to Windsor, Missouri. In 1964 appellant Darcy Lynn Howell was born in Missouri. In 1966 the Howell family returned to Oakland where appellant Gary Arnold Howell was born in 1967. In September 1968 the family moved to Metlakatla, where they remained until December 1970, when they returned to Windsor, Missouri. In

1973 they again returned to Metlakatla where they remained until 1977. Thereafter, the family returned to Windsor, Missouri, where they now reside.

In 1968 while living at Metlakatla, appellant Corinne Mae Howell executed an instrument entitled "Application for Membership in Annette Islands Reserve," which recites in pertinent part:

Metlakatla, Alaska, Oct. 28, 1968
COUNCIL OF ANNETTE ISLANDS
RESERVE

Metlakatla, Alaska 99926
Gentlemen:

I am submitting herewith my application to become a member of Annette Islands Reserve and do subscribe to the following principles of good citizenship.

1.—To be faithful and loyal to the Government of the United States of America.

2.—To be loyal to the local government of our community, to obey its ordinances and regulations, and to obey the laws of the Territory of Alaska and the laws of the United States.

3.—To co-operate earnestly in all endeavors for the education of our children, for the advancement of the community, and in the suppression of all forms of vice.

Permit Granted 11/1/68

Rejected

Respectfully,
/s/ Corinne M. Howell

At a hearing held on Sept. 25, 1979, on the contest initiated by the Bureau of Indian Affairs (BIA) to disenroll appellants, appellant Corinne Mae Howell explained the execution of the Oct. 28, 1968, application:

[T]hey told me I had to sign my name here [the application for membership] to

get a card so I could have my rights on the Island.

* * * * *

Q. Do you know what they meant by your rights on the Island?

A. Just to go to the clinic and stuff like that, you know, where you don't have to pay for any medication.

(Tr. 34).

Appellant testified that she was "surprised" when her membership in the Metlakatla Indian Community was announced at a public dance and banquet which she attended in November 1968 in the community. However, she took no affirmative action to disavow membership in the community until 1974, when, having been enrolled for benefits under the ANCSA, she learned that her eligibility for benefits was in doubt. In a letter to the BIA dated Dec. 2, 1974, she wrote:

I hereby affirm that I am, and have been off and on a member of the Metlakatla Indian Community. I will show you later.

Upon inquiring [of] Frida Damus on Nov. 5, 1974, I did not sign the affirmation of membership and *DID NOT VOTE*. That I gave up my voting rights, and membership, since I signed up with the Alaska Lands Claims Settlement.

So with this information in hand I hereby make intentions known in writing I intend to abandon my Community Membership in the Community of Metlakatla, Alaska and hereby request that my name be included on the Alaska Land Claims Settlement.

Appellant Corinne Mae Howell's application for enrollment under ANCSA shows her to be one-fourth Alaska Indian and five-eighths Tsimshian. Her children, appellants Gary Arnold, Richard De-

June 11, 1981

wayne, and Darcy Lynn Howell are shown on their application for benefits to be one-eighth Alaska Indian and three-eighths Tsimshian. Mrs. Howell testified that she intended to take the Missouri residence of her husband from the time of her marriage, which took place in California, and considers Missouri to be her place of domicile.

The Administrative Law Judge below rejected appellant's contentions concerning community membership holding:

Mrs. Howell did apply for membership in the Metlakatla Community. Whether or not she knew she was applying for membership, but thought she was only applying for health benefits, is immaterial because she was present on November 1, 1968, when her name was read as an approved member of the community, and by her silence, she ratified this action. Further, in her letter dated December 2, 1974, to the Enrollment Coordinating Office (Ex. 9), she stated, "I hereby affirm that I am, and have been off and on a member of the Metlakatla Indian Community." It was not until November 5, 1974, that she did not affirm her membership, did not vote, and gave up her voting rights and membership in the community in order to qualify for enrollment under the Act.

Thus, Mrs. Howell was a member of the community as of April 1, 1970, and that date has been defined as the critical date to be enrolled in Metlakatla so as to be ineligible for enrollment under the Act. (25 CFR 43h.11)

(Decision at 5-6, dated Apr. 17, 1980).

Discussion and Decision

The Metlakatla community is described by Cohen in the *Handbook*

of *Federal Indian Law*, at 415 (1941):

Unique among native communities is that of the Metlakatla Indians. Encouraged by federal officials about 800 of these Indians migrated in 1887 to the Annette Islands in southeast Alaska from their homes in Metlakatla, British Columbia. A ruling of the Attorney General held that the President of the United States lacked authority to establish a reservation for these Indians on the public domain without congressional sanction, because they were aliens, born outside of the boundaries of the United States proper. By the Act of March 3, 1891, Congress created a reservation for the use of these immigrants and such other Alaskan natives as might join them, to be used in common under rules and regulations prescribed by the Secretary of the Interior. By the Act of March 4, 1907, Congress permitted these Indians to be licensed as masters, pilots, and engineers of steamboats and as operators of motor boats, as if citizens of the United States. Congress granted collective naturalization by the Act of May 7, 1934, to the Metlakatlans and the Indians who emigrated from British Columbia not later than January 1, 1900, and resided continuously in Annette Island.

* * * * *

The privilege of joining the Metlakatlan community and occupying any part of the Island is subject to vote of the Metlakatlan council. To obtain membership, except by birth, requires the approval of three-fourths of the members of the town council. The land and resources of the reservation are held in common; individuals occupy land by permits from the council. Local self-government is recognized in rules and regulations of the Secretary of the Interior. [Footnotes omitted.]

[1] The unique character of the Metlakatla community continues

today. The Metlakatla Indian community retains the 1891 reserve in lieu of benefits under ANCSA. Accordingly, benefits under ANCSA are denied by sec. 19 of the Act, 43 U.S.C. § 1618(a), which recognizes an exception in the case of Metlakatla and provides:

§ 1618. Reservations; revocation; excepted reserve; aquisition of title to surface and subsurface estates in reserve; election of Village Corporations

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of title 25 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

The declared purpose of ANCSA is to extinguish "all claims by Natives and Native groups of Alaska, based on aboriginal land claims" (43 U.S.C. § 1601(a)). The term "Native" may include persons who are Tsimshian Indians (Metlakatlans), but only if those persons are not enrolled in the Metlakatla Indian community (43 U.S.C. § 1602(b)). The declared intent of Congress is to prevent duplication of benefits under ANCSA and other statutes providing benefits to Indians either by way of allotment (43 U.S.C. § 1617) or reservation (43 U.S.C. § 1618). Thus the Administrative Law Judge correctly

rule that Congress planned "to prevent an Alaskan Native from receiving double benefits" (Decision at 5, dated Apr. 17, 1980). It is clear on the face of the ANCSA that membership in the Metlakatla community precludes the receipt of benefits under ANCSA. Departmental regulations, which we are without authority to declare invalid, also make it clear, as the Administrative Law Judge noted, that any person enrolled in the Metlakatla community as of Apr. 1, 1970, is ineligible for enrollment under ANCSA. See 25 CFR 43h.11. The issues on appeal are, therefore, reduced to whether appellant's renunciation of Metlakatla membership on Dec. 2, 1974, as evidenced by her letter on that date, was effective to entitle her and her children to claim benefits under ANCSA.¹

¹ Appellants specify 25 exceptions to the Administrative Law Judge's ruling. Thus, they contend his ruling denied them due process, and the equal protection of the law guaranteed by the Fifth Amendment to the United States Constitution, and that he erred by failing to follow binding Departmental precedent established by the disenrollment contest entitled *United States v. Anderson*, Docket No. AL 77-57D, decided Nov. 30, 1977. They contend that application of the legal doctrines of res judicata and collateral estoppel prevent their disenrollment and that the provisions of secs. 3, 5, and 19 of ANCSA and 25 CFR Part 43h were misapplied by the finder of fact below. Finally, they contend that the Administrative Law Judge committed numerous errors in fact finding which affected the conclusions announced and resulted in an erroneous decision on the merits. However, the primary thrust of the arguments advanced by appellants as shown by the brief on appeal concerns whether the Administrative Law Judge correctly found that appellants' renunciation of Metlakatla community membership was effective to entitle them to benefits under ANCSA. The other specified errors are without merit.

June 11, 1981

To reach a determination of appellants' eligibility to be enrolled for ANCSA benefits, the Administrative Law Judge applied 25 CFR 43h.11 to establish Apr. 1, 1970, as the date eligibility criteria should be applied to determine individual entitlement to benefits.² Appellants point out that ANCSA did not become law until Dec. 18, 1971, and that the 1970 date used by the Departmental regulation appears to be merely the date of the 1970 census and bears no relation to the Act or a reasonable administration of the Congressional intentions to settle aboriginal claims.³ The regulation, 25 CFR 43h.11, provides: "No person who was enrolled in the Metlakatla Indian Community of the Annette Islands Reserve as of April 1, 1970, shall be eligible for enrollment under this Part [41 FR 32423, Aug. 3, 1976]."

² Even were the effective date of the Act used to determine eligibility, the result here would remain the same. In this connection, see *United States v. Bowen*, 8 IBIA 218, 88 I.D. 261 (1981).

³ The clear intent of the Act is to exclude the Metlakatla community from benefits. This intent is also indicated by the legislative history of the Act. Thus, the report of the Secretary to the House concerning the House bill subsequently enacted states the following concerning the Metlakatla community:

"Section 16 provides that the existing reserves that have been set aside by any means for natives use or administration of their affairs are revoked when such revocation is not inconsistent with the provisions of this Act. This provision does not revoke the Annette Islands Reserve because the revoking of such reservation would be inconsistent with the provisions of this Act since the Tsimshian Indians are not included in the settlement made by this bill."

(H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 2, reprinted in [1971] U.S. Code Cong. & Ad. News 2219.)

Prior to the 1976 revision of the regulation, 25 CFR 43h.11 read: "Applications from Native Alaska members of the Metlakatla Indian Community will be conditionally accepted subject to a determination of their eligibility for inclusion on the Alaska Native roll and entitlement to benefits under the Act." Before adoption, the current rule was published by the Department on June 4, 1976, with the comment (41 FR 22566), "A revision of § 43h.11 is proposed to more definitively reflect the status of persons enrolled in the Metlakatla Indian Community," indicating that the agency sought to implement the statutory directive that Tsimshian Indians benefiting from the Annette Islands Reserve be excluded from benefits under ANCSA.

Appellant Corinne Mae Howell contends she was neither a domiciliary or resident of the reserve on the effective date of the ANCSA, Dec. 18, 1971, which date she urges should be used to determine eligibility in her case, rather than the Apr. 1, 1970, date selected by the Departmental regulation. The record on appeal indicates appellant was born at Metlakatla and lived there until she left to attend school. Although not clearly stated in the record, it appears that she did not leave Alaska to join her family in California until some time after her completion of high school in 1961. From 1968 until 1970 she and her family lived in Metlakatla. In 1968 appellant made formal application for membership and was admitted

to the Metlakatla community. Her family was with her again in Metlakatla from 1973 until 1977. During that time her husband held a job in the community and appellant cared for her grandparents who lived in Metlakatla. On Mar. 27, 1973, meanwhile, while still at Metlakatla, she applied for benefits under ANCSA. The BIA, administering the Act under the pre-1976 regulation, accepted the application from appellant and her children. It was not until her application was questioned because of her membership in Metlakatla that appellant took action to disassociate herself from the Tsimshian community.⁴

Under the circumstances, it is apparent that appellant accepted benefits under the 1891 statute creating the Annette Islands Reserve.⁵ She applied for, and was admitted to membership in the community after spending much of her life in residence in the community. Assuming for the purposes of decision that the

1976 revision of 25 CFR 43h.11 does not apply in her case, since her application and rejection predate the revision of the regulation, appellant is nonetheless made ineligible for benefits under ANCSA by reason of her membership in, and acceptance of benefits from, the Metlakatla community.⁶

aboriginal occupancy. Metlakatla, a colony of Indians from British Columbia established in the late 19th century, is expressly excluded from the benefits provided by the Act. Membership in the colony excludes a share under ANCSA. Discussion of questions of residence or domicile is more confusing than beneficial to an understanding of individual claims by persons of Tsimshian ancestry for ANCSA benefits. (Resolution 74 denounces the receipt by Metlakatla members of ANCSA benefits and recommends the Secretary of the Interior disenroll Metlakatla members from the ANCSA rolls unless a member "abandon his membership in the Metlakatla Indian Community.") (Resolution 74, Metlakatla Indian community, June 24, 1974. The resolution makes no mention of residence requirements or domiciliary considerations.)

⁴ 43 U.S.C. § 1618(a). Appellant contends that the Department is precluded from reaching this decision by the decision in *United States v. Anderson*, Docket No. AL 77-57D (1979), and that legal doctrines of stare decisis, res judicata and collateral estoppel should operate to prevent the result reached here. In *Anderson* an Administrative Law Judge in a disenrollment contest permitted enrollment of Tsimshian Indians who had at least one-quarter Indian ancestry other than Tsimshian without regard to their membership in the Metlakatla community. Such a position is, of course, a clear violation of 43 U.S.C. § 1618(a) and ignores the statutory definition of "Native" which excluded such persons from receiving dual benefits (43 U.S.C. § 1602(b)). Assuming, in the light most favorable to appellant, that the facts and issues in the *Anderson* case are identical to the matter before the Board, the situation on appeal is simply that of two conflicting administrative actions which require resolution by the agency following complete agency review. 43 CFR 4.1010. In no event could this Department, following a construction of Departmental regulations which violates a statutory bar to enrollment, permit a prior erroneous decision to frustrate the intent of Congress to bar members of Metlakatla from receipt of ANCSA benefits. Both the Act and

⁴ Appellant points out several errors of fact in the findings of the Administrative Law Judge below. Thus, she correctly contends there is no showing that appellant voted in the election held in Metlakatla on Nov. 3, 1970. The decision below also incorrectly finds that all three minor children were born in California, a finding contradicted by a written submission by appellant indicating otherwise. The errors noted are not, however, substantial. Appellant's argument that the decision improperly characterized her Dec. 2, 1974, letter is incorrect. The minor factual discrepancies noted in the decision do not affect the correctness of the conclusions or the ultimate holding.

⁵ Citing Resolution 74 adopted by the Metlakatla Indian community in 1974, appellant argues that considerations of residence or domicile are determinative of this appeal. This approach, while ingenious, ignores the statute which is the basis for the benefits sought. ANCSA is intended to settle claims based upon

Mrs. Howell's children born in 1963, 1964, and 1967 are presumed to be members of the Metlakatla community during their minority pursuant to the provisions of Article II, Section 3, Constitution and Bylaws of the Metlakatla Indian community. There is no showing in the record that any of the three children has been emancipated, nor does it appear that any of the three has disavowed membership in the community. Their eligibility to share in benefits under ANCSA was made to depend upon their mother's claims for, and participation in, the community. All three children were present with appellant in Metlakatla from 1968 until 1970 and again from 1973 until 1977 and shared in the benefits derived from the 1891 reserve. They have taken no independent action to renounce membership in the community, and to do so would have been difficult, given their family circumstances. The Administrative Law Judge correctly concluded that the appellant's minor children also are precluded from receipt of benefits under ANCSA.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. Appellants are barred from enrollment

the implementing regulations are clearly intended to insure that multiplication of benefits does not occur. (To the extent that *Anderson* held Tsimshian ancestry is not a disqualifying bar to enrollment for otherwise qualified applicants, it is correct: such a finding is not inconsistent with the result here.)

for benefits under the Act.⁷ Agency officials of the BIA charged with enforcement of Departmental regulations respecting enrollment are directed to take appropriate action to disenroll appellants consistent with this opinion, which is final for the Department.

FRANKLIN D. ARNESS

Administrative Judge

I CONCUR:

WM. PHILIP HORTON

Chief Administrative Judge

ISLAND CREEK COAL CO.

3 IB SMA 165

Decided June 15, 1981

Cross-appeals by Island Creek Coal Co. and the Office of Surface Mining Reclamation and Enforcement from the Mar. 21, 1980 decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-13-P. That decision converted Cessation Order No. 79-I-9-5 into a notice of violation, upheld the notice for discharging blackwater

⁷ Appellants rely upon a strained construction of 25 CFR 43h.15 to argue that a person may not be disenrolled for membership in Metlakatla once enrolled, since the regulation specifically enumerates only sec. 5, ANCSA, as a basis for disenrollment. Sec. 43h.15 does not permit such a strained construction. Membership in Metlakatla is clearly defined by the regulation as one of the disqualifying factors which require disenrollment. This argument (also traceable to the *Anderson* decision) is rejected. The language of the Act concerning residence is directed primarily to area assignment of beneficiaries and does not involve considerations of basic eligibility for benefits.

into a creek, and assessed a \$2,200 civil penalty.

Affirmed in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally

OSM has established a *prima facie* case that a cessation order was properly issued when it shows a violation, practice, or condition that is casually connected to significant, imminent environmental harm or a reasonable expectation of such harm.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally

Cessation orders are extreme sanctions and should not be issued indiscriminately, but where the prerequisites for a cessation order are found, there need be no hesitation in closing the operation or its relevant portion.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally

Under the circumstances of this case, a cessation order requiring that all underground pumping of slurry be stopped was not overly broad.

APPEARANCES: George S. Brooks II, Esq., Lexington, Kentucky, for Island Creek Coal Co.; William Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

**OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND
RECLAMATION APPEALS**

Both Island Creek Coal Co. (Island Creek) and the Office of Surface Mining Reclamation and Enforcement (OSM) have sought review of the Mar. 21, 1980, decision of Administrative Law Judge Tom M. Allen that converted Cessation Order No. 79-I-9-5 into a notice of violation, upheld the notice, and assessed a \$2,200 civil penalty. This decision was issued under the provisions of the Surface Mining Control and Reclamation Act of 1977 (Act).¹ For the reasons set forth below, we affirm that decision in part and reverse it in part.

Background

On Apr. 10, 1979, an OSM inspector noticed that Trace Fork Creek in Logan County, West Virginia, was carrying a heavy sediment load. He followed the discolored water upstream to an embankment in the area of Island Creek's Holden #29 preparation plant (Tr. 27). After taking a sample of the discharge, he spoke with the plant superintendent. In the process of washing coal, the plant produced about 200,000 gallons of slurry per day with a sediment load of approximately 300,000 mg/l (Tr. 33). This slurry was pumped into abandoned underground mine workings located beneath the plant (Tr. 186). On the day of the inspection, some of this

¹ Act of Aug. 3, 1977. 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

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slurry was entering Trace Fork Creek. The cause of this discharge appeared to be that the borehole into which Island Creek was pumping slurry clogged up, the slurry overflowed into a small catch basin, and eventually found its way into the creek, perhaps through fissures in the bottom of the basin.

Although pumping of slurry into the apparently clogged borehole probably stopped before the inspector arrived, pumping continued into an air shaft (Tr. 139-140). When the superintendent was not able to provide the inspector with maps of the underground workings or any other evidence of elevation or interconnection of tunnels, the inspector issued a cessation order requiring Island Creek immediately to cease the discharge into the creek and the pumping of slurry into the mine workings. This order had the effect of closing the plant because it could not operate without creating slurry, and there was no place to dispose of that slurry except in the workings.

After issuing the order, the inspector took additional water samples. Analysis of all the samples taken showed elevated suspended solids as set out below:

- a. 75 feet above culvert above plant
18.00 mg/l
- b. at point of discharge (2 samples)
1,733.33 mg/l
1,900.00 mg/l
- c. 85 feet downstream (2 samples)
1,075.00 mg/l
461.50 mg/l

- d. 100 feet downstream 588.00 mg/l
- e. 1/4 mile downstream 647.60 mg/l
- f. 1.75 miles downstream

286.00 mg/l²

The cessation order was terminated the next day, Apr. 11, 1979, because the discharge had stopped.

After an assessment conference on the proposed civil penalty for the cessation order, Island Creek petitioned for review before the Hearings Division. A hearing was held on Feb. 22, 1980, and a decision was issued on Mar. 21, 1980. In that decision, the Administrative Law Judge found that a violation had occurred, but that a cessation order should not have been issued for the violation. He therefore converted the cessation order into a notice of violation and sustained the notice. He assessed a total of 42 points, or \$2,200, for the violation.

Both Island Creek and OSM sought review of this decision and filed briefs on appeal. In its brief to the Board, Island Creek raised for the first time OSM's authority to regulate the plant. On Sept. 23, 1980, the Board remanded the case to the Hearings Division for recommended findings of fact and conclusions of law on the question of whether the plant was subject to regulation. Before a hearing was held, the parties filed a joint motion for consent decision on Apr. 16, 1981, stipulating that the plant was subject to regulation. On Apr. 17,

² Tr. 37-44; Exhs. C-1 through C-7. Under 30 CFR 715.17(a), it is a violation to discharge water from a permit area with total suspended solids in excess of 70 mg/l.

1981, the Administrative Law Judge issued a decision recommending that the plant was subject to regulation and returning the case to the Board. The case is now ready for a decision on the merits.

Discussion and Conclusions

[1] Because Island Creek does not dispute that slurry from its preparation plant entered Trace Fork Creek, the major question before the Board is whether a cessation order was properly issued because of this occurrence. In *Claypool Construction Co., Inc.*, 2 IBSMA 81, 84-85, 87 I.D. 168, 170 (1980), we discussed the propriety of the issuance of cessation orders:

A cessation order is properly issued when an OSM inspector observes a condition, practice, or violation of the Act or regulations which is determined to be causing or can reasonably be expected to cause significant, imminent environmental harm. When review is sought of a cessation order issued under such circumstances, OSM must be prepared to supply prima facie proof: (1) of the violation, practice, or condition identified in the order; (2) of significant, imminent environmental harm or a reasonable expectation thereof; and (3) of a causal link between such reasonably expected or existing harm and the proven violation, practice, or condition. [Footnotes omitted.]

In this case OSM cited Island Creek for allowing "blackwater" to enter Trace Fork Creek.³ OSM's

evidence showed that blackwater was entering the creek. Analysis of water samples taken from the creek showed a low level of suspended solids above the plant and very high levels below the discharge point. These high levels of suspended solids exceeded the effluent limitations of 30 CFR 715.17(a). Island Creek does not dispute that blackwater entered the creek or that the effluent limitations were exceeded.

OSM also showed that significant environmental harm had occurred and could reasonably be expected to continue. Water pollution is itself an environmental harm, whether or not that pollution is shown to have had an impact on aquatic plant and animal life. An elevated level of suspended solids is one form of water pollution. The high levels of suspended solids here represent significant water pollution that was both observable and measurable. *Claypool Construction Co., Inc.*, *supra* 2 IBSMA at 86, 87 I.D. at 171. That pollution was also imminent because it was then occurring.

Finally, OSM showed a causal link between the violation and the environmental harm. Island Creek does not dispute that the discharge resulted from the pumping of slurry at the preparation plant. That slurry contained a sediment load of coal fines far in excess of the effluent limitations set out in the regulations. When that slurry entered the creek, it caused the creek water to be observably and measurably polluted. In addition to this present environmental harm, there

³ The order listed a violation of sec. 521(a) (2) of the Act, 30 U.S.C. § 1271(a) (2) (Supp. II 1978). Although this citation is arguably nonspecific, any inadequacies are removed by the narrative description of the violation *Island Creek Coal Co.*, 2 IBSMA 125, 87 I.D. 304 (1980).

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was a reasonable expectation that slurry would continue to enter the creek and would cause further environmental harm. Therefore, OSM established a prima facie case that a cessation order was properly issued.

[2] Island Creek did not rebut OSM's prima facie case. Instead, it sought to show that in other cases cessation orders had not been issued for this kind of violation and that, even if a cessation order were proper, it was overly broad in requiring the plant to shut down. The fact that notices of violation may have been issued for apparently similar violations in other cases is not evidence that a cessation order was inappropriate here. An inspector must deal with the situation found at each site. Because conditions will probably never be identical at different sites, the inspector must have some latitude in addressing the conditions discovered during each inspection. Cessation orders are extreme sanctions and should not be issued indiscriminately, but where the prerequisites for a cessation order are found, there need be no hesitation in closing the operation or its relevant portion.⁴

[3] In this case the inspector found an active discharge that was causing significant, imminent environmental harm to water resources by polluting Trace Fork Creek. Sec. 521(a)(2) of the Act, 30 U.S.C. § 1271(a)(2) (Supp. II 1978), requires the issuance of a cessation

order under these conditions. Furthermore, there was a potential discharge of 200,000 gallons of slurry per day with a sediment load of 300,000 mg/l. Because Island Creek officials could not show the inspector maps, elevation levels, or other data on the underground workings into which the slurry was being pumped, he could only speculate about the exact cause of the discharge. The inspector found an active discharge and was entitled, under these circumstances, to assume that the discharge would be affected by continued underground disposal. Therefore, the inspector properly issued a cessation order and required that all underground pumping be stopped.⁵ Cessation Order No. 79-I-9-5 is, therefore, reinstated and upheld.⁶

Island Creek also argues that too many civil penalty points were assigned for extent of damage. From the evidence and arguments presented, we see no reason to alter the assignment of points and calculation of the civil penalty.

Therefore, that part of the Mar. 21, 1980, decision below that converted Cessation Order No. 79-I-9-5 into a notice of violation is reversed and the Cessation Order is reinstated and sustained, and the

⁵ Because Island Creek presented no evidence as to when the discharge stopped, there is no basis for a finding that the cessation order remained in effect too long before it was terminated.

⁶ Because of this conclusion, we do not reach the question of an Administrative Law Judge's authority to convert a cessation order into a notice of violation when the cessation order was properly found to be unwarranted.

⁴ An inspector's decision to issue a cessation order remains subject to administrative review.

part assessing a civil penalty of \$2,200, based on 42 points, is affirmed. All motions not previously ruled upon, are denied.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

APPLICATION OF EAGLE PROTECTION AND MIGRATORY BIRD TREATY ACTS TO RESERVED INDIAN HUNTING RIGHTS

M-36936

June 15, 1981

Indian Tribes: Hunting and Fishing: Generally

The prohibitions of the Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act are nondiscriminatory, reasonable and necessary conservation measures to which reserved Indian hunting rights are subject.

Imposition of North Dakota State Fish and Game Laws on Indian Claiming Treaty and Other Rights to Hunt and Fish, M-36410 (Feb. 11, 1957), Migratory Bird Treaty Act, M-27690 (June 15, 1934), and other opinions of the Solicitor's Office dealing with the application of Federal migratory bird laws to Indians are overruled to the extent that they conflict with this opinion.

*OPINION BY OFFICE
OF THE SOLICITOR*

TO: ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS; ASSISTANT SECRETARY, INDIAN AFFAIRS; DIRECTOR, FISH AND WILDLIFE SERVICE

FROM: SOLICITOR

SUBJECT: APPLICATION OF EAGLE PROTECTION AND MIGRATORY BIRD TREATY ACTS TO RESERVED INDIAN HUNTING RIGHTS

This opinion addresses the question of whether the prohibitions of the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.*, and Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, apply to the reserved hunting rights of Indians. Indian reserved hunting and fishing rights are of two kinds. First, Indians have reserved hunting and fishing rights on their reservations, regardless of whether the treaty, statute, or executive order creating the reservation expressly mentions such rights. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Second, many tribes have off-reservation hunting and fishing rights; these rights are based upon specific treaty language. *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). For the reasons which follow, I conclude that the prohibitions of the Eagle Protection and Migratory Bird Treaty Acts are nondiscriminatory, reasonable and necessary conservation measures which apply to reserved Indian hunting rights.

In pertinent part, the Eagle Protection Act provides that:

Whoever, within the United States or any place subject to the jurisdiction

BIRD TREATY ACTS TO RESERVED INDIAN

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thereof, without being permitted to do so as provided [elsewhere in the Act], shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles . . . shall be fined . . . imprisoned . . . [or] assessed a civil penalty¹ . . . 16 U.S.C. § 668(a)-(b).

Similarly, the Migratory Bird Treaty Act provides that:

Unless and except as permitted by regulations made as . . . provided [elsewhere in the Act], it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . 16 U.S.C. § 703.

A number of court decisions have assumed a conflict between the provisions of the Eagle Protection Act or Migratory Bird Treaty Act on the one hand and reserved Indian hunting rights on the other hand

and have viewed the issue in terms of whether the statutes "abrogated" Indian hunting rights. It is not surprising that the courts framing the issue in these terms have reached inconsistent results.

In *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980), *cert. denied*, — U.S. — (1980), the Ninth Circuit held that the Eagle Protection Act abrogated or modified Indian treaty rights by prohibiting the taking of bald eagles by Indians in the absence of a permit under the Act. *See also*, *United States v. Al-lard*, 397 F. Supp. 429 (D. Mont., 1975). In *United States v. White*, 508 F.2d 453 (8th Cir. 1974), however, the Eighth Circuit applied the maxim that abrogations of Indian reserved rights were not lightly to be imputed to Congress, and held that the Eagle Act did not abrogate Indian hunting rights. The court proceeded to conclude that the Eagle Act had no application to Indians in the exercise of reserved hunting rights. *See also*, *United States v. Cutler*, 37 F. Supp. 724 (D. Idaho, 1947).

In my opinion, however, it is neither necessary nor appropriate to view the applicability of the Eagle Protection and Migratory Bird Treaty Acts to reserved Indian hunting rights in terms of "abrogation," because Indian rights and the acts can be construed as being in harmony with each other. *See Payne v. United States*, 264 U.S. 446, 448 (1924); *Coggins*,

¹ To assess a civil penalty, the government does not have to prove knowledge or wanton disregard for the consequences. 16 U.S.C. § 668(b).

Native American Indians and Federal Wildlife Law, 31 Stan. L. Rev. 375 (1979). Construing the acts and treaties as being in harmony with each other is especially appropriate for the Federal Government, since it is responsible both for administration of Indian affairs, including the protection of Indian rights, and for conservation of eagles and migratory birds.

The application to Indians of nondiscriminatory laws and regulations which are reasonable and necessary for conservation does not impinge upon reserved hunting and fishing rights because these rights do not include the right to take wildlife or fish if the taking would be contrary to the conservation of the species. *Puyallup Tribe v. Washington Game Dept.*, 391 U.S. 392 (1968) (*Puyallup I*); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Kennedy v. Becker*, 241 U.S. 556 (1916); *United States v. Winans*, 198 U.S. 371 (1905). As the Court observed with respect to Indian fishing rights in *Puyallup I*, *supra* at 398:

... the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Indian hunting and fishing rights are subject to a complete ban if the ban is applied in a nondiscriminatory manner and is necessary to assure the survival of a species. *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44, 49 (1973) (*Puyallup II*); *see also, Puyallup*

Tribe v. Washington Game Dept., 433 U.S. 165, 175-177 (1977) (*Puyallup III*); *Washington v. Fishing Vessel Ass'n., supra* at 683-684. As Justice Douglas stated for a unanimous Court in *Puyallup II*, *supra* at 49:

We do not imply that these [Indian] fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and *the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival*. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon, and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets. (*Italics added.*)

Thus, Indian hunting and fishing rights are subject to such nondiscriminatory restrictions as Congress may determine to be reasonable and necessary for conservation. Congress has broad power to legislate over Indian affairs. *Delaware Tribal Business Comm'n v. Weeks*, 430 U.S. 73, 84-85 (1977). Congress also has the power to legislate in order to conserve wildlife. *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Helsley*, 615 F. 2d 784 (9th Cir. 1979).

Neither the Eagle Protection Act nor the Migratory Bird Treaty Act raises any issue of discriminatory treatment against Indians. The sole question is whether the Acts reflect the judgment of Congress that the prohibitions are reasonable and necessary for conservation.

BIRD TREATY ACTS TO RESERVED INDIAN

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When the Eagle Protection Act was originally enacted in 1940, Congress specifically found that "... the bald eagle is now threatened with extinction . . ." Act of June 8, 1940, 54 Stat. 250. In explaining the protective purpose of the legislation, the legislative history states that "... if the destruction of the eagle and its eggs continues as in the past this bird will wholly disappear from much the larger part of its former range and eventually will become extinct." H.R. Rep. No. 2104, 76th Cong., 3d Sess. 1 (1940). When the Act was later amended to protect the golden eagle as well as the bald eagle, Congress found that "... the population of the golden eagle has declined at such an alarming rate that it is now threatened with extinction . . ." Pub. L. No. 87-884, 76 Stat. 1246 (1962). The legislative history notes specifically that:

Certain feathers of the golden eagle are important in religious ceremonies of some Indian tribes and a large number of the birds are killed to obtain these feathers, as well as to provide souvenirs for tourists in the Indian country. In addition, they are actively hunted by bounty hunters in Texas and some other States. As a result of these activities, if steps are not taken as contemplated in this legislation, there is grave danger that the golden eagle will completely disappear. H.R. Rep. No. 1450, 87th Cong., 2d Sess. 2 (1962).

In light of such findings and legislative history, it is not surprising that the Supreme Court has held that the Act is a "conservation stat-

ute" and has explained that its prohibitions were "... designed to prevent the destruction of certain species of birds." *Andrus v. Allard*, 444 U.S. 51, 52-53 and n. 1 (1979).

The purpose of the Migratory Bird Treaty Act is to implement four treaties concerning migratory birds which the United States has signed with Canada, Mexico, Japan, and the Soviet Union. 16 U.S.C. §§ 703, 704, 712; S. Rep. No. 27, 65th Cong., 1st Sess. 1-2 (1917); S. Rep. No. 2001, 74th Cong., 2d Sess. 1-2 (1936); S. Rep. No. 93-851, 93d Cong., 2d Sess. 1, 4 (1974); S. Rep. No. 95-1175, 95th Cong., 2d Sess. 6 (1978); *Missouri v. Holland*, *supra*. The treaty with Canada speaks of the need for measures to save migratory birds "... from indiscriminate slaughter and of insuring the[ir] preservation . . ." Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628. The treaty with Mexico states that "... it is right and proper to protect the said migratory birds . . . in order that the species may not be exterminated . . ." Convention for the Protection of Migratory Birds and Game Mammals. Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912. The treaties with Japan and the Soviet Union speak of "... taking measures for the management, protection, and prevention of the extinction of certain birds . . .," Convention for the Protection of

Migratory Birds and Birds in Danger of Extinction, and their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990, and of "... implementing measures for the conservation of migratory birds and their environment..." Convention Concerning the Conservation of Migratory Birds and their Environment, Nov. 19, 1976, United States-Soviet Union, — U.S.T. —, T.I.A.S. No. 9073. Thus, the purpose of the treaties implemented by the Migratory Bird Treaty Act is to preserve and protect various species of birds. As the Supreme Court held with reference to the Act's prohibitions, "... the Migratory Bird Treaty Act [is a] conservation statute... designed to prevent the destruction of certain species of birds." *Andrus v. Allard*, *supra* at 52-53 and n.1; *see also*, *Missouri v. Holland*, *supra* at 435 (where the Court stated that "[b]ut for the treaty and statute there soon might be no birds...").

In view of the above, I conclude that the prohibitions of the Eagle Protection and Migratory Bird Treaty Acts are nondiscriminatory, reasonable and necessary conservation measures to which Indian treaty hunting rights are subject. In reaching this conclusion, I am fully aware of the previous opinions of this Office that deal with the application of Federal migratory bird law to Indians: *Imposition of North Dakota State Fish and Game Laws on Indian Claiming Treaty and Other Rights to Hunt and Fish*, M-36410 (Feb. 11, 1957); *Migra-*

tory Bird Treaty Act, M-27690 (Jun. 15, 1934); *Conflict Between Migratory Bird Treaty with Great Britain and Treaty with the Yakimas re Hunting Rights on Reservation*, Memorandum for Comm'r of Indian Affairs (Feb. 10, 1942); *Migratory Bird Treaty Act and Bald Eagle Act—Indian Hunting Rights*, Memorandum to Director, Bureau of Sport Fisheries and Wildlife (Apr. 26, 1962); and other opinion memoranda. Such opinions were issued before the Supreme Court's decisions in *Puyallup I*, *Puyallup II*, and *Andrus v. Allard*, *supra*, and were not based on the analysis set forth herein. Accordingly, to the extent that such opinions conflict with this opinion, they are hereby overruled.

This opinion was prepared by the Division of Conservation and Wildlife of the Office of the Solicitor, Associate Solicitor, J. Roy Spradley, Jr., after consultation with the Division of Indian Affairs, Acting Associate Solicitor, Hans Walker. The principal authors were Ronald E. Swan and Robin A. Friedman.

WILLIAM H. COLDIRON
Solicitor

APPEAL OF SCONA, INC.

IBCA-1094-1-76

Decided June 16, 1981

Contract No. H5014208649, Bureau of Indian Affairs.

Appellant awarded \$10,500; appeal otherwise denied.

**Contracts: Disputes and Remedies:
Burden of Proof—Evidence: Credibility—Evidence: Weight**

Where the testimony of appellant's only witness testifying with respect to contract performance was found unworthy of belief and not credible, the Board holds that it has the discretion to reject all the testimony of such witness except that which has been corroborated; and the Board concludes, that except for one of the claims for an equitable adjustment conceded by the Government, there was no corroboration of the discredited testimony, and, therefore, the remaining claims of appellant must be denied for failure to sustain the burden of proof.

APPEARANCES: Mr. Alva Harris, Attorney at Law, Shelley, Idaho, for Appellant; Mr. Fritz Goreham, Department Counsel, Phoenix, Arizona, for the Government.

*OPINION BY
ADMINISTRATIVE JUDGE
DOANE*

*INTERIOR BOARD OF
CONTRACT APPEALS*

Background

A contract was awarded appellant on Sept. 21, 1973, in the amount of \$117,396 to install 764 lineal feet of concrete lining for a canal west of the Truckee River, construct a 45-inch siphon of precast concrete pipe under the river for 296 lineal feet, one check structure, and one bridge at the Pyramid Lake Irrigation Project, Pyramid Lake Indian Reservation, Washoe County, Nevada. Although the contract was awarded by the Bureau of Indian Affairs, it was administered by the

Bureau of Reclamation. The work was to be completed within 75 calendar days from receipt of the notice to proceed resulting in a scheduled completion date of Dec. 29, 1973. On Apr. 23, 1974, because of appellant's failure to make progress, the contract was terminated for default. The contract work was subsequently completed by appellant's two individual sureties on June 10, 1974.

The appellant had encountered considerable difficulty in attempting to perform the contract contending the two principal causes to be: (1) The failure of the Government to have a powerline within the construction right-of-way timely relocated and energized, and (2) defective specifications pertaining to the diversion of the water in the river to permit the siphon construction. The contracting officer in his final decision conceded that appellant was entitled to an extension of 102 calendar days and an equitable adjustment of \$77,437.08.

In its complaint on appeal, appellant claimed immediate payment due of \$79,249.71. This figure was accepted by Government counsel, less \$3,050 for liquidated damages claimed by the Government, and, pursuant to agreement of both parties, the Board, on Apr. 6, 1976, ordered immediate payment of \$76,199.71 to the Bank of Idaho, assignee of appellant. The complaint also requested an extension of time of 183 days and prayed for an equitable adjustment of \$464,264.18 plus "several hundred thousand dollars" additional when appellant had com-

pleted its own audit. The total amount sought by the complaint was approximately \$664,000.

A 3-day hearing was held in Carson City, Nevada, July 13-15, 1976, and by agreement of the parties the hearing was confined to the issue of entitlement only. The appellant was represented by the president of Scona, Inc., who was not a lawyer and was appellant's only witness. At the close of appellant's case, the Government moved to dismiss the appeal for failure of appellant to present any evidence to support any further entitlement in addition to what the contracting officer had already awarded. The presiding member of the Board took the motion under advisement and put the Government to its proof. At the close of the hearing, the president of Scona, Inc., was recalled and allowed to offer any further evidence he might have inadvertently overlooked when presenting appellant's case.

*The Board's Decision of
May 6, 1977*

In its decision of May 6, 1977, 77-1 BCA par. 12,518, the Board found, among other things, that: The prior experience of the president of the contractor had been limited to grass seeding; he intended to subcontract at least 70 percent of the work, even though the contract permitted subcontracting only 66⅔ percent; neither the president of the contractor company nor his superintendent had an engineering background; his employees and subcontractors left the

project when disputes arose over lack of timely payment; because he lacked suitable equipment, he was forced to rent it at premium rates; and his lack of expertise resulted in delays, defective work, and other disruptions to the project. The Board held that these findings justified the default termination of the contract.

The Board also found, however, that the Government had unreasonably delayed the relocation of a powerline for nearly a month which contributed to the delay of the project and ruled, therefore, that the liquidated damage assessment in the amount of \$3,050 should not be sustained. Whereupon, the appeal was denied except as to the improperly assessed liquidated damages.

*The Second Board Decision of
Dec. 28, 1977, On Motion for
Reconsideration and Rehearing*

Following the Board's decision of May 6, 1977, appellant moved by three separate documents for reconsideration and for a new or further trial. In a 3 to 2 decision, the majority granted the motions, vacated the previous decision, ordered the transcript to be stricken but allowed it to be treated as tantamount to discovery depositions, and ordered the previous pleadings stricken allowing the parties to file a new complaint and a new answer. The parties were granted a new hearing as if the first hearing had never occurred. *Appeal of Scona, Inc.*, IBCA-1094-1-76 (Dec. 28, 1977), 84 I.D. 1019, 78-1 BCA par. 12,934.

The rationale of the majority opinion for granting the motions was substantially that: (1) The delay and liquidated damages issues blurred the distinction between entitlement and quantum, and a waiver of the quantum issue could not be found absent clear and convincing evidence that such a waiver was intended; (2) no hearing on quantum had been accorded appellant and the complex questions of concurrent fault and damages could be properly resolved only on a record encompassing both entitlement and quantum; and (3) appellant was not represented by counsel and asserted that several witnesses for various reasons were unavailable at the first hearing but would be available upon rehearing.

In strong dissenting opinions, the two dissenting members of the Board argued in substance that: (1) Appellant did not present, nor did the record contain, adequate legal bases for granting the motions; (2) appellant was afforded due process; and (3) that any new evidence appellant sought to offer at a new hearing was readily available at the time of, or in connection with, the first hearing.

The Second Hearing

A second hearing was held for 6 days at Carson City, Nevada, Sept. 11-19, 1978. This time appellant was represented by counsel, Mr. A. Wayne Lalle, Jr., of the firm of Lewis, Mitchell & Moore, Seattle, Washington, and Mr. Alva A. Har-

ris of Shelley, Idaho. The principal witness for appellant was again the president of Scona, Inc. He testified that his occupation was contractor and president of Scona, Inc., during the period mid-1973 until 1976. Only two other witnesses testified for appellant. They were Mr. Paul Eller, an engineer expert witness not personally involved in the project and not an employee of Scona, Inc., and Mr. Daniel J. Nelsons, C.P.A., an accountant for Scona, Inc.

In his opening statement, Mr. Lalle stated that the original claim as submitted by the appellant, and subsequently revised, totaled some \$533,000 and that he was orally amending the complaint to incorporate the request for a total of \$250,767.97.

The transcript was received by the Board Dec. 4, 1978, and the final posthearing brief on the merits, Apr. 4, 1979.

Letter Admitting Falsification of Testimony

On May 5, 1979, this Board received a personal, handwritten letter from the former president of Scona, Inc., set forth herein in haec verba:

May 5, 1979

Department of Interior
Board of Contract Appeals
Washington, D.C.

Re: Scona, Inc.
Pyramid Lake

Gentlemen:

At several times in a person's life the events of time make for review. Such is

the reason for this letter—a review of the part * * * [I] played in the construction of the sphion [*sic*] on project and the presentation of the facts in the hearings before the BCA. It is the testimony before the Board's member that I am concerned about.

Enclosed is the decision and conclusions by Judge Young on my personal bankruptcy; of which the details are important i.e. Judge Young concludes, as he correctly does, that Harris and Co. had complete control over my actions through the purse string (page 9) and ever constant threat to take my house and cause damage to my wife.

Since my wife is an invalid my concern was always to attempt cooperation and save the house for her better being. No sooner had I testified at Carson City than the bondsmen tried eviction from the house, took over Scona, Inc. in a power grab and did show me that their continual concern for me and especially my wife was none other than a facade to get my testimony [*sic*]; for they not only would get the house, business, etc but also the claim money.

Deep within my heart I have known that I lied upon the witness stand. This was because of the constant threat to take my home and hurt my wife. This threat no longer exists and lift the burden of error I must. Scona, Inc was incompetent—the job was mismanaged, it was not the sole fault of the government for the added expenses. Your inquiry into the Steamboat Job Scona, Inc had with the Bureau of Reclamation, Denver, Contract 70-C0019 will confirm the same mismanagement as at Pyramid Lake.

Responsibility for this gross mismanagement can not be held solely against me, for after careful reading of the decision enclosed of Judge Young, who heard a lot of testimony, you'll find the ever present hand of the bondsmen and Alva A. Harris.

What can I say—Scona, Inc was not the white hatted clean bunch of guys as my testimony would indicate but more real as the government portrayed [*sic*]

us—into a job without proper equipment, unskilled help, and nearly complete failure at management.

Sincerely

/s/

Following receipt of the foregoing letter the Board, on May 17, 1979, issued an order dismissing appeal without prejudice to reinstatement upon written application of appellant filed with the Board within 90 days after receipt of notification from the Board that the questions presented had been resolved. The order recited receipt of the May 5 letter and that since a violation of secs. 287 and 1001 of Title 18 of the *United States Code*, pertaining to making false claims against the Government, could be involved, the information was being forwarded through appropriate channels for investigation by the Department of Justice.

On the same day, the Chief Administrative Judge of the Board transmitted to the Solicitor's Office of the Department the following documents: (1) The May 5 letter received from Darrell M. Anderson; (2) a copy of a letter dated Feb. 1, 1979, from Alva A. Harris addressed to the Contracting Officer for the Bureau of Indian Affairs, stating that on *January 29, 1979*, an election of officers and directors took place whereby Darrell M. Anderson was removed as a director and as an officer and "no longer exercises any authority, agency or relationship with Scona, Inc.," and that Darrell L. Cook, Kent E. Carlson, and Alva H. Harris were elected directors and

Alva A. Harris and Gaye Forest elected president and secretary, respectively; and (3) a copy of the Board's order of dismissal without prejudice dated May 17, 1979. The transmittal letter mentioned the possible violation of the United States Criminal Code sections and states, "we are forwarding this information to your office for submission to the Department of Justice for investigation."

For reasons unknown to the Board, the foregoing information was not submitted to the Department of Justice, but instead to the Office of the Inspector General of the Department of the Interior. That office conducted the investigation of a possible criminal violation.¹

Upon learning of this referral, the Chief Administrative Judge, on May 25, 1979, wrote a memorandum to the Inspector General correcting a reference, in the May 17 transmittal memorandum, to sec. "289" of Title 18, U.S.C. to read, sec. "287."

The Investigation

On July 27, 1979, a special agent of the Inspector General's Office requested and received from the recorder of this Board the following additional documents relating to this appeal: (1) Findings of fact and decision by the contracting of-

ficer, dated Dec. 8, 1975; (2) The original transcript of the second hearing; (3) Copy of appellant's complaint dated Jan. 31, 1978; and (4) Copy of Government's answer dated Mar. 2, 1978. On Aug. 15, 1979, these four items were returned to the Board.

On Nov. 20, 1979, the Board received from the Acting Assistant Inspector General for Investigations copy No. 1 of the completed investigation with the admonition that the report was on loan to the Board and should be returned. The report itself was marked, "The reproduction of this report or any part thereof by any method whatever is prohibited by Interior Department regulation." The last sentence of the transmittal letter stated: "In accordance with 357 DM 1 requests for access to the report made under the Freedom of Information or Privacy Acts of 1974 shall be referred to the Inspector General for decision."

The investigation report was in the form of a memorandum from Special Agent, Mark Sucher, to the Acting Assistant Inspector General for Investigations. It consisted of two summary statements by Special Agent Sucher and a statement from the former president of Scona, Inc., in the form of an affidavit, indicating that it had been subscribed and sworn to before Special Agent, Harry T. McClain, at Greer, Arizona, on July 31, 1979. The summary statements were as follows:

The investigation revealed that * * * [subject] felt that the [sic] had perjured

¹ The Board has not been cited to any legal authority, and we know of none, under which the Office of the Inspector General has jurisdiction to investigate possible criminal violations by private citizens not employees of the Department.

himself because he testified that he was the President and Controlling Officer of Scona Inc., when in fact he was not.

[subject] was interviewed in Greer, Arizona, by Special Agent Harry T. McClain. * * * [Subject] stated that he had "lied" in his testimony before the Claims Board by claiming that he was President and Controlling Officer of Scona Inc., when he was not. * * * [He] attested that all the facts he gave in his testimony were truthful. He did admit that the only reason he stated that he "lied" on the witness stand was to attract attention.

The affidavit was generally self-serving. It related the history of Scona, Inc., and affiant's business relationships with Alva A. Harris and his bondsmen and how, through his indebtedness to them, they actually had controlled Scona, Inc. The only statements in the affidavit that seem to have any bearing on his testimony, which was the subject of the investigation, were as follows:

I testified at this hearing with the impression that I was the President of Scona Corporation and, as such, in control of the Corporation, but I subsequently found that I did not control the Corporation at all. After several days of testimony, a Federal Bankruptcy Judge found that after March 1, 1975, Alva Harris controlled with Darrel Cook and Thomas Christensen owners. Because I had testified as President and controlling officer of the Scona Corporation, I wrote a letter to the Board of Contract Appeals, U.S. Department of the Interior, Washington, D.C. and stated that I had lied upon the witness stand in the hearings concerning Pyramid Lake and the cost overruns on that job. The material facts in the testimony are true, but since I testified as the controlling officer of Scona Corporation, this was a lie. I testified concerning this claim because Mr. Alva Harris, Attorney-at-law and Secretary/Treasurer of Scona Corporation, told me

that I was President of the Corporation at the time the testimony was taken. * * *

The only reason that I testified at the Pyramid Lake hearings was to clear up my debts, but if I had known that I would be forced into bankruptcy by these people and that they would also get the fruits of my testimony, I would not have testified.

The investigation report does little to enlighten the Board with respect to the truth or falsity of the testimony. It does not show that he was ever directly confronted with the statements made in his May 5 letter, such as, "Scona, Inc was incompetent—the job was mismanaged, it was not the sole fault of the government for the added expenses," or with the text of the last paragraph of that letter which read: "What can I say—Scona, Inc was not the white hatted clean bunch of guys as my testimony would indicate but more real as the government portrayed [*sic*] us—into a job without proper equipment, unskilled help, and nearly complete failure at management."

On Feb. 4, 1980, the Board issued an order permitting application for reinstatement pursuant to previous order. In this order, the Board recited, among other things, that the report of investigation had been reviewed and returned to the Inspector General as requested, and that the necessary findings of the credibility of the testimony of the subject witness would be made and based upon the entire record on file in this case. The order than allowed appellant 90 days from date of receipt within which time to

apply for reinstatement of the appeal. Reinstatement was applied for by Alva A. Harris, one of the attorneys for appellant, on Apr. 18, 1980.

Upon reinstatement, the Chief Administrative Judge of the Board, realizing that the credibility issue was facing the Board as well as the attorneys for the parties, discussed by telephone, with one of the special agents of the Inspector General's Office, the matter of the restrictions placed upon the use of the investigative report. He pointed out that the restrictions destroyed any value that the report might otherwise have. Subsequently, on Apr. 25, 1980, the Inspector General of the Department enclosed with a memorandum to the Board a copy of the subject investigative report "for inclusion as a part of your hearings record," stating that "the matter is considered closed in this office," and advised that the Freedom of Information Act requests by Lewis, Mitchell & Moore, and Alva A. Harris for copies of the report were being honored.

Reinstatement of the appeal occurred on May 7, 1980, but a few days prior thereto, the Board was advised by telephone that the firm of Lewis, Mitchell & Moore of Seattle had withdrawn from the case and no longer represented appellant. The reinstatement order allowed counsel for both parties about 30 days to file briefs on the question of the credibility of the testimony. To assure equal access to the record, along with the order,

the Board enclosed a copy of the investigative report for Department counsel and copies of the May 5 letter for counsel of both parties.

Briefs, Discussion, and Findings

In the appellant's brief on the credibility issue, submitted pursuant to the reinstatement order, counsel, among other things, stated:

It is Scona's position that [the] letter of May 5, 1979, is one of vindictiveness, and a last attempt to reckon revenge upon his creditors and their attorney, Alva A. Harris. Knowing he had lost and must pay, he takes one last swing at them. He will obtain a cancellation of the claim and thus wipe out any possibility of the Bondsmen regaining some of the money used to finish the Pyramid Lake Contract. * * *

What we have here is a liar trying to harm and wreck vengeance upon others, but whose factual performance indicates good skill and management. * * * [He] is a liar. We don't deny that. Our position is that he didn't lie about the facts and workmanship of this contract. His lie was designed to destroy the fruits of this claim going to repay the losses of the Bondsmen. His personal vendetta against Mr. Cook, Mr. Christensen and Mr. Harris should not be allowed to ruin Scona, Inc.'s rightful claim in this matter.

In the Government's brief, submitted pursuant to the reinstatement order, Department counsel contended that the posthearing statements, of the witness, the May 5, 1979, handwritten statement, and the July 31, 1979, typewritten statement given to the agent of the Inspector General, should be made part of the record. The basis for

this contention were that the statements were an admission against interest; that the May 5, 1979, statement was an admission from the "heart" to the Board that he had lied under oath at the two hearings; that although the contract was with Scona, Inc., it was a one man small construction firm that incorporated to increase its bonding capacity and broaden its operations; and that the former president was the real party in interest throughout the contract performance. Department counsel advanced the further view that at the time of submitting the May 5, 1979, statement, the witness was not aware of the possible criminal or penalty repercussions thereof, and by his subsequent statement, when aware of the situation he had placed himself into, attempted to mitigate the gravity of the situation by limiting his perjury to his officership in the company. The final paragraph of the Government's brief on the credibility issue reads as follows:

So, while it would be ideal for the government to have the matter end with the May 5 admission, which the writer personally feels are [*sic*] correct, however, the crux of the situation is that all the testimony and statements deals with the credibility or lack thereof of * * * [the witness]. It is urged that the bottom line is that * * * [the witness] *has no credibility*. Absent his testimony, any hope the claimant has of succeeding is left in shambles. There is not one shred of credible evidence left on the part of the claimant relating to the performance of the contract. The parade of witnesses promised for the second hearing never materialized. No small wonder considering the

involvement of * * * [the witness]. The record is replete as to the incompetence of * * * [the witness] in the performance of the contract. He did not have a clue as to how to complete the project. Should the American taxpayer have to pay for such incompetency? Hopefully not. The contractor was compensated for additional work occasioned by the delay in moving the power poles. Scona is not entitled to any further compensation and the appeal should be denied again.

We have no problem with making the two subject statements part of the record in this case. Government counsel has requested it. Appellant's counsel has not objected to it. The statements were voluntarily made by the key witness for appellant. The Board inferred in its last two procedural orders that the statements would be treated as part of the record. Therefore, since both parties had equal access to the documents before submitting their final briefs, the Board rules that the May 5, 1979, letter received from the witness and the investigative report received from the Office of the Inspector General are admitted into the record.

This panel must now deal with the credibility issue. Government counsel said that the witness "has no credibility" and at one point used the term "perjury." On the other hand, appellant's counsel categorically stated that his own principal witness, and the only witness for appellant with respect to contract performance, "is a liar," but asserted that "he didn't lie about the facts and workmanship of the contract." We reiterate that portion of

the May 5 unsolicited letter to the Board where he wrote:

Deep within my heart I have known that I lied upon the witness stand. This was because of the constant threat to take my home and hurt my wife. This threat no longer exists and lift the burden of error I must. Scona, Inc was incompetent—the job was mismanaged, it was not the sole fault of the government for the added expenses.

We agree with Government counsel that the witness apparently attempted to mitigate the effect of the letter by his affidavit of July 31, 1979, when he stated that the only lie in his testimony pertained to his presidency and being in control of the corporation. The record shows that, although he was not have been in control, he was, in fact, president at the time he testified at the hearings. He was not replaced as president of Scona, Inc., until Jan. 29, 1979, some 4 months after the second hearings. His recantation with respect to contract performance was in general terms only. He did not specifically disavow the May 5 statement that "it was not the sole fault of the government for the added expenses." What is the Board to believe—the statements made to "lift the burden of error" or the recantation statements?

The foregoing scenario leads us to the conclusion that the testimony of appellant's key witness is unworthy of belief. We, therefore, feel compelled to find, and do find, that the testimony of the subject witness adduced at the hearings in this case, is not credible.

In light of this credibility finding, Government counsel would urge the Board to deny all of appellant's claims on the ground that the former president of Scona, Inc., was the only witness for appellant who testified with respect to contract performance and "absent his testimony, any hope the claimant has of succeeding is left in shambles." This argument suggests the application of the legal maxim, *falsus in uno, falsus in omnibus*, which means literally, false in one thing, false in everything. But this maxim has seldom been applied strictly. The general rule, recognized by statute in some jurisdictions, is that while the fact that a witness has willfully testified falsely as to material matter lays him open to suspicion and justifies the triers of fact in rejecting all of his testimony, except that which is corroborated by other evidence, they are not required to do so, and may accept such part of the testimony as they deem proper, notwithstanding the false statements.²

Thus, as triers of fact in the exercise of our discretion, we choose, considering all the circumstances of this case, to reject the subject testimony, except with respect to that part which has been corroborated.³ There was no corroboration by ap-

² For a general discussion of the case law dealing with the application of the maxim, *falsus in uno, falsus in omnibus*, see 98 C.J.S. *Witnesses* § 469 (1957).

³ This is consistent with the position taken by the Board in *Meva Corp.*, IBCA-648-6-67 (Aug. 18, 1969), 76 I.D. 205, 225, 226, 69-2 BCA par. 7,838 at 36,430.

pellant's other witnesses, since he was the only one testifying on the entitlement issues pertaining to contract performance. However, we do find corroboration by the Government concerning the added costs claimed by appellant in having to destroy and rebuild the canal embankment. Government counsel may have forgotten the concession made in his brief on the merits pertaining to that claim. On pages 8 through 9 thereof, he stated:

I would agree with Judge Steele's remarks at the close of the hearing that the contractor is entitled to additional costs in regard to embankment costs for that area he had to destroy in order to cut his diversion channel. I have been unable to determine if that was included in the additional costs allowed the contractor. It would appear that it was not. The cost amount offered by the contractor is, of course, unaudited but the government will defer to the Board as to the reasonableness.

Again, in summary on page 11, he wrote:

The government's position is quite clear. That is, the contractor, except for possibly the reconstructed embankment, has been allowed his *actual* costs including overhaul [*sic*] and profit for additional work that may have been occasioned by the delay caused by the presence of the powerline.

In appellant's posthearing brief, authored and submitted by Lewis, Mitchell & Moore of Seattle, Washington, the following points were made on pages 39 and 40 thereof: That the Government's project engineer characterized the progress of the embankment work as "excel-

lent" (4 Tr. 668); the increased cost of the embankment performance was not attributable to fault on the part of the appellant; and the additional cost incurred for destroying and rebuilding a portion of the canal embankment to accommodate the second diversion channel was \$10,500 (6 Tr. 959; App. Exh. 16 at 1). That figure, to the best knowledge of the Board, was not refuted by the Government. We find, therefore, that the Government concession on this claim item constitutes corroboration of the discredited testimony and is sufficient to permit an award for an equitable adjustment in the stated amount.

We find further that appellant has failed to sustain its burden of proof with respect to establishing entitlement to the remainder of its claims involved in this appeal. The total dollar amount of those claims, set forth in appellant's final brief on the merits, is \$238,474.14.

Decision

Wherefore, the appeal is denied except for the embankment claim of \$10,500, which is hereby awarded to appellant.

DAVID DOANE

Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW

Chief Administrative Judge

RUSSELL C. LYNCH

Administrative Judge

ROBERT H. COVINGTON ET AL.

55 IBLA 232

Decided *June 22, 1981*

Appeal from decisions of the Alaska State Office, Bureau of Land Management, rejecting various noncompetitive oil and gas lease offers.

Affirmed.

1. Alaska: Oil and Gas Leases—Alaska National Interest Lands Conservation Act: Generally—Oil and Gas Leases: Lands Subject to—Wildlife Refuges and Projects: Leases and Permits—Withdrawals and Reservations: Effect of

An offer to lease for oil and gas in the Arctic National Wildlife Refuge is properly rejected where the lands in the refuge have been withdrawn from the operation of the mineral leasing laws by either secs. 1002 or 1003 of the Alaska National Interest Lands Conservation Act. Standard offers to lease for oil and gas may not be construed as requests to undertake exploratory activities only. The only exploratory activities permitted in the Arctic National Wildlife Refuge are governed by sec. 1002 of the Act. Any requests to undertake exploratory activities are premature until the Secretary of the Interior has issued guidelines governing exploration in the refuge.

2. Alaska: Oil and Gas Leases—Words and Phrases

"Leasing." The word "leasing" in the phrase "no leasing * * * leading to production of oil and gas" in sec. 1003 of the Alaska National Interest Lands Conservation Act includes leasing for the purpose of exploratory activities.

APPEARANCES: Robert H. Covington, Alice L. Doyle, William T. Engwall, Margaret J. Engwall, Paula M. Benepe, John P. Culhane, Carl W. Lind, Gerald J. Culhane, Michael W. Morey, Thomas R. Culhane, Sherman G. Reynolds, Raymond E. Plummer, Jr., Duane R. Gorder, Lloyd Swenson, J. Michael Schachle, Stephen A. Schachle, Kevin R. Gorder, pro se; Robert R. Johnson, pro se, and for Paul N. Johnson and Edward J. Young; John Bradbury, Esq., Anchorage, Alaska, for Steve C. Holland.

OPINION BY
ADMINISTRATIVE JUDGE
HENRIQUES

INTERIOR BOARD OF
LAND APPEALS

Appeals have been taken from decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting oil and gas lease offers because the lands sought are within the Arctic National Wildlife Refuge (ANWR).¹ The decisions indicate that sec. 1003 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487 (Dec. 2, 1980), 94 Stat. 2371, 2452 (to be codified at 16 U.S.C. §§ 3101, 3143), prohibits the development of oil and gas in the refuge and thus, by mandate of the Congress, the Secretary of the Interior has no authority to issue oil and gas leases for lands within the refuge.

¹ For a list of appellants and lease offers, see Appendix A.

Because the identical situation is present in each appeal and because of the very great similarity in the statements of reasons submitted by the several appellants, we have, *sua sponte*, consolidated the appeals for consideration.

As a preliminary matter, we wish to comment on the appellants' contention that since the BLM decisions are based on the premise that the "Secretary has no authority to issue oil and gas leases within the Arctic National Wildlife Refuge," the decisions must be reviewed only on that basis and not on any other contentions which might have been made by BLM. It is well established that the Secretary of the Interior has broad plenary powers over disposition of public land and their resources, and that throughout the appeals process, so long as legal title to the land remains in the Government, there is continuing jurisdiction in the Department to consider all issues on land claims. *Schade v. Andrus*, 638 F.2d 122 (9th Cir. 1981); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364, 1367 (9th Cir. 1976). See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920). Upon assuming jurisdiction of an appeal, the Board of Land Appeals, as the authorized representative of the Secretary of the Interior, exercises his authority to consider the entire record in making a decision and the review is not limited to the theories of law upon which the parties have proceeded theretofore. *United*

States v. Gassaway, 43 IBLA 382 (1979). Appellants' reliance upon *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), is misplaced. The BLM decisions are not "agency decisions" as that term is used in *Chenery, supra*. The decision of this Board will be the "agency decision."

In their statements of reasons, appellants argue that BLM has misinterpreted sec. 1003 of ANILCA and urged that it does not interdict all leasing within the Arctic National Wildlife Refuge but only prohibits leasing which will lead to production of oil or gas. They contend that the Secretary is empowered to issue leases limited to exploratory activities.

Appellants reason that if Congress had intended to prohibit all forms of leasing, sec. 1003 would have provided that "production of oil and gas from and leasing and development of the Arctic National Wildlife Refuge are prohibited." Alternatively, appellants suggest that if Congress intended such a result, it could have omitted sec. 1003 and leasing would then be governed by other provisions of ANILCA. Instead, appellants note that Congress added "a separate oil and gas leasing section which specifically and exclusively governs the ANWR and which contains a clause barring only those forms of leasing and development 'leading to production.'" Appellants further contend that had Congress intended an outright prohibition of all leasing it would have used the language of total withdrawal typically applied to bar

activity on public land.² They note as well that sec. 1002(h) (6) states that the Secretary is required to recommend to Congress what areas should be opened "to development and production" of oil and gas and urge that, since the provision "does not ask for recommendations on which lands should be opened to leasing," the omission must mean that the refuge is already open to leasing.

Appellants continue by noting that Title X of ANILCA establishes a system intended to encourage exploratory activities by private parties and to provide Congress with adequate information to make an informed decision on the ultimate development of oil and gas in the refuge including the coastal plain. Finally, appellants suggest that Title X favors private parties for exploratory activity but the costs incurred by those parties will be high. Thus private parties must be given some incentive to participate in the exploration of ANWR. Appellants conclude:

Unless the Secretary authorizes exploratory leases pursuant to Section 1003, there will be no significant incentive for private exploratory activity. Therefore, the Secretary should exercise his authority to issue exploratory leases, which grant the holder the exclusive right to explore the designated area and which guarantee the holder the first option to

develop those lands ultimately opened to development.

[1, 2] After a thorough review of the applicable provisions and legislative history of ANILCA, we conclude that appellants have selectively examined Title X and conveniently ignored pertinent provisions of the title and that, therefore, their assessment of sec. 1003 and of the management scheme set out by the Congress for the Arctic National Wildlife Refuge is incorrect.

Title III of ANILCA establishes or redesignates various significant wildlife resource areas, including the Arctic National Wildlife Refuge, as units of the National Wildlife Refuge System. Sec. 304, which provides for the administration of the refuges generally, states in part that all public lands in each refuge are "withdrawn, subject to valid existing rights, * * * from all forms of appropriation or disposal under the public land laws, including location, entry and patent under the mining laws *but not from operation of the mineral leasing laws*" (sec. 304(c)). (Italics added.) The section also directs that the Secretary of the Interior not permit any use, including oil and gas leasing, in the refuge "unless such use * * * is compatible with the purposes of the refuge" (sec. 304(b)).

Sec. 702 of Title VII of ANILCA designates portions of units of the National Wildlife Refuge System as wilderness in accordance with the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976). Wilderness areas are generally open to mineral leasing

² The language typically employed to effect a withdrawal of the public domain is "withdrawn from all forms of appropriation or disposal under the public land laws, including location, entry and patent under the mining laws and from operation of the mineral leasing laws," and variations thereof.

until Dec. 31, 1983. 16 U.S.C. § 1133 (d) (3) (1976).

Title X of ANILCA reflects the particular determination by the Congress that a decision as to oil and gas developments in the Arctic National Wildlife Refuge be made only with adequate information and the full participation of the Congress. Following hearings on Alaska lands legislation, Congress was acutely aware that available information was conflicting and uncertain as to the extent of oil and gas resources in the refuge and as to the effect that oil and gas development would have on the widely recognized wildlife and wilderness values of the refuge. S. Rep. No. 413, 96th Cong., 1st Sess. 240-41 (1979), *reprinted in* [1981] U.S. Code Cong. & Ad. News 9244-45.

Title X, as it pertains to the Arctic National Wildlife Refuge, requires a two-pronged evaluation of the resources of the refuge. Sec. 1001 directs the Secretary of the Interior to carry out a systematic interdisciplinary study of certain Federal lands in Alaska, including the Arctic National Wildlife Refuge.³ The study will assess potential

oil and gas resources, review wilderness characteristics, study wildlife resources, and make recommendations as to future use and management of oil and gas resources, wilderness designation of the lands, and protection of the wildlife resources. The study and findings are to be submitted to the President and Congress no later than 8 years after enactment of ANILCA.

Sec. 1002 directs the Secretary to undertake a comprehensive and continuing assessment of fish and wildlife resources in the coastal plain of the refuge and an analysis of the potential impacts of oil and gas exploration, development and production on those resources. Sec. 1002 further authorizes a closely regulated program of exploratory activities on the coastal plain with the aim of identifying, by means other than drilling, those areas having oil and gas production potential and of estimating the volume of oil and gas within the coastal plain. The coastal plain is all of the nonwilderness portion of the refuge. Since it appears that all of appellants' lease offers fall within the coastal plain area, a closer examination of the details of Congress plan for the coastal plain is necessary.

Sec. 1002 first directs the Secretary to conduct a continuing study of fish and wildlife and their habitats with an initial report to be published within 18 months after Dec. 2, 1980, the date of enactment of ANILCA (sec. 1002(c)). In addition, within 2 years after enactment, the Secretary shall establish, by regulation, initial guidelines

³ Sec. 1001(a) states:

"The Secretary shall initiate and carry out a study of all Federal lands (other than submerged lands on the Outer Continental Shelf) in Alaska north of 68 degrees north latitude and east of the western boundary of the National Petroleum Reserve—Alaska, other than lands included in the National Petroleum Reserve—Alaska and in conservation system units established by this Act."

Although all units of the National Wildlife Refuge System are by definition conservation system units (*see* sec. 102(4)), the intent of Congress is clear that the lands in the Arctic National Wildlife Refuge are to be included in this study. S. Rep. No. 413, 96th Cong., 1st Sess. 239-40 (1979), *reprinted in* [1981] U.S. Code Cong. & Ad. News 9243-44.

governing exploratory activities on the coastal plain (sec. 1002(d)). After the initial guidelines are promulgated, any interested person and the Geological Survey may submit exploration plans to the Secretary for approval (sec. 1002(e)). Sec. 1002 prescribes specifically the procedures for plan approval, including publication of notice of any application and the text of the plan in the *Federal Register* and in newspapers of general circulation in Alaska. No exploration plan may be approved during the 2 years following Dec. 2, 1980 (see sec. 1002(e), (f), and (g)). A report to Congress must be submitted after 5 years (sec. 1002(h)). Finally, and significantly, subsection (i) states: "Until otherwise provided for in law enacted after [Dec. 2, 1980], all public lands within the coastal plain are *withdrawn from all forms of entry or appropriation under the mining laws, and from operation of the mineral leasing laws, of the United States.*" (Italics added.) We are not aware of any law enacted by the Congress since Dec. 2, 1980, which provides for any abatement of the withdrawal effected by sec. 1002(i).

Sec. 1003, on which appellants rely almost exclusively to support their arguments that leasing for exploration purposes in the Arctic National Wildlife Refuge is not prohibited, reads as follows: "Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to production of oil and gas from the range shall

be undertaken until authorized by an Act of Congress."

We find first that activities in the coastal plain of the refuge are governed by the more specific provisions of sec. 1002, which withdraws those lands from the operation of the mineral leasing laws except for the limited program of exploratory activities set out therein.

Second, we find appellants' interpretation of the language of sec. 1003 unconvincing. The phrase "leasing * * * leading to production," in the context of the Department's mineral leasing program pursuant to the mineral leasing laws, must be given a broader interpretation. The ultimate goal in the leasing program is production. Leasing activities authorized upon the issuance of an oil and gas lease, not involving a known geologic structure of a producing oil and gas field, necessarily include prospecting or exploring activities (see sec. 4 of the lease terms, Offer to Lease and Lease for Oil and Gas, Form 3110-1). Thus we conclude that the term "leasing" generally includes exploration activities. Contrary to appellants' assertion, we believe that if Congress had meant to prohibit only physical development and production, it would not have specifically used the term "leasing."⁴ This interpretation is the

⁴ Examination of the derivation of sec. 1003 supports our interpretation. The enacted language is a modified version substituted by the Senate for the original provision as found in House bill, H.R. 39, 96th Cong., 1st Sess., as reported by the House Committee on Interior and Insular Affairs, H.R. Rep. No. 96-97(I) (1979). The House bill left only nonwilderness lands in wildlife refuges subject to the

only one which is consistent with the studies authorized by Congress to assess the wildlife resources and potential oil and gas resources of the refuge and the concern of the Congress that it be fully informed of the potential ramifications of oil and gas activities in the refuge.

Each of the rejected oil and gas lease offers was filed on BLM Form 3110-1, styled "Offer to Lease and Lease for Oil and Gas (Sec. 17 Noncompetitive Public Domain Lease)." The lease terms set forth

operation of the mineral leasing laws. It designated a substantial portion but not all of the Arctic National Wildlife Refuge as wilderness. As part of a North Slope lands study, the Secretary of the Interior was directed to conduct an oil and gas exploration program on the nonwilderness portion of the refuge and then report to Congress. The original House version of sec. 1003 was a logical extension of the House scheme for the refuge. It read: "Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no development leading to production of oil and gas from the range shall be undertaken until authorized by an Act of Congress." Thus, for those nonwilderness lands in the refuge technically open to mineral leasing under the general provision of the bill, exploration was specifically authorized whereas development and production was prohibited.

The Senate substitute bill left all lands in wildlife refuges open to mineral leasing. Sec. 1002 of the Senate bill directed a study and exploration program for only the coastal plain of the refuge and otherwise withdrew the coastal plain from the operation of the mineral leasing laws pursuant to sec. 1002(1). The Senate then modified the House version of sec. 1003 to include a prohibition against "leasing" as well as "development leading to production of oil and gas." *Unlike the House provision*, sec. 1003 of the Senate bill, which was later enacted, applies to those lands not specifically covered by sec. 1002. We conclude therefore that the Senate amended the House language so that the remaining lands in the refuge would be fully protected from oil and gas activities until Congress could make an informed decision as to whether to allow oil and gas activities in the refuge.

on the form recite these rights of the lessee:

Section 1. Rights of lessee.—The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations or other structures necessary to the full enjoyment thereof, for a period of 10 years, and so long thereafter as oil or gas is produced in paying quantities; subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistent with the terms of this lease.

A lease issued on this form expressly conveys the right to produce oil or gas. Appellants' use of this form does not comport with their present arguments that they seek only a lease limited to exploratory activity, but with concomitant priority to a lease authorizing production of oil or gas if and when such activity may be authorized. If, at the time appellants submitted their offers, they were not seeking the right to produce oil and gas pursuant to sec. 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976), they should not have used BLM Form 3110-1, a lease which provides such right.

Furthermore, under sec. 1002 of ANILCA, the Secretary has no authority to issue mineral leases, including oil and gas leases, within the coastal plain of the Arctic National Wildlife Refuge at this time and no authority to approve explo-

ration plans for the area until 2 years after Dec. 2, 1980. Sec. 1002 (e) requires that any exploration plan submitted to the Secretary conform to guidelines established by the Secretary pursuant to this section. A necessary corollary, supported by the introductory language of subsection (e),⁵ is that no exploration plan may be submitted to the Secretary until after the Secretary has prescribed the regulatory guidelines for such exploratory activities.

We conclude that appellants' offers were properly rejected because the Secretary has no present authority to lease for oil and gas in either the coastal plain or the wilderness area of the Arctic National Wildlife Refuge. We reject appellants' assertion that their offers can be construed as offers to lease for exploratory activities. The statutory scheme is clear as to the steps which must occur before exploratory activities in the coastal plain may be undertaken. Submissions seeking the right to explore the coastal plain are premature at this time.

In addition, we are not aware of any statute or regulation which would allow appellants' lease offers to remain pending until such time as it is determined that oil and gas

leasing should be permitted on the subject lands. The longstanding rule of the Department is that applications may not be suspended to await possible availability of the land sought. *Harold L. Anderson*, 10 IBLA 293 (1973); *William J. Colman*, 3 IBLA 322 (1971). 43 CFR 2091.1.

Three appellants have suggested that BLM violated the terms of sec. 1009 of ANILCA by failing to include a statement as to the reasons that oil and gas leasing on the lands they sought would be incompatible with the purposes of the Arctic National Wildlife Refuge. We disagree. Sec. 1009 may not be read in isolation from the other provisions of ANILCA. The section presumes that the Secretary has the authority under the Mineral Leasing Act of 1920, *supra*, to lease and requires that in exercising the discretion to lease or not to lease in a wildlife refuge, which is not also a wilderness area, the Secretary states the specific reasons for any decision, including a statement on the compatibility of leasing with the purposes of the refuge. This is not the situation before us because here the Secretary does not have the authority to issue a lease.

Finally, several appellants requested that a hearing be held on the issues raised by these appeals. These issues do not involve disputes as to facts but rather involve questions of law: the interpretation of provisions of ANILCA and their applicability to appellants' offers.

⁵ Sec. 1002(e) begins:

"*Exploration Plans.*—(1) After the initial guidelines are prescribed under subsection (d), any person including the United States Geological Survey may submit one or more plans for exploratory activity * * * to the Secretary for approval. An exploration plan must set forth such information as the Secretary may require in order to determine whether the plan is consistent with the guidelines."

Appellants have had ample opportunity to present appropriate legal argument in support of their appeals to this Board in their statements of reasons. The requests for a hearing are denied. 43 CFR 4.415. See *John J. Schnabel*, 50 IBLA 201 (1980); *Dorothy Smith*, 44 IBLA 25 (1979), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decisions of the Alaska State Office are affirmed.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

APPENDIX A

<i>IBLA No./Appellant</i>	<i>Lease Offer</i>	<i>Lands Covered (Umat meridian)</i>
81-383 Robert H. Covington-----	F 72806	T. 7 N., R. 38 E., sec. 24.
	F 78207	T. 8 N., R. 33 E., sec. 24.
	F 72808	T. 7 N., R. 31 E., sec. 8.
	F 72809	T. 7 N., R. 26 E., sec. 1.
81-397 Steve C. Holland-----	F 72671	T. 9 N., R. 34 E., secs. 1-4, 9, 11, 15, 16, 21, 25, 28.
	F 72672	T. 9 N., R. 35 E., secs. 1, 4-7, 16, 17, 20, 28, 36.
	F 72674	T. 9 N., R. 39 E., secs. 20-23, 26, 29, 32, 35.
	F 72679	T. 5 N., R. 41 E., secs. 4, 9, 10, 16.
	F 72680	T. 8 N., R. 26 E., secs. 12, 13.
	F 72681	T. 8 N., R. 27 E., secs. 7, 18.
81-402 Alice L. Doyle-----	F 72677	T. 9 N., R. 34 E., secs. 5-8, 17-19.
	F 72678	T. 9 N., R. 35 E., secs. 29, 30.
81-403 Robert R. Johnson, <i>et al</i> ---	F 72670	T. 9 N., R. 34 E., secs. 10, 12, 22, 26, 27, 32-36.
	F 72673	T. 9 N., R. 35 E., secs. 18, 19, 30-32.
	F 72675	T. 7 N., R. 39 E. secs. 7, 18, 19.
81-404 William T. Engwall, <i>et al</i> ---	F 72691	T. 8 N., R. 27 E., secs. 17, 22, 26, 27.
		T. 8 N., R. 33 E., secs. 23, 27.
81-412 John P. Culhane-----	F 72739	T. 6 N., R. 24 E., secs. 5-8.
81-413 Carl W. Lind-----	F 72742	T. 8 N., R. 33 E., secs. 14, 22.
81-414 Gerald J. Culhane-----	F 72740	T. 8 N., R. 34 E., secs. 2, 12.
81-415 Michael W. Morey-----	F 72741	T. 8 N., R. 33 E., secs. 21, 28.
81-416 Thomas R. Culhane-----	F 72738	T. 7 N., R. 29 E., secs. 11, 12, 14- 16, 18, 19, S½ of sec. 17.
81-425 Paul N. Johnson, <i>et al</i> -----	F 72745	T. 8 N., R. 26 E., secs. 25, 36.
	F 72746	

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<i>IBLA No./Appellant</i>	<i>Lease Offer</i>	<i>Lands Covered (Umiat meridian)</i>
	F 72747	T. 8 N., R. 34 E., secs. 1-12.
	F 72748	T. 9 N., R. 33 E., sec. 22 and S½ of sec. 15.
81-439 Sherman G. Reynolds----	F 72676	T. 7 N., R. 39 E., secs. 16, 17, 30.
81-456 Raymond E. Plummer, Jr.	F 72743	T. 8 N., R. 35 E., sec. 18.
	F 72744	T. 7 N., R. 38 E., sec. 30
81-468 Duane R. Gorder-----	F 72668	T. 9 N., R. 33 E., secs. 13, 14, 23, 24.
	F 72669	T. 7 N., R. 39 E., secs. 27, 28, 33, 34.
81-475 Lloyd Swenson-----	F 72692	T. 8 N., R. 28 E., sec. 30 and 160 acres in sec. 29.
81-565 J. Michael Schachle-----	F 72821	T. 8 N., R. 38 E., secs. 27-29.
	F 72822	T. 8 N., R. 33 E., secs. 2, 12.
	F 72823	T. 7 N., R. 30 E., secs. 7, 10, 11.
	F 72824	T. 7 N., R. 25 E., sec. 15.
81-575 Stephen A. Schachle-----	F 72820	T. 7 N., R. 30 E., secs. 1, 12.
81-576 Kevin R. Gorder-----	F 72819	T. 9 N., R. 25 E., onshore acreage in secs. 5, 7-9.

**EARTH POWER CORP.
THERMAL RESOURCES, INC.**

55 IBLA 249

Decided June 22, 1981

Appeals from decisions of the Utah State Office, Bureau of Land Management, requiring the acceptance of certain stipulations as a condition for issuance of various geothermal resource leases. U 25336, U 37159, and U 37161.

Set aside and remanded.

1. Geothermal Leases: Discretion to Lease—Geothermal Leases: Stipulations

Decisions by BLM to require acceptance of special stipulations prior to leasing certain lands for geothermal resources will be upheld when the record shows that the decisions reflect a reasoned analysis of the factors involved based upon considerations of public interest,

and no sufficient reason to disturb the decisions is shown. Where Geological Survey has reported that lands sought are valuable for geothermal resources and Congress recently passed legislation in support of the development of geothermal resources, decisions requiring no surface occupancy stipulations will be set aside and the cases remanded for consideration of the feasibility of the leases issuing with less onerous stipulations.

APPEARANCES: P. Thomas Thornbrugh, Esq., for appellants.

*OPINION BY
ADMINISTRATIVE JUDGE
HENRIQUES*

*INTERIOR BOARD OF
LAND APPEALS*

Earth Power Corp. (Earth Power) appeals from the decision of the Utah State Office, Bureau of Land Management (BLM), dated Mar. 29, 1977, which required ap-

pellant to accept a special stipulation providing for no surface occupancy on certain lands as a condition precedent to issuance of geothermal resources lease U 25336, and to indicate willingness to accept a similar stipulation for other lands in the application, the absence of which would result in final rejection of the application as to such lands.¹

Thermal Resources, Inc., appeals from a similar Utah State Office decision dated Aug. 16, 1977, rejecting, in part, geothermal resources lease applications U 37159 and U 37161, as to a portion of the lands identified therein unless appellant indicated a willingness to accept special stipulations providing for no surface occupancy on those lands.²

¹ BLM's decision required the acceptance of a stipulation stating:

"No occupancy or other activity on the surface of lots 1-4, S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 4; lots 5, 6, W $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ Sec. 10; and the W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 15, T. 22 S., R. 6 W., SLM, Utah, is allowed under this lease."

In addition, it requested that Earth Power indicate whether it would accept a lease with a no surface occupancy stipulation for the S $\frac{1}{2}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ sec. 4; sec. 9; W $\frac{1}{2}$ sec. 10; and the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 15, T. 22 S., R. 6 W., Salt Lake meridian, Utah.

Lease application U 25336 also covered the E $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$ sec. 15, T. 22 S., R. 6 W., Salt Lake meridian, Utah. The decision indicated that action to process the application as to these lands would be taken after Earth Power responded to the stipulation requirement.

² Lease application U 37159 covered secs. 5, 6, 8, 17, T. 22 S., R. 6 W., Salt Lake meridian, Utah. Lease application U 37161 covered secs. 7 and 30, lots 1 through 4, E $\frac{1}{2}$ W $\frac{1}{2}$, NE $\frac{1}{4}$ sec. 18, and lots 1 through 4, E $\frac{1}{2}$ W $\frac{1}{2}$, SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 19, T. 22 S., R. 6 W., Salt Lake meridian, Utah.

The BLM decision held for rejection secs. 5, 8, and 17, T. 22 S., R. 6 W., Salt Lake meridian, from lease application U 37159 and the E $\frac{1}{2}$ sec. 7 and N $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE

The appeals have been consolidated by the Board because identical statements of reasons have been filed by each appellant, and the issues at bar are identical.

The BLM decision directed to appellant Thermal Resources, Inc., stated:

The National Environmental Policy Act of 1969 declared a national policy to encourage productive and enjoyable harmony between man and his environment and required all agencies of the Federal Government to include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official. Therefore, and under the regulations in 43 CFR 3200.0-6(a), the Sevier Lake geothermal environmental analysis has been prepared by the Richfield District Office, Bureau of Land Management.

The environmental analysis identifies * * * [part of the] lands [in the application] as having outstanding resource values incompatible with geothermal resources leasing: * * *.

These lands are within the Tabernacle Hill geological area. Tabernacle Hill consists of a volcanic crater, numerous lava tubes, a large cinder cone resembling the Mormon Tabernacle in Salt Lake City, and the surrounding lava flow. The cinder cone area consists of thirteen recent volcanic cones and craters plus the surrounding lava flows. The area is a favorite of school groups in all educational levels. A recreation area designation, a protective withdrawal, and facility development are proposed for the area.

A public meeting was held in Fillmore, Utah on March 9, 1977 to discuss a proposed withdrawal from the public land and mining laws. Approximately eighty

$\frac{1}{4}$ sec. 18, T. 22 S., R. 6 W., Salt Lake meridian from lease application U 37161, unless Thermal Resources, Inc., agreed to a no surface occupancy stipulation as to those lands.

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percent of the forty people attending the meeting favored the withdrawal.

Geothermal exploration, development and operation on or near this recreation site could reduce or destroy the recreational value of the site. Geothermal activity in close proximity would be out of harmony with and would detract from the interpretive and scenic values of this geologic site. Mainly, as with general recreation use, geothermal activity will draw new people into the area and recreational demands will increase at specific recreation sites. Littering, human waste problems and general deterioration of this site could occur. Also, geothermal production facilities could block access points and interfere with the physical use of this recreation area. Adjacent production noise could make the visiting of adjacent recreational sites unenjoyable. Producing steam adjacent to popular recreation areas could be dangerous. If a well should become uncapped, recreational visitors could be injured and the recreation site would have to be closed.

It has been determined that the public interest would best be served by invoking the discretionary authority of the Secretary of the Interior and holding the applications for rejection as [to] the * * * described lands. The only alternative to rejection of these lands is issuance of a lease which would prohibit occupancy and might *never* afford any beneficial use. *Chevron Oil Company*, 24 IBLA 159 (1976).

In addition to the above, the BLM decision sent to Earth Power also stated:

The regulations in 43 CFR 3200.0-6(b) state that special terms and conditions shall be developed to be included in leases as required to protect the environment, to permit use of the land for other purposes, and to protect other natural resources. Accordingly, it has been determined that a lease should not be issued for * * * [a portion of the lands identified in the lease application]

authorizing disturbance of the surface. A lease may be issued upon acceptance of the enclosed stipulation.

In each case, appellant was given 30 days to act to accept the restrictions outlined or suffer rejection of its application as to those lands.

In their statement of reasons, appellants contend that the requirement for a no surface occupancy stipulation constitutes improper use of discretion under 43 CFR 3200.0-6(b),³ without an affirmative showing that the criteria in that regulation have been considered. It is argued that the need for energy mineral deposits was not considered by BLM, contrary to the

³ The cited regulation 43 CFR 3200.0-6(b) reads as follows:

"(b) Prior to the final selection of tracts for leasing, the Director, or the head of the agency charged with the administration of the surface, if that officer so elects, shall, when appropriate, evaluate fully the potential effect of the geothermal resources operations pursuant to a leasing program on the total environment, fish and other aquatic resources, wildlife habitat and populations, aesthetics, recreation, and other resources in the entire area during exploratory, developmental, and operational phases. This evaluation will consider the potential impact of the possible development and utilization of the geothermal resources including the construction of power generating plants and transmission facilities on lands which may or may not be included in a geothermal lease. To aid him in his evaluation and selection of tracts the Director shall request and consider the views and recommendations of appropriate Federal agencies, may hold public hearings after appropriate notice, and shall, as appropriate, consult with State agencies, organizations, industries, and lease applicants, and shall consider all other potential factors, such as use of the land and its natural resources, the need for the energy mineral deposits, and socio-economic conditions consistent with multiple-use management principles. If a decision is made to lease, the Director shall develop special terms and conditions to be included in leases as required to protect the environment, to permit use of the land for other purposes, and to protect other natural resources."

mandate of the Congress as expressed in the legislative history of the Geothermal Steam Act of 1970.⁴ Further, they state that the required stipulations do not consider the principles of multiple use management set out in the Act.⁵ Finally, appellants contend that it has not been shown by BLM that the no surface occupancy stipulation is required to protect the environment, to permit use of the land for other purposes, or to protect the natural resources present. To the contrary, they state that the decisions holding that the area is a favorite of school groups in all educational levels and that a proposed protective withdrawal and facility development for recreation have not been shown to be incompatible with surface development of the geothermal resources. They contend the decisions are merely speculative as to possible harm to recreational visitors from the anticipated geothermal development.

In conclusion appellants' state that the dangers complained of will be minimized by the fact that all operations under geothermal resources leases must adhere strictly to and comply with the Geothermal Resources Operational Or-

ders promulgated by Geological Survey.

BLM has filed an application, U 40395, to withdraw from settlement, sale, location, and entry under the general land laws, including the mining laws, some 4,097 acres in T. 22 S., R. 6 W., Salt Lake meridian, including most of the land included in the three geothermal resources lease applications on appeal. The proposed withdrawal will not preclude mineral leasing. *See* 45 FR 40241 (June 13, 1980). In its request for permission to file the withdrawal application, BLM stated that the Geological Survey had reported that all the lands involved are valuable for geothermal resources.

In the Geothermal Energy Act of 1980, P.L. 96-294, §§ 602-644, 94 Stat. 763-77 (1980) (to be codified at 30 U.S.C. §§ 1501-1542), the Congress found specifically that domestic geothermal resources can be developed into regionally significant energy sources promoting the economic health and national security of the Nation. The Act authorized the Secretary of Energy to make project loans for geothermal reservoir exploration; to study and establish a reservoir insurance program; and to provide assistance for studies of the feasibility of accelerating development of certain geothermal resources.

[1] Generally, a decision by BLM to refrain from leasing certain lands for geothermal resources will be upheld when the record shows the decision to be a reasoned analysis of the factors involved based upon considerations of public inter-

⁴ 30 U.S.C. §§ 1001-1025 (1976).

⁵ Appellants cite to section 17 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1016 (1976), which states in part:

"Administration of this chapter shall be under the principles of multiple use of lands and resources, and geothermal leases shall, insofar as feasible, allow for coexistence of other leases of the same lands for deposits of minerals under the laws applicable to them, for the location and production of claims under the mining laws, and for other uses of the areas covered by them."

June 26, 1981

est and when no sufficient reason to disturb the decision is demonstrated. *California Geothermal, Inc.*, 37 IBLA 172 (1978). A decision to require acceptance of restrictive stipulations, rather than to refuse to lease, will be upheld on a similar basis. *Western Oil Shale Corp.*, 41 IBLA 105 (1979). Here, however, in light of the recently expressed policy of the Congress in support of the multiple use of land and of the development of geothermal resources, and in light of the report of the Geological Survey that the lands sought are indeed valuable for geothermal resources, we will remand the cases to BLM for further study to determine if geothermal resources leases can reasonably be issued with less onerous stipulations than the no surface occupancy stipulations originally proposed, without destroying the scenic and recreation values of the site.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded to the BLM State Director for Utah for further action consistent with this decision.

DOUGLAS E. HENRIQUES
Administrative Judge

We concur:

BERNARD V. PARRETTE
Chief Administrative Judge

EDWARD W. STUEBING
Administrative Judge

GRAFTON COAL CO., INC.

3 IBSMA 175

Decided June 26, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from the July 24, 1980, decision by Administrative Law Judge Tom M. Allen in Docket No. CH 0-175-R vacating Notice of Violation No. 80-I-37-7 issued under the authority of the Surface Mining Control and Reclamation Act of 1977 by OSM to Grafton Coal Co., Inc., for an alleged failure to eliminate a highwall in violation of 30 CFR 715.14.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

Even where approval has been granted to construct a cut-and-fill terrace, 30 CFR 715.14(b) (2) (iii) requires that no highwalls may be left.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

Prior presentation of credentials by an OSM inspector is not required when no employee of the operator is present on the minesite.

3. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally—Surface Mining Control and Reclamation Act of 1977: Bonds: Release of

Release of a portion of a permittee's performance bond by a state does not reduce OSM's authority to regulate that permittee.

APPEARANCES: Harold Chambers, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Mark Squillace, Esq., Glenda Hudson, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; James Rodney Christie, Esq., Clarksburg, West Virginia, for Grafton Coal Co., Inc.

*OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed a decision dated July 24, 1980, by Administrative Law Judge Tom M. Allen vacating Notice of Violation (NOV) No. 80-I-37-7. OSM had issued the notice of violation to Grafton Coal Co., Inc. (Grafton), under the authority of the Surface Mining Control and Reclamation Act of 1977 (Act)¹ for Grafton's alleged failure to eliminate a highwall at its minesite near Weston, West Virginia, in violation of 30 CFR 715.14.

*Factual and Procedural
Background*

Grafton had finished coal extraction activities in late 1978 and had undertaken reclamation efforts. West Virginia authorities had conducted their last inspection in Feb-

ruary 1979. Thus, on the occasion of the OSM inspection that gave rise to the notice of violation on Feb. 6, 1980, Grafton was no longer on the site as an active operator. An OSM inspector had met with Grafton personnel a week or more before the inspection, had reviewed maps and documents with them, and told them he intended to inspect the site soon. During the inspection he discovered what appeared to be a violation of the approximate original contour reclamation requirements, namely a failure to reclaim highwall along an approximately 525-foot portion of the site's 4,000-foot cropline. He issued the notice of violation accordingly.

Grafton applied for review of the notice of violation on Mar. 7, 1980, and the Administrative Law Judge held a hearing on May 30, 1980. At the hearing, two items of evidence were presented which had a bearing on the decision under review. First, a State inspector testified that he had given oral approval for a permit modification allowing Grafton to construct a cut-and-fill terrace along the portion of the cropline involved. Indeed, he testified that he "could almost say for certain that [he] instructed the foreman to construct this terrace" (Tr. 48). Second, Grafton submitted its request for approval of its grading work to the State in March 1979, and the State granted the approval in March 1980, simultaneously returning 82 percent of Grafton's performance bond.

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

Discussion

The Administrative Law Judge identified five issues in the case, one of which has been decided in a previous case involving Grafton and one of which we need not reach because of our answer to the question whether a violation of 30 CFR 715.14 can be sustained.² We reverse the Administrative Law Judge on the remaining three issues, as discussed below.

[1] The first issue is whether Grafton violated 30 CFR 715.14 by failing to eliminate all highwalls. This issue was related to the question whether Grafton had been granted approval for a cut-and-fill terrace in accordance with 30 CFR 715.14(b)(2). Even assuming it had been granted such approval, Grafton would have to eliminate all highwalls: 30 CFR 715.14(b)(2)(iii) provides that in "no case may highwalls be left as part of terraces."³ OSM's evidence consisted of testimony of two inspectors and two sets of photographs (Tr. 9-13, 27-30; Exhs. 4-9, 10-12). These photographs clearly show from 3-12 feet of vertical rock faces with unconsolidated material at the bottom (defined as talus at the hearing). Such faces fall within the definition

of highwall at 30 CFR 710.5 when they are created during mining. *Cf. Grafton Coal Co., Inc.*, 2 IBSMA 316, 87 I.D. 521 (1980).

Grafton's testimony in response was that these areas were the back-slope of the terrace, although it conceded they would be hard to distinguish from highwall (Tr. 41-42). The testimony of the State inspector who was present for most of the reclamation was that he did order the construction of the terrace but that the 525-foot area was probably highwall that had been created during mining and not been eliminated (Tr. 48, 54).

The Administrative Law Judge held that Grafton successfully carried its ultimate burden of persuasion. We do not agree. OSM's evidence constituted a prima facie case of failure to eliminate all highwalls. Grafton's response was insufficient to refute OSM's evidence.

[2] At the hearing Grafton moved to vacate the NOV on the grounds that the OSM inspectors did not present credentials to an employee of Grafton before entering onto its property. The Administrative Law Judge denied the motion at the hearing but reconsidered in his opinion and held that it should have been granted because no extraordinary circumstances existed to excuse entry without presenting credentials (Decision at 8-9). *See Consolidation Coal Co.*, 1 IBSMA 273, 86 I.D. 523 (1979); after remand, *Consolidation Coal Co.*, 2 IBSMA 21, 87 I.D. 59 (1980).

² Those issues were whether a permit must be modified in writing before a cut-and-fill terrace may be constructed in accordance with 30 CFR 715.14(b)(2) and whether the approval under that regulation had been properly granted. In *Grafton Coal Co., Inc.*, 2 IBSMA 316, 87 I.D. 521 (1980), we held the answer to the first question was "no."

³ See also *Tollage Creek Elkhorn Mining Co.*, 2 IBSMA 341, 87 I.D. 570 (1980).

Although we agree that there are no extraordinary circumstances in this case, as there were in *Consolidation*, the question is "whether, objectively, entry without prior presentation of credentials was justified." *Consolidation Coal Co.*, *supra*, 2 IBSMA at 24, 87 I.D. at 61 (1980). In this case no Grafton employee was on the site on either of two occasions when an inspector arrived. Under these circumstances entry without presentation of credentials is justified. As the Administrative Law Judge noted in his opinion, "as a practical matter, [prior presentation of credentials] would only have delayed the inevitable reinspection of the notice of violation for the same offense" (Decision at 9). Our decisions in *Consolidation* were not intended to prevent or delay inspections when no employee of an operation is present.⁴

[3] The Administrative Law Judge phrased the last issue as "when a percentage of a bond is released, what effect does that have on the jurisdiction of OSM?" (Decision at 7). His answer was that OSM retains jurisdiction only to enforce regulations in the initial program that were not the subject of the state's release of the performance bond.

Again, we cannot agree. We note initially that OSM issued the notice of violation involved in this case before West Virginia approved the release of part of Grafton's performance bond. The

State's later action does not affect OSM's earlier enforcement action. Further, the State's approval was not only partial but conditional. Finally, as we have previously held, the fact that a permittee is subject to state regulation involving any of the requirements of the initial program authorizes OSM to exercise its dual regulatory jurisdiction with respect to all of those requirements. *James Moore*, 1 IBSMA 216, 221, 86 I.D. 369, 372 (1979).⁵ The fact that a state releases part of a permittee's bond does not of itself reduce OSM's authority to regulate that permittee.

The July 24, 1980, decision vacating Notice of Violation No. 80-I-37-7 is reversed.

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

FARMINGTON COAL CO.

3 IBSMA 182

Decided June 29, 1981

Petition by the Office of Surface Mining Reclamation and Enforcement for review of the Aug. 25, 1980, decision

⁴ See also *Capitol Fuels, Inc.*, 2 IBSMA 261, 87 I.D. 430 (1980); *Consolidation Coal Co.*, *supra*, 1 IBSMA at 276, 86 I.D. at 525 (1979).

⁵ See also *Dennis E. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979). The dual role of the Federal Government has been well established. See S. Rep. No. 95-128, 95th Cong., 1st Sess. 57 (1977); *Dayton Mining Co., Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979); *Cravat Coal Co., Inc.*, 2 IBSMA 249, 259, 87 I.D. 416, 421 (1980); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, No. 79-1538, slip op. at 4 (Sup. Ct. June 15, 1981).

of Administrative Law Judge Tom M. Allen, Docket No. CH 0-92-P, vacating Notice of Violation No. 79-I-38-58 for failure to show authority to regulate respondent's operation during the initial regulatory program.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface Coal Mining Operations." Extraction of coal from a coal refuse pile is an activity which falls within the definition of "surface coal mining operations," as contained in revised Part 700, and OSM has authority to regulate such an operation during the initial regulatory program.

APPEARANCES: John B. Woodrum, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Cecil W. Taylor, Esq., Martin, Taylor, Fralin, Freeman & Perrow, Lynchburg, Virginia, for Farmington Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of the Aug. 25, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-92-P. That decision vacated Notice of Violation No. 79-I-38-58 on the grounds that

OSM had no authority to regulate respondent's operation during the initial regulatory program. For the reasons set forth below, we reverse that decision.

Factual and Procedural Background

The parties stipulated before the Administrative Law Judge as follows: Farmington Coal Co. (Farmington), the respondent, is a registered limited partnership and owns an 18-acre tract of land in Marion County, West Virginia, upon which is located a "gob" or coal refuse pile; the gob pile was recovered from the earth prior to Aug. 3, 1977, and contains mined coal unsuitable for marketing in its present condition; the coal refuse pile is owned by Marion Pallet Co., a West Virginia corporation; Farmington constructed, owns, and operates on the property a coal preparation facility at which the gob is processed by being crushed, screened, washed, cleaned, and tipped, recovering 40 percent coal from the refuse material, the remainder of which is disposed of in another area off the site; 30 tons of clean coal per hour pass through the preparation facility for which Farmington pays a royalty to the Marion Pallet Co. on each ton that enters interstate commerce; the only permit Farmington has is a water pollution control permit No. P-5942-77 issued Dec. 5, 1977; and except for the above-described operation, Farmington has no other coal mine interest and is not legally or physi-

cally associated with any other coal mining operation, nor does it process any material through its preparation facility except the coal refuse physically located on the property.

On Dec. 5, 1979, OSM inspected Farmington's operation and issued Notice of Violation No. 79-I-38-58, citing two violations of the Surface Mining Control and Reclamation Act of 1977 (Act).¹ Violation 1 was issued for failure to cause all surface drainage from the disturbed area to pass through a sedimentation pond or a series of sedimentation ponds before leaving the disturbed area in violation of 30 CFR 715.17(a). Violation 2 was issued for failure to post mine identification signs as required by 30 CFR 715.12(b). A proposed civil penalty assessment in the amount of \$1,780 was issued to Farmington for these violations by the OSM Assessment Office. On Feb. 19, 1980, Farmington paid the proposed civil penalty into escrow and filed a petition for review of OSM's enforcement actions pursuant to 43 CFR 4.1150.

The parties stipulated the relevant facts and moved to submit the issue of OSM's authority to regulate Farmington's operations to the Administrative Law Judge, who on May 28, 1980, granted the parties' motion and set a briefing schedule. On Aug. 25, 1980, after consideration of the parties' briefs, the Administrative Law Judge issued a decision vacating Notice of Violation No. 79-I-38-58, finding that

OSM had no authority to regulate Farmington's operation during the initial regulatory program because it did not fall within the definition of a "surface coal mining operation" in 30 CFR 700.5.

On Sept. 24, 1980, OSM filed a petition for discretionary review of the decision which the Board granted on Oct. 7, 1980. Thereafter, both parties filed timely briefs.

Discussion and Conclusions

The Administrative Law Judge held:

[W]here the notices of violation issued while the State of West Virginia was under permanent regulations, there is no question but what the issue would be resolved in favor of the respondent [OSM] * * *.

It would appear that since the Secretary did not see fit to include gob or refuse piles within the interim regulations, while specifically including them in the permanent regulations, no expansion of the definition of surface mining operations was intended at this time to include operations such as Farmington. [2]

[1] Although he may have been misled by the parties' brief,³ the Administrative Law Judge's conclusion is incorrect. The definition of "surface coal mining operations" was amended on Mar. 13, 1979, by adding the language "and *Provided further*, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse

² Aug. 25, 1980, decision in Docket No. CH 0-92-P at 4.

³ Both parties apparently relied on the definition of surface coal mining operations as it appeared at 42 FR 62676 (Dec. 13, 1977), before it was amended early in 1979. See OSM Brief at 2; Farmington Brief at 2.

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

June 29, 1981

piles."⁴ (30 CFR 700.5; 44 FR 15315 (Mar. 13, 1979).) This definition was made applicable during the initial regulatory program effective Apr. 12, 1979.⁵ (44 FR 14902 (Mar. 13, 1979); 44 FR 15485 (Mar. 14, 1979).) Therefore, Farmington was subject to OSM's regu-

lation when it was inspected on Dec. 5, 1979.

The Administrative Law Judge's decision of Aug. 25, 1980, is reversed, and the case is remanded for determination of the proper civil penalty assessment.

NEWTON FRISHBERG

Administrative Judge

WILL A. IRWIN

Chief Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

⁴ The addition of this proviso was intentional, as is indicated by the following comment from the preamble to the Mar. 13, 1979, regulations:

"Surface coal mining operations. The definition of surface coal mining operations follows the statutory definition, except that it includes in a proviso clause reference to extraction of coal from coal refuse piles as falling within the definition. The proposed regulation also included extraction of coal from refuse piles, but placed the relevant language in the main text of the definition.

"1. A number of comments received by OSM recommended deletion of 'extraction of coal from coal refuse piles.' Although this change would make the definition conform to the definition in Section 701(28) of the Act, it would reintroduce the uncertainties about the regulatory coverage of mining of refuse piles. Mining of refuse piles can be as environmentally harmful as any other mining; but, like the remaining of previously mined areas, if mining and reclamation are done correctly there can be a substantial improvement. Analysis of the statute and legislative history has convinced the Office that such extraction is an operation intended to be regulated under the Act. Congress specifically exempted certain mining activities in 701(28) and 528 of the Act. Rather than including remaining of refuse piles among the exemptions, Congress wrote a comprehensive definition of surface coal mining operations. Therefore, OSM has decided not to change the definition." 44 FR 14914 (Mar. 13, 1979).

⁵ The definition of surface coal mining operations previously applicable to the initial regulatory program was contained in 30 CFR Chapter VII Part 700 as one of the "General" regulations. (42 FR 62676 (Dec. 13, 1977).) The Mar. 13, 1979, amendment of 30 CFR Chapter VII recodified and revised Part 700. (44 FR 15312 (Mar. 13, 1979).) The revised definition appears in 30 CFR 700.5 as part of Subchapter A—General regulations. Subchapter A is "intended to serve as a guide to the rest of the Chapter and to the regulatory requirements and definitions generally applicable to the programs and persons covered by the Act." (Italics added.) 30 CFR 700.1(a).

GERTRUDE E. SHERMAN v. ACTING AREA DIRECTOR, PORTLAND AREA OFFICE, BUREAU OF INDIAN AFFAIRS

9 IBIA 25

Decided June 29, 1981

Appeal from decision by Acting Area Director declaring mother of deceased Klamath Indian to be decedent's sole heir entitled to decedent's share of judgment funds awarded the Klamath Tribe.

Reversed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally—Indian Probate: Klamath Tribe—Indian Tribes: Judgment Funds

While it is true that the Klamath Termination Act, Aug. 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1976), rendered inapplicable to Klamath tribal members the Secretary's usual jurisdiction over Indian heirship determinations as set

forth in 25 U.S.C. §§ 372-373 (1976) (*see* 25 U.S.C. § 564h), Congress, by the more recent Act of Oct. 1, 1965, 79 Stat. 897, 25 U.S.C. §§ 565-565g (1976), specifically empowered the Secretary of the Interior to determine the rightful heirs of deceased Klamath enrollees entitled to a share of judgment funds payable from the United States for the limited purpose of seeing that such funds are distributed to the heir or heirs so determined.

2. Bureau of Indian Affairs: Administrative Appeals: Generally—Indian Probate: Klamath Tribe

The Secretary has no statutory authority to pay creditors' claims against estates of deceased Klamath Indians out of judgment funds distributable by the Secretary under the Act of Oct. 1, 1965, 79 Stat. 897.

APPEARANCES: Edwin D. Harris, Esq., for appellant Gertrude E. Harrington Sherman; Kurt Engelstad, Esq., for appellee Anna S. Nickels, (at hearing); Anna S. Nickels, pro se, after hearing; Vernon Peterson, Jr., Esq., Office of the Regional Solicitor, Portland, Oregon, for the Department.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

This appeal arises from a decision rendered May 22, 1979, by the Acting Area Director, Portland Area Office, Bureau of Indian Affairs, determining the heirship of Herman Gene Sherman, deceased Klamath enrollee No. 1782. The Acting Area Director's heirship determination was rendered under delegated authority from the Secretary, who, pursuant to the Act of

Oct. 1, 1965, 25 U.S.C. § 565a(b) (1976), is required to determine the heirs of any deceased Klamath enrollee entitled to a share of certain judgment funds awarded the Klamath Tribe. The heirs so found by the Secretary are thereupon considered legal successors to the decedent's distributive share of the fund.

In this case, the Acting Area Director held Anna S. Nickels, surviving mother of Herman G. Sherman, to be decedent's sole heir. In reaching this conclusion, the Acting Area Director rejected the claim of Gertrude E. Harrington Sherman, appellant herein, that she was the decedent's surviving spouse. Specifically, the Acting Area Director held that appellant could not have been married to Herman Sherman because there was no evidence that she had obtained a divorce from a prior husband identified as John Jordan.

The Acting Area Director's decision was appealed by Gertrude E. Sherman to the Commissioner of Indian Affairs pursuant to provisions of 25 CFR Part 2. By memorandum dated Oct. 22, 1979, Acting Deputy Commissioner of Indian Affairs, Sidney Mills, referred the appeal to the Board of Indian Appeals for resolution pursuant to 25 CFR 2.19(a) (2).

Upon receipt of the administrative record, it was apparent to the Board that the Acting Area Director's decision was reached without the benefit of any evidentiary hearing. In light of the factual controversies involved, it was deemed

June 29, 1981

appropriate by the Board to refer this case to the Hearings Division of the Office of Hearings and Appeals for a fact-finding hearing and issuance of a recommended decision by an Administrative Law Judge. Such referral was ordered by the Board on Oct. 29, 1979, pursuant to the authority of 43 CFR 4.361(a) (1979), *as amended*, Jan. 23, 1981, 46 FR 7334, 7337 (§ 4.337) (1981).

An evidentiary hearing was held by Administrative Law Judge Robert C. Snashall on Apr. 16, 1980, in Portland, Oregon. Gertrude E. Sherman, appellant, and Anna S. Nickels, appellee, were represented by counsel at this hearing. On Sept. 9, 1980, Judge Snashall issued his findings and recommended decision. Therein, he concluded that the Office of Hearings and Appeals, including the Board of Indian Appeals, has no jurisdiction to enter an heirship determination in this case; assuming such authority does exist, Judge Snashall recommended that the Board reverse the Acting Area Director's heirship determination and hold for the appellant. All interested parties were allowed to file exceptions to the recommended decision. By memorandum dated Sept. 26, 1980, counsel for the Office of the Regional Solicitor, United States Department of the Interior, Portland, Oregon, filed a statement disagreeing with Judge Snashall's jurisdictional ruling. By letter dated Oct. 14, 1980, counsel who represented appellee Anna Nickels at the evidentiary hearing informed the Board that any further appearances by appellee in this matter

would be accomplished by her, *pro se*. The Board received exceptions to the recommended decision from Anna Nickels, *pro se*, on Oct. 10, 1980. No exceptions have been filed by appellant.

Jurisdiction

For the proposition that the Office of Hearings and Appeals lacks jurisdiction to enter a final heirship determination in this case, including thereby a declaration of succession to decedent's share of judgment funds awarded the Klamath Tribe, Judge Snashall stated as follows:

It should be noted at the outset, however, the Klamath Termination Act of August 13, 1954, 68 Stat. 718, withdrew Klamath probate matters from application of the general Indian probate and other applicable laws. 25 U.S.C. 564(h). This general withdrawal of Federal jurisdiction over members of the Klamath Tribe was further buttressed by the Act of August 15, 1953 (commonly known as Public Law 280), 667 [sic] Stat. 588, 28 U.S.C. 1360 (1970), which is essence, *inter alia*, gave civil and criminal jurisdiction over all Indian country within the state of Oregon to the said state with the exception of the Warm Springs Indian Reservation. The Act of October 1, 1965, *supra*, which by section 565a(b) provides for distribution of judgment funds to members of the Klamath Tribe, mandates that "a share payable to a deceased enrollee shall be paid to his heirs or legatees upon the filing of proof of death and inheritance satisfactory to the Secretary of the Interior, who's [sic] findings and determinations upon such proof shall be final and conclusive." The Secretary's authority to make these determinations was delegated to the Area Director, Portland Area Office, Bureau of Indian Affairs. See 30 F.R. 14335 (November 16, 1965);

10 BIAM 2.3A. The undistributed judgment funds are not to be paid to a deceased Indian's estate, but rather the Act provides that such funds are to paid directly to the heirs or legatees of the decedent as determined by the Secretary. Such funds do not therefore become a part of the decedent's trust estate, nor do they take on the character of Indian trust monies, and are by virtue of the above statutes distributable through state court probate proceedings. In fact, it appears the Office of Hearings and Appeals has no jurisdiction whatsoever in these proceedings and that the Area Director should deposit the share of judgment funds applicable to decedent, and others similarly situated, with the appropriate state court for its determination of heirs or devisees. (cf: Act of September 21, 1968, (Public Law 90-507), 82 Stat. 860, (California Judgment Funds); the Act of May 21, 1970 (Public Law 91-259), 84 Stat. 253 (Umatilla Judgment Funds). Clearly, Congress did not intend as to distribution of Klamath judgment funds the applicability of 43 CFR Part 4 nor departmental decisions in accordance therewith. (cf: Act of July 1, 1973, 87 Stat. 99 as affected by the Act of October 19, 1973 (Public Law 93-134), 87 Stat. 466.) However, inasmuch as the undersigned cannot determine jurisdiction the hearing was held as directed by the Board.

[1] The Board is unable to follow the logic of the above recommended findings and conclusions. While it is true that the Klamath Termination Act, 25 U.S.C. §§ 564-564x (1976), rendered inapplicable to Klamath tribal members the Secretary's usual jurisdiction over Indian heirship determinations as set forth in 25 U.S.C. §§ 372-373 (1976) (*see* 25 U.S.C. § 564h), Congress, by the more recent Act of Oct. 1, 1965, 79 Stat. 897, specifically empowered the Secretary of the Interior to determine the rightful

heirs of deceased Klamath enrollees entitled to a share of certain judgment funds payable from the United States for the limited purpose of seeing that such funds are distributed to the heirs so determined by the Secretary. The relevant provisions of the Act of Oct. 1, 1965, as codified in 25 U.S.C., state:

§ 565

The Secretary of the Interior is authorized and directed to distribute in accordance with the provisions of this subchapter the funds appropriated in satisfaction of a judgment obtained by the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, hereinafter called the Klamath Tribe for the purposes of the administration of this subchapter, from the Indian Claims Commission against the United States in docket numbered 100 * * *.

§ 565a

* * * * *

(b) a share payable to a deceased enrollee shall be paid to his heirs or legatees upon the filing of proof of death and inheritance satisfactory to the Secretary of the Interior, whose findings and determinations upon such proof shall be final and conclusive * * *.

§ 565g

The Secretary is authorized to prescribe rules and regulations to carry out the provisions of this subchapter.

There is nothing ambiguous in the foregoing statutory provisions concerning the authority of the Secretary to determine heirs of deceased Klamath enrollees for the purpose of distributing judgment fund shares to those entitled thereto. Sec. 565a(b) clearly contemplates that the Secretary make "findings and determinations" re-

garding inheritance. Had Congress intended for the Secretary to merely defer to state court inheritance rulings, it could easily have done so. Of course, state probate determinations with respect to property of deceased Klamath Indians may be considered by the Secretary, along with other kinds of proof, in reaching an heirship decision under 25 U.S.C. § 565a(b).

In accordance with the statutory authority to promulgate appropriate rules to implement the Act of Oct. 1, 1965, the Office of the Secretary delegated to the Area Director, Portland Area Office, Bureau of Indian Affairs, the authority to perform the functions vested in the Secretary by the 1965 Act. *See* 30 FR 14335 (Nov. 16, 1965); 10 BIAM 2.13A. Because administrative actions of area directors are appealable under Department regulations to the head of the Bureau of Indian Affairs and to the Board of Indian Appeals, it was not only appropriate but required by law that the Area Director's decision at issue in this case be considered an appealable action. *See* 25 CFR 2.19.

While this probate controversy is the first of its kind to reach the Board of Indian Appeals, the Board is no stranger to probate disputes. It is a regular function of the Board to review inheritance decisions made by Indian probate administrative law judges who probate the estates of Indians who die possessed of trust or restricted property. Pursuant to 25 U.S.C. § 348 (1976), the Department is required to apply state laws of descent

and distribution in ascertaining the heirs of Indians who, as in the case at bar, die intestate. The hearing held in this case was conducted by the Indian probate judge most familiar with Oregon State law. All things considered, therefore, the procedural steps taken by the Department in this matter have followed a logical course, within the bounds of Departmental rules, to secure a fair and just result.¹

In accordance with the above discussion, Judge Snashall's opinion that the Board of Indian Appeals lacks jurisdiction in this appeal is rejected.

Findings and Conclusions Regarding Heirship

The Board has examined the complete record in this case, including the Acting Area Director's initial decision, the transcript of hearing held by the Administrative Law Judge, all exhibits of record, the recommended decision issued Sept. 9, 1980, and comments of the parties subsequent thereto. Based on this review, we accept the recom-

¹ it would be preferable, in the Board's opinion, if special rules existed allowing for inheritance determinations in Klamath judgment fund cases which correspond to the Department's general Indian probate procedure codified at 43 CFR Part 4, Subpart D. Specifically, it would seem more desirable to have an evidentiary hearing in the first instance presided over by an Administrative Law Judge, not an area director, with a right of appeal to this Board from such heirship determination. However, the due process rights of the parties to this proceeding have not been violated where, as here, an area director's heirship ruling was appealed, an evidentiary hearing held, and a final decision entered following an opportunity for the submission of briefs by all concerned.

mended findings and conclusions of Judge Snashall to the effect that Gertrude E. Sherman, not Anna Nickels, is the lawful sole heir of Herman G. Sherman.

It was proven by Gertrude Sherman that she married the decedent on Mar. 13, 1973, at a ceremony held in Vancouver, Washington (Exh. A-5, Tr. of Hearing). Based on evidence supplied by Anna Nickels, the Acting Area Director held that this marriage was invalid because of a showing that Gertrude Sherman was married to John R. Jordan at the time of her alleged marriage to the decedent. The foregoing holding was entered without any opportunity for appellant to refute the evidence submitted by appellee and relied upon by the Acting Area Director in reaching his decision. It was established at the hearing of Apr. 16, 1980, that Anna Nickels had altered a certificate showing the marriage of one Gertrude L. Sherman to John R. Jordan on Mar. 17, 1970, by changing the "L" to an "E." Anna Nickels admitted that she made the alteration of this significant piece of evidence (Tr. 94). But for the resourcefulness of appellant who tracked down Gertrude L. Sherman in California and brought her to the hearing, this incredible action of Anna Nickels might never have come to light.²

² Anna Nickels attempted to justify her fraudulent action on grounds that she had not been able to obtain satisfaction on this probate dispute for over 6 years and that she had been told that Gertrude E. Sherman had, in fact, been married to John R. Jordan (Tr. 94). The record also reflects a bitter relationship between Anna Nickels and appellant which was no doubt aggravated when appellant was arrested for the shooting of Herman Sher-

The Board hereby adopts as its own findings and conclusions all other recommended findings and conclusions of Administrative Law Judge Snashall regarding appellant's marital relationship with decedent.

[2] The Board specifically rejects the recommended findings and conclusions of Judge Snashall that costs incurred by appellee for the burial of her son may be reimbursed by the Bureau of Indian Affairs from the judgment fund share to be paid appellant. There is no basis for the payment of such claims in a proceeding of this type.³

The Area Director, Portland Area Office, Bureau of Indian Affairs, is directed to take whatever actions are necessary to effectuate the holdings of this opinion. Pursuant to the provisions of 43 CFR 4.1, this decision is final for the Department.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

man on Dec. 25, 1974. Following a preliminary examination on Mar. 13, 1975, in *State of Montana v. Gertrude Harrington Sherman*, Ravalli County, Montana, appellant was released without charge concerning this incident.

³ This "probate" case stems from the narrow duty of the Secretary to see that certain judgment funds awarded members of the Klamath Tribe go to such members or their lawful heirs as determined by the Secretary. 25 U.S.C. §§ 372-373, which the Department has construed as allowing the payment of claims against the estates of deceased Indians (see *Estate of John Joseph Kipp*, 8 IBIA 30, 87 I.D. 98 (1980)) have no applicability to the probate of estates of Klamath Indians "who died 6 months or more after August 13, 1954." 25 U.S.C. § 564h.

*June 29, 1981***CHARLES J. RYDZEWSKI****55 IBLA 373***Decided June 29, 1981*

Appeal from decision of the Montana State Office, Bureau of Land Management, dismissing protest of rejection of simultaneous oil and gas lease applications (MTA-Sims-003).

Reversed and remanded.

1. Accounts: Payments—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Filing—Regulations: Interpretation

A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. A regulation specifying a bank money order as an acceptable form of remittance requires the acceptance of a personal money order issued by a bank.

APPEARANCES: Charles J. Rydzewski, *pro se*.

**OPINION BY
ADMINISTRATIVE JUDGE
GRANT**

**INTERIOR BOARD OF LAND
APPEALS**

Charles J. Rydzewski appeals the decision of the Montana State Office, Bureau of Land Management (BLM), dated Sept. 12, 1980, dismissing his protest of BLM's rejection of his tendered remittance and drawing entry cards for the July 1980 simultaneous oil and gas drawing.

Appellant filed drawing entry cards for several parcels¹ available in the July 1980 drawing, but his tendered filing fee was rejected by BLM because, as the BLM decision dismissing the protest states, his remittance, designated on its face as a personal money order, did not meet the requirements of 43 CFR 3112.2-2. 45 FR 35164 (May 23, 1980). The regulation states "The filing fee shall be paid in U.S. currency, Post Office or bank money order, bank cashier's check or bank certified check, made payable to the Bureau of Land Management."

Reference to copies of the rejected instruments in the case file discloses that they are both identified as a "Personal Money Order," and that they bear the name of Union Bank and Trust Co., N. A. (Union Bank), with an address of Grand Rapids, Michigan. The instruments further contain the inscription "Pay To The Order Of" followed by a blank line to be filled in with the name of the payee; the specification of a certain amount of money to be paid, together with the name of the bank, which has been imprinted by machine; and blank lines for the date, signature, and address of the drawer. The instruments have been signed by appellant, Charles J. Rydzewski, as drawer, and the blanks for the name of the payee, the date, and the address of the drawer have been completed in the handwriting of ap-

¹ The parcels to which this appeal applies are: 7 through 11, 14, 15, 17 through 19, 23, 32, 37, 38, 40 through 42, 44, 48 through 50, 89, 91, 94, and 104 through 111.

pellant. The instruments have not been signed by an official of the bank; but the bank's name appears in the lower left hand corner, and the bank's serial number for the money order appears in the upper right hand corner.

In his statement of reasons for appeal, appellant asserts that the personal money orders he tendered are "responsible, acceptable, [and] negotiable across the nation." Appellant states that "[a]ll banks in the Midwest States area issue the same kind of money orders, [and] there is no other type of bank money order [available]."

A letter from the Vice President and Assistant Cashier of Union Bank, James E. McGookey, submitted in support of the appeal, states:

Gentlemen:

Our customer, Charles R. Rydzewski, has asked us to write this letter regarding his appeal under the above docket number.

We wish to verify to you that the personal money orders which Mr. Rydzewski purchased from us and submitted to you are valid instruments issued by our bank and which would be honored upon proper presentation. We consider the personal money orders to represent bank funds and as such we classify them as official checks similar to cashier's checks and certified checks. We do not issue an instrument with the designation bank money order but instead use the personal money order.

We hope that this will help to clarify the nature of the instrument which Mr. Rydzewski submitted to you.

The pertinent regulations governing the simultaneous oil and gas

filing procedures provide that only certain forms of remittance are acceptable in payment of the filing fees, including "bank money order, bank cashier's check or bank certified check." 45 FR 35164 (May 23, 1980) (to be codified in 43 CFR 3112.2-2(a)). Further, the regulations provide that applications filed shall be examined prior to selection and that any application which is "[a]ccompanied by an unacceptable remittance" shall be returned to the applicant together with the filing fee. 45 FR 35165 (May 23, 1980) (to be codified in 43 CFR 3112.5(a)). Therefore, the issue raised by this appeal is whether a simultaneously filed oil and gas lease application accompanied by a filing fee in the form of a personal money order issued by a bank is properly rejected pursuant to a regulation providing that a bank money order is an acceptable form of remittance.

[1] A bank money order has been defined as "an instrument issued by an authorized officer of a bank and directed to another, evidencing the fact that the payee may demand and receive upon indorsement and presentation to the bank the amount stated on the face of the instrument; such an instrument is paid from the bank's funds and liability for payment rests solely on the issuing bank." 2 Anderson, *Uniform Commercial Code*, § 3-104:20 (2d ed. 1971). A personal money order issued by a bank for a consideration accepted as adequate by the bank is a purchase of the credit of the bank

and constitutes a means of establishing or transmitting that credit so that once issued to the purchaser it is no longer revocable by the bank. 10 Am. Jur. 2d, *Banks* § 545 (Supp. 1980). Thus, it would appear that the payee of a money order issued by a bank may be assured that funds to cover the instrument have been transferred to the bank. The money orders submitted by appellant are consistent with this definition of a bank money order.

However, a bank money order that does not require the signature of the issuer has been held subject to a stop payment order. 10 Am. Jur. 2d, *Banks* § 643 (Supp. 1980). An instrument denominated a "Personal Money Order" which at the time of purchase by the bank's customer had an amount of money written on it, and on the face of which the bank's name and address were printed, but which was blank as to date, payee, and name and address of drawer, these items being subsequently completed by purchaser, falls within the "check or other draft" provisions of sec. 3-409 of the *Uniform Commercial Code* (UCC) on which drawee is not liable until acceptance of the instrument and, accordingly, is subject to a stop payment order prior to such acceptance. *Krom v. Chemical Bank New York Trust Co.*, 38 App. Div. 2d 871, 329 N.Y.S. 2d 91 (1972). This Board has recognized that a personal money order issued by a bank is similar to a personal check to the extent that payment

may be stopped any time prior to acceptance by the drawee bank. *Ross L. Kinnaman*, 48 IBLA 239 (1980).

Thus, a bank personal money order may be distinguished from a customary bank money order signed by an authorized bank official, which, like a cashier's check, entails an instrument drawn on a bank, issued by the drawee bank, and signed by an authorized bank employee, so that it cannot ordinarily be countermanded. See *Frank H. Gower, Jr.*, 53 IBLA 146 (1981); *Oxy Petroleum, Inc.*, 52 IBLA 239 (1981). Subsequent to issuance of the regulation identifying "bank money orders" as an acceptable form of remittance, BLM attempted by internal memorandum to make this distinction in specifying what type of bank money order is acceptable. Instruction Memorandum No. 80-635, change 2, dated Nov. 3, 1980, asserts that the characteristics of bank money orders are similar to cashier's checks in that they are: drawn on a bank, issued by the drawee bank, and signed by an authorized bank employee. The instruction memorandum further states that personal money orders, even if issued by a bank, are not acceptable. Unfortunately, the governing regulation was not amended to reflect this clarification.

A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a pref-

erence right to a lease. *Bill J. Maddox*, 34 IBLA 278 (1978); *A. M. Shaffer*, 73 I.D. 293 (1966). The regulation simply does not specify what types of money order issued by banks are acceptable. Therefore, personal money orders issued by a bank should be accepted and rejection of appellant's remittance and drawing entry cards was improper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded.

C. RANDALL GRANT, JR.

Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

ANNE POINDEXTER LEWIS

Administrative Judge

**STATE OF ALASKA, DEPT. OF
TRANSPORTATION AND
PUBLIC FACILITIES***

5 ANCAB 307

Decided June 26, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14866-A, F-14866-A2 and AA-9368.

Affirmed in part; modified in part.

1. Rights-of-way: Revised Statutes Sec. 2477—Rights-of-way: Nature of Interest Granted

A right-of-way granted by Revised Statutes Sec. 2477 is a less-than-fee interest in the nature of an easement. Following the acceptance of a Revised Statutes Sec. 2477 grant of right-of-way, the Federal Government retains its fee interest in the land, subject to the right-of-way, and may dispose of it pursuant to law.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Alaska Native Claims Settlement Act: Conveyances: Easements—Alaska Native Claims Settlement Act: Easements: Public Easements

The existence of a Revised Statutes Sec. 2477 right-of-way precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing right-of-way.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—

*Not in chronological order.

Alaska Native Claims Settlement Act: Conveyances: Easements—Alaska Native Claims Settlement Act: Easements: Public Easements

The continued existence of a Revised Statutes Sec. 2477 right-of-way following conveyance of the underlying fee interest is entirely independent of any reservation, pursuant to § 17(b), of a public easement.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Conveyances—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Rights-of-way granted by Revised Statutes Sec. 2477 shall be identified in the decision to issue conveyance and in the conveyance document in the same manner as other third-party interests which the Bureau of Land Management need not adjudicate.

APPEARANCES: Susan Urig, Esq., on behalf of the State of Alaska, Dept. of Transportation and Public Facilities; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD**

Summary of Appeal

This appeal involves the question of whether the Bureau of Land Management erred in deciding to convey land pursuant to the Alaska

Native Claims Settlement Act (ANCSA) without expressly declaring the conveyance to be subject to an alleged R.S. 2477 right-of-way located thereon. The issues raised are whether the land subject to an R.S. 2477 right-of-way can be conveyed, and whether the Bureau of Land Management may reserve, pursuant to § 17(b) of ANCSA, a public easement along the entire length of the right-of-way.

The Board holds that the existence of an alleged R.S. 2477 right-of-way neither precludes conveyance of the subject land nor the reservation of a coincident public easement, but that where the Bureau of Land Management is informed of the existence of the right-of-way, the decision to issue conveyance and the subsequent conveyance document must expressly declare that the conveyance and the public easement are each subject to the right-of-way.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

In 1959 and 1960, the State of Alaska constructed, on public lands,

a road from the south end of the Hooper Bay Airport easterly to the village of Hooper Bay. In so doing, the State purported to accept the grant, pursuant to Revised Statutes Sec. 2477, 14 Stat. 253 (1866) (repealed 1976) (R.S. 2477), of a 100' right-of-way (r/w) along the entire length of the road.

On Sept. 30, 1980, the Bureau of Land Management (BLM) issued its decision numbered F-14866-A, F-14866-A2, and AA-9368. The decision approved for conveyance to Sea Lion Corp. (Sea Lion) lands surrounding the village of Hooper Bay, including the lands covered by the Hooper Bay Airport Road.

On Oct. 30, 1980, the State of Alaska, Dept. of Transportation and Public Facilities (hereinafter State), appealed the above-designated decision. The State alleged that R.S. 2477, prior to its repeal in Oct. 1976, was a standing offer of a free r/w, which r/w was created upon acceptance of the offer by the State. The State argued that acceptance was complete when the road was finished (in 1960), if not previously.

The State declared that all subsequent entries are subject to the State's r/w, thus BLM may reserve a public easement pursuant to § 17 (b) (3) of ANCSA only subject to the State's 100' r/w. In fact, the State argued, there is no r/w interest remaining for the BLM to reserve to itself. By the reservation of an easement to itself, BLM in effect seeks to repeal the State's r/w. The State asserted that the road itself is a preexisting (pre-ANCSA) 100'

r/w, and that the BLM's failure to object 20 years ago to the State's acceptance of a 100' r/w should now estop BLM from seeking to limit that r/w by almost half its present width.

The BLM filed its Answer on Jan. 9, 1981. BLM asserted that the State's alleged r/w "does not preclude the reservation of a § 17(b) easement for the road and the conveyance of the underlying fee to Sea Lion Corp. Neither the § 17(b) easement nor the conveyance to the village corporation will affect the State's interest, if any, under [R.S. 2477]."

The BLM pointed out that the State devoted a significant portion of its brief to arguments that it has a valid interest pursuant to R.S. 2477. BLM asserted that the Department is not the proper forum for such arguments, and that questions involving the validity of rights-of-way under R.S. 2477 should be resolved in State court. The BLM further asserted that, pursuant to the Nov. 20, 1979, amendment to Secretary's Order No. 3029, 43 FR 55287 (1978) (S.O. 3029), the BLM has neither the authority nor the obligation to adjudicate R.S. 2477 r/w interests, thus the existence of the State's claimed r/w cannot be a factor in deciding whether a § 17(b) easement should be reserved.

The BLM disagreed with the State's apparent assumption that the State's claimed r/w would somehow be diminished by the proposed

conveyance of lands and reservation of a § 17(b) easement for the airport road. The BLM declared that, as the appealed decision expressly states, all ANCSA conveyances are subject, pursuant to § 14(g) of ANCSA, to valid existing rights. The BLM further asserted that the appealed decision, in compliance with the Nov. 20, 1979, amendment to S.O. 3029, did not and could not recognize the State's claimed r/w.

The BLM argued further that an R.S. 2477 r/w is a less-than-fee interest in the nature of an easement. BLM declared that the Federal Government may dispose of its remaining fee interest in spite of an R.S. 2477 claim and regardless of the absence of a reservation or exception in the patent for the alleged r/w, and that conveyance is not inconsistent with an R.S. 2477 claim.

BLM also asserted that reservation of a § 17(b) easement is not inconsistent with a claimed R.S. 2477 r/w, and that the State's argument is based upon a mistaken view of the nature of an R.S. 2477 r/w interest.

The State, on Feb. 9, 1981, replied that the true effect of the BLM's reservation of a 60' wide § 17(b) easement is to dedicate 40 feet of the State's r/w to a third party while appropriating the remainder of the State's property interest for itself. The State declared that the only dispute before the Board concerns the effects rather than the validity of the State's r/w, and that this

Board is the proper forum before which the State may seek protection of its r/w interests.

The State declared that its acceptance of the R.S. 2477 grant severed the resulting r/w from the public domain, and thus there is nothing for BLM to adjudicate. The State argued that if the BLM has a duty to make certain that public rights-of-way are preserved, then § 17(b) of ANCSA requires only that BLM recognize the State's valid existing r/w at Hooper Bay, and that such recognition is merely an acknowledgment, and not an adjudication, of the r/w. The State also argued that should the BLM believe further action is necessary to fulfill its § 17(b) obligations, the BLM could reserve a 100' public r/w and expressly state that such r/w is subject to the State's R.S. 2477 r/w.

The State asserted that the BLM's failure to reserve to itself the full 100' width of the State's r/w causes the State to lose its r/w interest in the portion not reserved, and that the State's ability to exercise its property rights within the 60' reserved to the United States is greatly diminished. For an example of the latter concern, the State declared that if the BLM's reservation were recognized, the State would no longer be authorized to independently, without Federal approval, locate and relocate utilities within its r/w. Further, the Federal Government would become responsible along with the State for maintenance of the Hooper Bay Airport Road, resulting in considerable management problems.

The State argued that acceptance of the R.S. 2477 grant severed the *land* underlying the r/w from the public domain, and that BLM cannot now reserve an interest in property which it relinquished to the State.

Finally, the State asserted that there is no authority for the proposition that the State's r/w can exist concurrently with the public easement reserved to the United States. The State distinguished *Berger v. Ohlson*, 9 Alaska 389 (D.C. Alaska 1938), on the basis that the court ruled therein with regard to a specific intersection, and not a length-wise concurrence, of two rights-of-way.

Decision

The State has brought this appeal asking:

(1) cancellation of the proposed reservation of a public easement coincident with a portion of the State's R.S. 2477 r/w for the Hooper Bay Airport Road;

(2) alternatively to item 1, reservation of a 100' wide public easement entirely coincident with, and expressly subject to, the State's R. S. 2477 r/w;

(3) exclusion of the State's 100' R.S. 2477 r/w from conveyance to Sea Lion Corporation;

The State also, without explanation, asserts that BLM's reservation of only a 60' wide § 17(b) public easement causes the State to lose that 40' wide portion of its R.S. 2477 r/w not overlapped by the § 17(b) easement.

The BLM has responded that the State's alleged R.S. 2477 r/w pre-

cludes neither reservation of a § 17(b) public easement for the Hooper Bay Airport Road nor conveyance of the underlying fee to Sea Lion Corp. BLM asserted that it has neither the authority nor the obligation to adjudicate the validity of the asserted r/w, and that the existence of the alleged r/w cannot be a factor in deciding whether a § 17(b) easement should be reserved. The BLM also asserted without explanation, except by allusion to the Nov. 20, 1979, amendment to S.O. 3029, that it cannot recognize the r/w claimed by the State.

Sec. 14(g) of ANCSA provides in part:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement * * * has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Departmental regulations found in 43 CFR 2650.3-1(a) provide further that:

Pursuant to sections 14(g) and 22(b) of [ANCSA], all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as * * * rights-of-way * * *.

Accordingly, Native-selected

lands subject to rights-of-way are to be included in conveyances pursuant to ANCSA, but the conveyances are subject to the rights-of-way. Further, the Board has previously ruled that both the decision to convey lands and the subsequent conveyance document must specifically identify interests in the lands being conveyed which are protected under ANCSA as valid existing rights.¹ Since rights-of-way granted by the United States are, if valid, protected under § 14(g) of ANCSA as valid existing rights, they must be specifically identified in both the BLM's decision to convey lands and the subsequent conveyance document.

Prior to its repeal in 1976, R.S. 2477 provided simply: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The State asserts that its acceptance of the R.S. 2477 r/w grant severed from the public domain the land underlying the r/w. Such assertion is incorrect.

"A right-of-way is most typically defined as the right of passage over another person's land." *Wilderness Society v. Morton*, 479 F. 2d 842, 853 (D.C. Cir. 1973). It would be unusual to apply the term to absolute ownership of the fee simple of lands to be used for a railway or

¹ *Appeals of the State of Alaska/Seldovia Native Association, Inc.*, 2 ANCA 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]. Secretarial policy expressed in S.O. 3029 and not changed by the Nov. 20, 1979 amendment thereto essentially affirmed the Board's ruling on this matter.

any other kind of a way. *Williams v. Western Union Ry. Co.*, 5 N.W. 482, 484 (Wis. 1880); BLACK'S LAW DICTIONARY 1489 (4th ed. rev. 1968). Furthermore, "grants by the sovereign for which no compensation is made will be strictly construed against the grantee and pass nothing but what is conveyed in clear and explicit language." *Oregon Short Line R.R. Co. v. Murray City*, 277 P. 2d 798, 802 (Utah 1954). "[A]ny ambiguity in a grant is to be resolved favorably to a sovereign grantor—'nothing passes but what is conveyed in clear and explicit language' * * *." *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 272, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942).

[1] Accordingly, a r/w granted by R.S. 2477 is a less-than-fee interest in the nature of an easement. *Berger v. Ohlson*, *supra* at 395; *Oregon Short Line R.R. Co. v. Murray City*, *supra* at 802. Following the acceptance of an R.S. 2477 grant of r/w, the Federal Government retains its fee interest in the land, subject to the r/w, and may dispose of it pursuant to law. *Alfred E. Koenig*, A-30139 (Nov. 25, 1964); *Herb Penrose*, A-29507 (July 26, 1963).

The Federal Government's retention and control of the fee interest in the land affected by an R.S. 2477 r/w, which control includes the Government's authority to issue additional rights-of-way affecting the same land, is manifest in Departmental regulations in 43 CFR 2822.2-2, which state:

A right-of-way granted pursuant to R.S. 2477 confers upon the grantee the

right to use the lands within the right-of-way for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes. Additional rights-of-way will be subject to the highway right-of-way. Future relocation or change of the additional right-of-way made necessary by the highway use will be accomplished at the expense of the additional right-of-way grantee. Prior to the granting of an additional right-of-way the applicant therefor will submit to the Authorized Officer a written statement from the highway right-of-way grantee indicating any objections it may have thereto, and such stipulations as it considers desirable for the additional right-of-way. Grants under R.S. 2477 are made subject to the provisions of § 2801.1-5(b), (c), (d), (e), (i), and (k) of this chapter.

The decision of the District Court in *Berger v. Ohlson*, *supra*, is not contrary. The Court, in discussing an earlier Colorado case, specified that the grant of a r/w under R.S. 2477 "severs the land" from the public domain, and that following appropriation and proper designation, the "way" ceased to be a portion of the public domain. 9 Alaska at 395. But the Court immediately went on to find that the right granted under R.S. 2477 was in the nature of an easement which could exist concurrently with a r/w subsequently granted to the Alaska Railroad. 9 Alaska at 395. The Court manifestly was not declaring that the grantee of an R.S. 2477 r/w received fee simple title to the affected ground. The specification that such a grant severs the "land" seems to be an unfortunate choice of words rendered in a context in which the emphasis was on the sev-

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erance, and the point being made was that an R.S. 2477 r/w is not a right obtained merely by prescription.

[2, 3] Thus, the existence of an R.S. 2477 r/w for the Hooper Bay Airport Road precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. In either case, the owner of the R.S. 2477 r/w retains the r/w interest, and the reservation and/or conveyance is subject to that r/w interest.² Such reservation and/or conveyance does not affect the previously existing r/w.³ Accordingly, the continued existence of the R.S. 2477 r/w following conveyance of the underlying fee interest is entirely independent of any reservation, pursuant to § 17(b), of a public easement coincident with that r/w interest.

Overlapping § 17(b) public easement and R.S. 2477 r/w interests may cause some administrative concern regarding future maintenance and other responsibility within the affected area. Such concerns, however, do not preclude the existence of both interests concurrently.

[4] The BLM has asserted that it has neither the authority nor the obligation to adjudicate the validity of the State's asserted r/w. In deed, the Secretary's Nov. 20,

1979, amendment to S.O. 3029 declared that BLM should not adjudicate rights-of-way claimed under R.S. 2477. Nonetheless, said amendment does not preclude identification of claimed R.S. 2477 rights-of-way. Such rights-of-way shall be identified in the decision to issue conveyance and the conveyance document in the same manner as other third-party interests which the BLM need not adjudicate. Such identification does not recognize or declare the validity of the alleged interest.

Order

The above-designated decision of the Bureau of Land Management is hereby amended so as to conform to this decision of the Board. Publication of an amended decision to issue conveyance is not required. The conveyance document issued pursuant to the above-designated decision of the Bureau of Land Management shall expressly state that the conveyance of land and the reservation of a public easement for the Hooper Bay Airport Road are each subject to the State's R.S. 2477 right-of-way, if valid, for the Hooper Bay Airport Road.

This represents a unanimous decision of the Board.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

² 43 U.S.C. § 1613(g); *State v. Crawford*, 441 P. 2d 586, 590, (Ariz. 1968).

³ The rights acquired by the public pursuant to R.S. 2477 are not affected by the passing into private ownership of land over which a public highway has been thus established. *Lovelace v. Hightower*, 168 P. 2d 864 (N.M. 1946).

**DOYON, LIMITED &
STATE OF ALASKA***

5 ANCAB 324

Decided June 26, 1981

Appeal from the Decisions of the Alaska State Office, Bureau of Land Management F-19155-16, F-14882-A and F-14882-B.

Partial decision affirming BLM.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally—Submerged Lands

The Department of the Interior under provisions of ANCSA and regulations in 43 CFR has both the authority and responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

2. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Navigable Waters

The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

3. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Navigable Waters

When the State of Alaska's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands

selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the Decision to Issue Conveyance.

APPEARANCES: Elizabeth S. Ingraham, Esq., for Doyon, Limited; G. Kevin Jones, Esq., Elizabeth J. Barry, Esq., Bruce E. Schultheis, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; William H. Timme, Esq., Wilkinson, Cragun & Barker, for Gana-a' Yoo, Limited; Shelley J. Higgins, Esq., Assistant Attorney General, for the State of Alaska.

*OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD*

Summary of Appeal

The sole issue raised by Doyon, Limited is "whether BLM erred in approving for conveyance to and charging against the acreage entitlement of Doyon, Limited [under ANCSA] submerged lands to which the State of Alaska claims title." As to this issue, the decision of the Bureau of Land Management is affirmed without affecting the issues of navigability as raised by the State of Alaska.

The Board concluded that the Bureau of Land Management acted within its authority and responsibility to determine what lands are "public lands" under § 3(e) of ANCSA and therefore available for selection by a Native corpora-

*Not in chronological order.

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tion when it made a determination of the nonnavigability of water bodies.

The Board further found that since the State of Alaska's claim of ownership of the submerged lands relied solely upon its own information on navigability of the water bodies, that the Bureau of Land Management was neither bound to accept the State of Alaska's contrary result nor to recognize its claim as an interest leading to a fee title which required excluding of land under ANCSA.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Jan. 23, 1974 and Dec. 9, 1974, selection applications F-14882-A and F-14882-B, were filed for the Native Village of Koyukuk which subsequently, along with other Native villages, merged into the single corporation of Gana-a' Yoo, Limited. The selection applications excluded certain water bodies, asserting that ownership of the submerged lands was claimed by the State of Alaska.

On Apr. 15, 1980, a Decision to Issue Conveyance (DIC) was issued by the Bureau of Land Management (BLM) which found these same water bodies to be non-navigable, stating:

Because these water bodies have been determined to be nonnavigable, they are considered to be public lands withdrawn under Sec. 11(a)(1) and available for selection by the village pursuant to Sec. 12(a) of the Alaska Native Claims Settlement Act.

Section 12(a) and 43 CFR 2651.4(b) and (c) provide that the village corporation shall select all available lands within the township or townships within which the village is located, and that additional lands selected shall be compact and in whole sections. The regulations also provide that the area selected will not be considered to be reasonably compact if it excludes other lands available for selection within its exterior boundaries.

For these reasons, the water bodies which were improperly excluded in Mine-elghaadza'. Limited's application are considered selected.

DIC at 3.

On May 19, 1980, Appellant, Doyon, Limited (Doyon), filed a Notice of Appeal (ANCAB VLS 80-21) and on June 12, 1980, filed its statement of reasons.

On May 21, 1980, Appellant, State of Alaska (State), in a separate appeal, filed an Amended Notice of Appeal (ANCAB VLS 80-20) and its statement of reasons on June 10, 1980, stating the issue appealed was the navigability determinations made by BLM.

On Apr. 2, 1975, regional selection application F-19155-16 was filed by Doyon under § 12(c) of

ANCSA. This selection application also excluded water bodies asserting that ownership of the submerged lands was claimed by the State.

On Apr. 1, 1980, BLM issued a DIC on Doyon's selection F-19155-16 and found, *inter alia*, that the excluded water bodies were non-navigable and therefore must be selected.

On Apr. 30, 1980, Doyon filed a Notice of Appeal and statement of reasons (ANCAB RLS 80-10) asserting that because the State claimed title to the appealed submerged lands, they should be excluded from lands approved for conveyance in the DIC.

The State was joined as a necessary party to this appeal (ANCAB RLS 80-10) by order of May 5, 1980. The State, in brief filed on June 10, 1980, alleges that BLM erred as a matter of fact and law in determining certain water bodies to be nonnavigable by including the submerged lands in the DIC.

By request of the parties, the Board on July 10, 1980, ordered that the three appeals, ANCAB VLS 80-20, ANCAB VLS 80-21, and ANCAB RLS 80-10, be consolidated (ANCAB VLS 80-21 (C)).

Thus, the *Appeal of Doyon, Limited and the State of Alaska*, ANCAB VLS 80-21 (Consolidated), is the result of consolidation of appeals by Doyon and the State from two separate decisions published by the BLM in the *Federal Register*. Doyon and the State each filed separate appeals from the

Decisions of the BLM F-14882-A and F-14882-B. Doyon appealed the Decision of the BLM F-19155-16; the State was joined as a necessary party.

A conference of the parties to the consolidated appeal was held in the Board offices on Aug. 11, 1980, to establish briefing schedules and hearings. At the request of Doyon, the Board agreed that prior to scheduling briefing or hearings on the navigability issue raised by the State, the Board would accept briefings and rule on the sole issue raised by Doyon in both ANCAB VLS 80-21 and ANCAB RLS 80-10.

Decision

Doyon asserts that BLM erred in failing to exclude the submerged lands to which the State claims ownership from lands approved for conveyance in the above-referenced DICs and thereby charging such acreage against their entitlement under ANCSA.

After the above selection applications were filed and lands had been approved for conveyance, the State periodically delineated additional water bodies within the selected lands as being navigable. Doyon contends that these later claimed submerged lands must also be excluded from conveyance by BLM.

The Board does not here address the issue raised by the State as to whether the BLM erred, as a matter of fact and law, in determining that certain water bodies in this appeal are nonnavigable and therefore are "public lands" selectable by a

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Native corporation pursuant to ANCSA.

It is noted that when Doyon refers to the State's "claim of title" to the disputed submerged lands, it is relying only upon the conclusions of navigability made by the State and not upon findings in an administrative appeal of a determination made by BLM. The State depicted certain water bodies as being navigable on the State Water Delineation Maps. Notice of ownership of such water bodies was mailed to BLM and Doyon. Doyon seeks exclusion from their conveyance of all such water bodies and to have the Board rule as a matter of law that receipt of the above documents by BLM prevents conveyance of the submerged lands claimed in exactly the same manner as would an appeal to this Board or to the courts.

Doyon advances several theories in support of its contention that under provisions of ANCSA, what is referred to as a claim of title to submerged lands by the State required BLM to exclude such land from conveyance in the DIC even before a final determination of the issue of navigability has been made.

Doyon asserts that since the statutory entitlement under ANCSA is for a specified acreage, BLM has the duty to convey to each Native corporation its full acreage entitlement of land having a "marketable title." For title to be marketable Doyon states that it must be free from a "reasonable objection of a reasonable purchaser" and that when BLM includes submerged

lands to which the State claims title in a conveyance, it is virtually certain that Doyon will be forced into later litigation.

The duty of determining which lands are public lands raises the issue of navigability, because lands under navigable water bodies belong to the State pursuant to the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, *as amended*, (1958), and the Submerged Lands Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, *as amended*, and are not public lands to be conveyed under ANCSA. In order to convey Doyon's full acreage entitlement, BLM must determine which submerged lands are Federal public lands, *i.e.*, nonnavigable.

However, Doyon argues that while BLM has the duty to convey the submerged lands of nonnavigable bodies of water as public lands, it has no jurisdiction to convey lands underlying navigable waters. The exclusive jurisdiction to make a final determination of the question of navigability of water bodies for purposes of title rests with the Federal courts and not with the Department of the Interior.

BLM responds that § 14(e) of ANCSA does not require conveyance of a "marketable title" in the sense of providing absolute assurance that there is no possibility of any future litigation resulting from a claim of interest. BLM asserts that §§ 17(b)(2), 11(a), 14(g), 16(a) and 19(a) of ANCSA, protect third-party interests, without expressly or by implication, requiring

the Secretary to initiate litigation to determine the existence or validity of such rights, yet such third-party claims clearly present the possibility of litigation. Secretary's Order No. 3029, 43 CFR 55287 (1978) (S.O. 3029), notes that ultimate validity of all such interests may require court litigation.¹

While acknowledging that the Department of the Interior does not have authority to conclusively adjudicate title to the submerged lands which binds the State's claim of navigability, BLM argues that it is authorized and required pursuant to § 3(e) of ANCSA and the provisions of 43 CFR 2650.0-5(g) and 2650.5-1(b) to make an administrative determination identifying "public lands" which is appealable to this Board. BLM adds that the Department of the Interior does not have a trust or fiduciary relationship with Native corporations under ANCSA which necessitates a quiet title proceeding to be initiated before conveyance can be made.

The Board first examines whether BLM had authority to determine that the submerged lands were or were not public lands within terms of § 3(e) of ANCSA.

Decisions of the Department have consistently held that it has both the responsibility and the authority to make the determination

which lands, including submerged lands, are public lands and therefore within the jurisdiction of the Department. In the case of *State of Oregon*, A-24715, 60 I.D. 314, 315 (1949), it is stated that: "The Secretary of the Interior is authorized, and is under a duty, to consider and determine what lands are public lands, what public lands have been or should be surveyed, and what public lands have been or remain to be disposed of by the United States." See also *Burt A. Wackerli*, A-30576, 73 I.D. 280, 286 (1966).

In the case of *State of Montana*, 11 IBLA 3, 80 I.D. 312 (1973), an appeal was taken from a BLM decision which held that Indian Lake was nonnavigable and that title to the lands covered by the lake was in the United States. The State of Montana contended that the lake was navigable at the time of statehood and therefore title was in the State. The State asserted further that it was contrary to due process for the BLM to decide title to the disputed land. The Interior Board of Land Appeals (IBLA) affirmed BLM's decision on the lake's non-navigability and found no violation of due process in such a finding being made by the Department which could be appealed for review. IBLA held that:

The Secretary of the Interior has the authority and the duty to determine what lands are public lands of the United States, including the authority to determine navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a State upon its admission into the Union.

¹S.O. 3029 at 55291, under heading of *Adjudication of Third Party Valid Existing Rights*, states in part: "Clearly the administrative act of listing an interest as a valid existing right or of failing to list it does not create or extinguish the right. Because of this the ultimate validity of all interests may require court litigation."

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11 IBLA at 4, 80 I.D. at 313.

Thus the Secretary of the Interior is not precluded from finding that the submerged bed of a water body is public land and that title did not pass to the State upon statehood.

In response to a jurisdictional challenge by the State to the Board's authority to determine public land status of submerged lands, the Board stated in *Appeal of Doyon, Limited*, 4 ANCAB 50, 57, 86 I.D. 692, 695 (1979) [RLS 76-2], that:

As defined in Section 3(e) of ANCSA, "Public Lands" means all Federal lands and interests therein located in Alaska except (not pertinent)' and further by regulations in 43 C.F.R. § 2650.0-5(g) adopted pursuant thereto as '(including the beds of all nonnavigable bodies of water), except: (not pertinent).' Therefore, the issue of navigability must be determined to enable a finding to be made whether lands selected are within available 'public lands' and further, to determine the effect on total acreage entitlement as provided in 43 C.F.R. § 2650.5-1(b).

The Board therefore, concludes that it is not only authorized, but necessarily must decide issues of navigability of bodies of water located within lands selected by Native Regional Corporations.

Thus, the Board's previous holding concluded that before BLM can convey Doyon's statutory entitlement under ANCSA, in exercise of its authority an initial determination must be made that the selected lands are "public lands" within the meaning of § 3(e) of ANCSA.

The Board's review of the Act and the above-referenced regula-

tions discloses no ambiguity in terms. The language in each is clear on its face as to what is required of BLM.²

[1] The Board finds that BLM has both the authority and the responsibility, under ANCSA and regulations in 43 CFR, to determine which lands, including submerged lands, are public lands within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

The Board has found that BLM is within its authority under provisions of ANCSA to find that water bodies are nonnavigable and therefore that submerged lands are Federal "public lands." Aside from the merits of such a determination by BLM which is not here an appealed issue, the remaining issue is whether Doyon's assertion of the State's claim of ownership, outside the context of an appeal, is sufficient to require BLM to exclude such submerged lands from conveyance.

The State's claim of ownership of the disputed submerged lands rests upon a navigability determination of water bodies made by the State. From its own navigability information the State compiles Water Delineation Maps depicting the navigable water bodies and providing

² The Board also notes that BLM's authority to determine navigability is contained in provisions of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2431 (1980), Sec. 901(b), which states in part: "No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act."

notification to BLM of the State's position.

Under provisions of 43 CFR 2650.5-1(b), for the computation of acreage entitlement, BLM is directed to take into account the navigability or nonnavigability of bodies of water within areas withdrawn for selection by a Native corporation:

Surveys shall take into account the navigability or unnavigability of bodies of water. The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act. Prior to making his determination as to the navigability of a body of water, the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made. The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the act.

The above regulation gives the State an opportunity to provide information to the BLM as to the navigability water bodies within the selected lands. However, it is clear that it is the Secretary, not the State, who possesses authority to make the navigability determination for the Department, and further, that the information provided by the State is advisory, rather than binding. The receipt of such information by BLM does not constitute

a claim of ownership under ANCSA which requires BLM to exclude the submerged lands from conveyance.

[2] The Board finds that BLM is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to the navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

Doyon argues that it is essential to its contention that these submerged lands should be excluded from conveyance for BLM to recognize that a claim of navigability by the State creates in the State a third-party valid existing right leading to fee title, which is protected under ANCSA from conveyance to a Native corporation. Doyon further contends that whether the State's claim of ownership to the submerged lands is considered either a factual title or one which upon final determination of navigability may lead to title, the basis for excluding the lands in analogous to the basis for excluding other interests leading to title under ANCSA.

The Board disagrees.

The Board has previously held that although BLM determined that lands are "public lands" within the meaning of § 3(e) of ANCSA and therefore available for selection by a Native corporation, that under provisions of ANCSA and regulations BLM is required to exclude lands from conveyance when a

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party claims an interest under laws which lead to acquisition of title. See *Appeal of Eklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75-10] and *Appeal of State of Alaska/Seldovia Native Association*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15].

In this case, the State's claim of ownership to the submerged lands is not based upon any entry made or interest acquired under any Federal or State law which could lead after adjudication, to title. Although the navigability of water bodies is determined under Federal law, the determination is based solely upon an evaluation of factual navigation at the time of statehood and can be made only by a court. *Appeal of Doyon, Limited, supra*. The State's claim of ownership is based merely on its own factual finding which in this case, is contrary to BLM's own determination of nonnavigability. BLM may have been erroneous in evaluating the factual information upon which it determined that the submerged lands are public lands. However, until it has been determined that BLM erred in finding that the water bodies are nonnavigable, any contrary assertions are merely that and do not create an interest leading to acquisition of title to the disputed submerged lands.

[3] When the State's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final ad-

judication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires BLM to exclude such lands from the DIC.

Therefore, the Board finds that the single issue on appeal, as stated by Doyon, is without merit, and is hereby dismissed.

While the issue here decided is a partial decision of ANCAB VLS 80-21 (Consolidated), it was the sole issue raised by Doyon in the above-referenced appeal ANCAB VLS 80-21 and as one of the issues in appeal ANCAB RLS 80-10. Therefore, the effect of this decision will be to terminate the appeal of Doyon (ANCAB VLS 80-21) and to remove it from the file record of ANCAB VLS 80-21 (Consolidated).

This represents a unanimous decision of the Board.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

**FELDSLITE CORPORATION
OF AMERICA**

56 IBLA 78

Decided July 15, 1981

Appeal from decision of the Oregon State Office, Bureau of Land Management, declaring a quartz millsite loca-

tion abandoned and void. OR MC 3408 (Wash).

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Assessment Work—Mining Claims: Millsites

The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976) to file an annual notice of intention to hold the millsite is a curable defect and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: W. R. Matthews, President of Feldslite Corporation of America, for appellant.

*OPINION BY
ADMINISTRATIVE
JUDGE BURSKE*

*INTERIOR BOARD OF
LAND APPEALS*

Feldslite Corporation of America appeals from the decision of the Oregon State Office, Bureau of Land Management (BLM), dated Apr. 4, 1979, declaring the Feldslite Quartz Millsite Location, OR MC 3408 (Wash), which had been recorded with BLM on Nov. 8, 1977, to have been abandoned because of a failure to file an annual assessment statement or notice of intention to hold the claim prior to Dec. 31, 1978, as required by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1976), and 43 CFR 3833.2-1.¹

¹ Subpart 3833 was revised effective Mar. 16, 1979, at 44 FR 9720 (Feb. 14, 1979). In this

[1] At the outset, we must note that the State Office consistently referred to appellant's millsite claim as a mining claim. While millsite claims are initiated under sec. 15 of the General Mining Law of 1872, 17 Stat. 91, 96, *as amended*, 30 U.S.C. § 42 (1976), the question of whether a millsite is a "mining claim" or "mining location" has received varying answers through the years.² Thus, millsites have been denominated "creature[s] of the mining laws," *United States v. Werry*, 14 IBLA 242, 250, 81 I.D. 44, 48 (1974), or, alternatively, "a part of the general mining laws." *United States v. Cuneo*, 15 IBLA 304, 322, 81 I.D. 262, 270 (1974). It has also been established that a millsite is a "claim" within the provisions of 30 U.S.C. § 38 (1976), which obviates the need to prove a formal location where a claim has been held and worked for a period equal to the statute of limitations of the State in which the land is located. *See Dalton v. Clark*, 18 P. 2d 752, 754 (Cal. App. 1933); *Cleary v. Skiffich*, 65 P. 59 (Colo. 1901).

On the other hand, it is equally clear that a millsite is not a mining claim within the meaning of 30

opinion, references to regulations are to the revised version. However, we note that the revisions to cited regulations were generally editorial and did not change the substantive requirements in effect in 1978.

² Compare the syllabus from *Hales and Symons*, 51 L.D. 123 (1925), "A mill site is not a mining claim or location within the meaning of the United States Mining laws" with *Eagle Peak Copper Mining Co.*, 54 I.D. 251 (1933), "A mill site appurtenant to a lode is a 'location' under the mining laws of the United States."

U.S.C. § 28 (1976), which requires the performance of assessment work, *Dalton v. Clark*, *supra*, and thus is not subject to the provisions of 30 U.S.C. § 28b (1976) which prescribes procedures for the deferment of performance of assessment work. *Andrew L. Freese*, 50 IBLA 26, 87 I.D. 395 (1980). This conflicting treatment of millsites has, for the most part, been occasioned by an analysis of the relationship of a millsite claim to the specific provision of the mining laws involved. It is the context and purpose of the words "mining claims" in any statute that must determine whether or not millsites are intended to be included within its ambit.

Analysis of sec. 314 (a) and (b) of FLPMA, 43 U.S.C. § 1744 (a) and (b) (1976), clearly discloses an intent *not* to include millsite within the term "mining claim" as used in that section. In the first place, sec. 314(a), relating to proof of assessment work and notices of intention to hold, is directed to "the owner of an unpatented lode or placer mining claim." Millsites, while they may in certain contexts be considered mining claims or mining locations, are neither lode nor placer in form, being limited by statute to no more than 5 acres. Then, too, in sec. 314(b), which relates to notices of location, Congress has clearly evinced a desire to differentiate among mining claims, millsites, and tunnel sites. Thus, the opening line of the provision makes specific reference to "an unpatented lode or

placer mining claim *or* mill or tunnel site."

With reference to millsites and tunnel sites, therefore, we feel that the statute must be read as only requiring the filing of notices of location. But it is also clear that Departmental regulations require the filing of notices of intention to hold, *see* 43 CFR 3833.2-1(d), and it is undisputed that no such filing was made in the instant case in calendar year 1978.³ The question before us concerns the effect of such a failure to file, where the necessity for filing is determined by the regulations and not the statute.

We have noted in the past that there is a difference between the consequences which attend a failure to comply with a statutory recordation requirement and one which is purely regulatory. Thus, we have recognized that a failure to comply timely and scrupulously with the express statutory requirements cannot be waived by the Department. *Lynn Keith*, 53 IBLA 192, 88 I.D. 369 (1981). On the other hand, failure to comply promptly with those requirements based on purely regulatory language is subject to curative action. *See Robert W. Hansen*, 46 IBLA 93 (1980).

³ That there was no statutory requirement for the filing of notices of intention to hold millsites was recognized in the adoption of the regulation requiring such filings. Thus, Assistant Secretary Martin noted:

"One comment pointed out that the statute did not require the annual filing of a notice of intent to hold a mill or tunnel site and the requirement should be deleted. However, the section is needed so the Bureau can keep informed as to the status of sites and has been retained."

44 FR 9721 (Feb. 14, 1979).

This approach has received judicial approbation in a recent decision by the Tenth Circuit Court of Appeals in *Topaz Beryllium Co. v. United States*, No. 79-2255 (filed May 21, 1981). Therein, the court reviewed the various provisions of both the statute and the regulations, and noted:

We conclude that the Secretary has not ignored § 1744(c) which assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings required only by § 3833—and not by the statute—are not made. This is also the Secretary's view: failure to file the supplemental information is treated by the Secretary as a curable defect. A claimant who fails to file the supplemental information is notified and given thirty days in which to cure the defect. If the defect is not cured, "the filing will be rejected by an appealable decision." [Footnote omitted.]

Admittedly, the language of the court was primarily directed toward filings of notices of location, but we think the logic has equal applicability to the instant question. Accordingly, we hold that upon the failure of a millsite claimant to file an annual notice of intention to hold, BLM should notify the claimant of this deficiency and afford the claimant a period of time in which to comply with the regulatory requirement. Should compliance not then occur, the millsite will properly be declared abandoned and void. We note that such a procedure both advances the Department's desire to be kept informed as to the status of claims on the public domain, and provides a mechanism for millsite

owners to cure filing inadvertencies which might otherwise have proved fatal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case file remanded for further action not inconsistent herewith.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

BRUCE R. HARRIS
Administrative Judge

LEROY PEDERSEN

56 IBLA 86

Decided July 15, 1981

Appeal from decision of the California State Office, Bureau of Land Management (BLM), denying the request for suspension of hardrock prospecting permit CA 1698.

Set aside and remanded.

1. Mineral Lands: Prospecting Permits

Where, pursuant to 43 CFR Part 3510, BLM grants a 2-year permit for hardrock mineral prospecting on certain acquired national forest lands with the concurrence of the Forest Service and Geological Survey, and thereafter fails to approve the permittee's operating plan during the term of the permit and a 2-year extension, the permit will be considered to have been suspended during that period and the permittee granted a 2-year term

for prospecting with the right to apply for an extension as provided by the regulations.

APPEARANCES: Leroy Pedersen, pro se.

*OPINION BY
ADMINISTRATIVE JUDGE
FRAZIER*

*INTERIOR BOARD OF
LAND APPEALS*

Leroy Pedersen has appealed from the Feb. 2, 1979, decision of the California State Office, Bureau of Land Management (BLM), denying his request for suspension of his acquired lands hardrock prospecting permit CA 1698. The permit was issued for prospecting gold and tungsten for a 2-year term beginning Aug. 1, 1975, and was extended through July 31, 1979.

Pedersen's permit covers acquired lands in the Tahoe and Plumas National Forests along a ridge which is the common boundary between the two forests. The area lies on the northeastern boundary of the East Yuba RARE II area. The Pacific Crest Trail presently runs generally along the ridge between the two forests.

Pedersen applied for the permit at issue on Mar. 6, 1974. BLM then requested review and recommendations as to approval of the permit from the Forest Service (FS) and Geological Survey (Survey). FS prepared an environmental analysis report (EAR) and a title report which it submitted to BLM on Dec. 18, 1974. It recommended that

the permit be issued but specified certain management requirements and constraints to be included in the permit conditions and Pedersen's operating plan. Survey recommended that the permit be allowed subject to certain stipulations. Pedersen agreed to the conditions and submitted a revised operating plan on July 1, 1975. BLM issued the prospecting permit on Aug. 1, 1975, subject to the further condition that prospecting operations could not begin until the operating plan was approved.¹

In February 1977 Survey informed Pedersen that completion of the environmental analysis of his plan had been delayed pending receipt of archeological and historical data from FS.² Based on this information, Pedersen requested a 2-year extension of his permit through July 31, 1979, which BLM approved in Jan. 1978. In a separate request, Pedersen asked that

¹ In 1976 Pedersen also located 30 lode mining claims, known as the Pinnacle 1 through 4 and Alpine 1 through 26 claims, on national forest lands which are adjacent to the permit lands and were open to mineral location. After doing preliminary prospecting, he filed a prospecting plan for these claims with FS. In March 1979 FS issued a final environmental analysis report recommending approval of the plan without need for an environmental impact statement. California State Senator John H. Nejedly, who has objected to these claims as well as permit CA 1698, appealed this determination and requested a stay of operations. The Department of Agriculture granted the stay as of May 29, 1979. We are unaware as to whether Pedersen has yet been allowed to prospect these claims.

² According to an FS situation summary dated Mar. 20, 1978, FS sent a report on the archeological survey of the lands encompassed by Pedersen's permit to Survey on Feb. 15, 1977. This report does not appear in the permit case file now before the Board.

the rental he paid for the first 2 years of the permit be refunded because he had not been allowed to do any exploration. In March 1978 BLM denied this request. Pedersen then appealed to this Board on this issue. He also appealed a statement by a FS officer indicating that FS would not approve a mineral lease for the land in CA 1698 in the future and would request that BLM cancel Pedersen's permit.³ By order dated Dec. 27, 1978, the Board dismissed the appeal from the FS actions as the Board lacks jurisdiction to entertain an appeal from a decision of a FS official. We set aside the BLM decision denying a refund and remanded the matter. We held that it was

premature to decide whether a refund can be authorized until it is determined if the permittee has or will have any right of enjoyment from the permit or that the permit was erroneously issued because of a mistake of fact or law. * * * [A] refund may not be authorized while appellant seeks rights under the permit.

Survey apparently issued a draft EAR on Pedersen's operating plan for comment in December 1978, and the final EAR on Apr. 23, 1979. On May 2, 1979, the Survey Conservation Manager for the Western Region determined that the plan could be approved without preparing an environmental impact statement (EIS). BLM then approved

the plan on May 23, 1979, approximately 2 months before Pedersen's permit was to expire.⁴

On Jan. 10, 1979, Pedersen requested "a four (4) year suspension of the payment and prospecting period terms of my Prospecting Permit CA 1698, to be effective between the effective date (Aug. 31, 1975) of [the permit] and the date on which the Area Mining Supervisor [Survey], approves my Prospecting Plan submitted July 1, 1975." BLM issued the decision now on appeal on Feb. 2, 1979, denying the suspension on the ground that the regulations do not provide for suspension.

On Feb. 26, 1979, appellant wrote Survey, enclosing data to substantiate the existence of commercial quantities of ore in the permit area, and requesting a preference right lease. He acknowledged that "due to circumstances beyond his control" he had been unable to comply with all the requirements of the permit, and sought a determination from Survey on whether or not he qualified for a lease. Survey replied on June 25, 1979, that the data submitted would not "indicate conclusively that valuable deposits of gold, tungsten, or other heavy minerals have been discovered in the permit area."

This appeal involves only the

³ FS requested that BLM cancel the prospecting permit because it conflicted with the National Forest Multiple Use Management Plan for the area and FS had concluded that it should not have consented to the permit in the first place. BLM determined that it did not have the authority to rescind or cancel the permit for this reason.

⁴ Neither the draft nor final EAR appear in the permit case file. References to their issuance are found in correspondence from Pedersen to BLM dated Jan. 10, 1979, and to Survey dated Aug. 1, 1979. Record of the Survey and BLM determinations also does not appear in the file, though reference to them is found in other correspondence.

question whether or not denial of the request for suspension of the permit was proper. In his statement of reasons, appellant charges *inter alia*, that failure to approve the prospecting plan in time to complete the prospecting work outlined therein would be a breach of contract if the permit is not retroactively suspended to allow 4 years of prospecting. He emphasizes that he is not seeking a refund of the rental payments, but rather continues to seek his rights under the permit. He also asserts that due to weather conditions, his claim is accessible only 3 months of each year, giving him only 12 months of prospecting time in a 4-year period. He argues that this is discriminatory and inequitable vis-a-vis permittees in more temperate climates. He further argues that his permit, issued in 1975 predated the FS RARE II Wilderness Review begun in June 1978 and completed in January 1979, with the lands being designated for "further planning," thereby giving appellant "grandfather rights" unavailable under a new permit. He asserts that the Department was negligent in not approving the prospecting plan.

[1] Prospecting permits are issued pursuant to Departmental regulations at 43 CFR Part 3510. Issuance of a permit grants to "the permittee the exclusive right to prospect on and explore the lands involved to determine the existence of, or workability of, and commercial value of the mineral deposits therein." 43 CFR 3510.1-2. This

right, however, may be limited by the conditions imposed by other regulations or as set forth in the permit itself.

The regulations at Part 3510 impose only one condition on activities pursuant to a prospecting permit. Thus, 43 CFR 3510.1-2 states that when the permittee prospects or explores "[o]nly such material may be removed from the lands as is necessary for experimental work or the demonstration of the existence of [mineral] deposits in commercial quantities." The permit issued by BLM, by its terms, however, imposes additional conditions and responsibilities with which the permittee agrees to comply.

For the purpose of this appeal we must examine those conditions which appellant, the permittee, agreed to meet before prospecting operations could begin even though BLM had issued the prospecting permits. First, the standard permit form requires that appellant comply with Survey operating regulations found at 30 CFR Parts 211 and 231.⁵ In addition, appellant's permit also required compliance with BLM regulations, 43 CFR Part 23. These sets of regulations are similar, each governing prospecting, exploration, and other mining activities on public lands.

The focus of this appeal, more particularly, is on the requirements of 30 CFR 231.10 and 43 CFR 23.7. Both provisions specify that the Survey mining supervisor after

⁵ 30 CFR 211 deals with coal mining and is therefore inapplicable to appellant.

consultation with other involved agencies, or the BLM district manager under 43 CFR 23.7, must approve a permittee's operating plan before prospecting may begin on the permit lands. Both the Survey and the BLM regulations also state specifically that no operations shall be performed except under an approved plan. 30 CFR 231.10(a); 43 CFR 23.7(e) and 23.8(g).

In addition to these Departmental approvals, sec. 2(c) of appellant's permit specifies that appellant "shall not prospect lands under the administrative jurisdiction of the Forest Service without prior notice to and consent of that Service to a plan for prospecting." As the lands involved in this case were acquired by FS for purposes of the national forests, the FS approval must be viewed in the context of 16 U.S.C. § 520 (1976), which governs prospecting and development on acquired forest lands, and sec. 402 of the Reorganization Plan No. 3 which transferred the functions of the Secretary of Agriculture under that section to the Secretary of the Interior. Sec. 402 further provided that mineral development on such acquired lands shall be authorized only when the Secretary of Agriculture advises the Secretary of the Interior that development will not interfere with the purposes for which the land was acquired and only in accordance with conditions specified by the Secretary of Agriculture to protect those purposes.

Appellant does not challenge the appropriateness or validity of these

conditions. The identified Departmental regulations are designed to promote the Departmental policy of encouraging development of mineral resources in a manner which protects the environment and the public health and safety. 43 CFR 23.1; 30 CFR 231.1(b). Appellant, in effect, asserts that BLM may not impose such conditions in a manner which deprives a permittee of the rights granted to him under the permit. In this case the lengthy process involved in approving appellant's operating plan has, in effect, nullified appellant's permit.

The issue is one of reasonable timeliness by the Governmental agencies in taking the necessary action. On July 1, 1975, appellant submitted his operating plan revised to conform to the requirements identified by FS and Survey prior to permit issuance. An EAR recommending approval of the plan was not issued by Survey apparently until April 1979. There is little in the case record to indicate the reason that the Survey review took almost 4 years, though it appears that some delay was caused by FS not submitting its report in a prompt manner. No other problems are addressed.

Both sets of operating regulations envision prompt approval of prospecting plans. The BLM regulations provide that "[t]he mining supervisor or the district manager shall *promptly* review the exploration plan submitted to him by the operator and shall indicate to the operator any changes, additions, or amendments necessary to meet the

requirements formulated pursuant to * * * [these regulations and the permit]." 43 CFR 23.7(d) (*italics added*). Survey regulations specify that "[t]he mining supervisor shall consult with the other agencies involved, and shall *promptly* approve the plans or indicate what modifications of the plans are necessary * * *." 30 CFR 231.10(a) (*italics added*). Where, by regulation, *prompt* review and approval is required, we find it unreasonable for approval of an operating plan under a 2-year permit, upon which all rights granted by the permit are conditioned, to take almost 4 years.

Environmental review is an important and necessary condition to approval of activities on Federal lands. The regulations at 43 CFR Part 3510 specifically governing prospecting permits, however do not address such environmental review and, more significant in this case, they do not provide any procedural means by which to remedy the problem caused by the time involved in reviewing the environmental impact of appellant's operating plan. The 2-year permit term was first promulgated at 43 CFR 200.35 in 1958 (*see* 23 FR 3775 (May 30, 1958)), long before passage of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976), or the promulgation of the regulations in 43 CFR Part 23 in 1969 (*see* 34 FR 852 (Jan. 18, 1969)), and 30 CFR Part 231 in 1972 (*see* 37 FR 11041 (June 1, 1972)). It is obvious, at least in this case, that the time in-

involved in obtaining approval of the operating plan during the permit term does not serve the particular purpose of the permit system which is to regulate prospecting on public land, or the general purpose of encouraging development of public minerals resources. The time taken for environmental review in this case has rendered the permit useless.⁶ It would have been better to have required all approvals before issuance of the permit to avoid the problems that have arisen in this case.

BLM's issuance of prospecting permit CA 1698 in the first place evidences an intent, with Survey and FS concurrences, that appellant be allowed to prospect the lands covered by the permit. To date appellant has not been allowed to prospect or explore during the term of the permit. The issuance of a permit under such circumstances is a meaningless action from which appellant clearly has derived no benefit. It appears that appellant has done everything required of him in good faith. In the interest of fairness, we hold that when all ap-

⁶ As we have indicated the case file does not specifically reflect the reasons for the length of time involved in reviewing appellant's operating plan. It is clear that appellant believes that the delay has in large part been the result of alleged interference by California State Senator Nejedly. We wish to point out that the requirement for the consideration of the environmental impact of particular Federal actions is in part designed such that the views and interests of concerned citizens become part of the Governmental decisionmaking process. However, we are also concerned that, in a case such as the one now before us, the input from such concerned citizens does not become a tool for obstructing the rights of others.

provals are finalized, appellant shall be allowed to prospect for a 2-year period under permit CA 1698 with the rights to request a 2-year extension under the regulations if warranted at the end of the first term. The 2-year period shall run either from the date of service of this decision or the date when approval of appellant's operating plan is finalized, whichever is later.⁷

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this decision.

GAIL M. FRAZIER

Administrative Judge

WE CONCUR:

JAMES L. BURSKI

Administrative Judge

DOUGLAS E. HENRIQUES

Administrative Judge

WAYNE YARNELL

3 IBSMA 188

Decided *July 15, 1981*

Appeal by Wayne Yarnell of the Feb. 12, 1981, decision of Chief Administrative Law Judge L. K. Luoma

⁷ References in the case file indicate that BLM did approve the plan in 1979 although no actual record of such approval appears in the case file. If such approval was given, the 2-year term shall run from the date of service of this decision. If such approval must still be finalized, the 2-year term shall run from the date of final approval.

upholding the decision of Office of Surface Mining Reclamation and Enforcement Regional Director Raymond L. Lowrie not to take enforcement action against Peabody Coal Company's Ozark, Arkansas, surface mine on the basis of Mr. Yarnell's citizen's complaint.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

Because elapsed time is not a reason for failure to cite a violation of the Act and regulations discovered during an inspection, the fact that a permittee manages to complete an illegal action between inspections does not of itself protect it against a citation for the violation.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

OSM has a duty to investigate thoroughly a citizen's accusation that a state has failed to meet its obligations.

3. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally—Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Appropriate contour.*" "Appropriate contour," as used in 30 CFR 715.14(e), is not synonymous with "approximate original contour."

4. Surfacing Mining Control and Reclamation Act of 1977: Impoundments: Generally

provals are finalized, appellant shall be allowed to prospect for a 2-year period under permit CA 1698 with the rights to request a 2-year extension under the regulations if warranted at the end of the first term. The 2-year period shall run either from the date of service of this decision or the date when approval of appellant's operating plan is finalized, whichever is later.⁷

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this decision.

GAIL M. FRAZIER

Administrative Judge

WE CONCUR:

JAMES L. BURSKI

Administrative Judge

DOUGLAS E. HENRIQUES

Administrative Judge

WAYNE YARNELL

3 IBSMA 188

Decided *July 15, 1981*

Appeal by Wayne Yarnell of the Feb. 12, 1981, decision of Chief Administrative Law Judge L. K. Luoma

⁷ References in the case file indicate that BLM did approve the plan in 1979 although no actual record of such approval appears in the case file. If such approval was given, the 2-year term shall run from the date of service of this decision. If such approval must still be finalized, the 2-year term shall run from the date of final approval.

upholding the decision of Office of Surface Mining Reclamation and Enforcement Regional Director Raymond L. Lowrie not to take enforcement action against Peabody Coal Company's Ozark, Arkansas, surface mine on the basis of Mr. Yarnell's citizen's complaint.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

Because elapsed time is not a reason for failure to cite a violation of the Act and regulations discovered during an inspection, the fact that a permittee manages to complete an illegal action between inspections does not of itself protect it against a citation for the violation.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

OSM has a duty to investigate thoroughly a citizen's accusation that a state has failed to meet its obligations.

3. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally—Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Appropriate contour.*" "Appropriate contour," as used in 30 CFR 715.14(e), is not synonymous with "approximate original contour."

4. Surfacing Mining Control and Reclamation Act of 1977: Impoundments: Generally

Although, in general, a permanent impoundment should be contoured before it is filled with water, on the evidence available in this case, we decline to hold that the reclamation techniques used were illegal.

5. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

OSM is entitled to determine, on the basis of the evidence available to it, that a violation could not be proven, even if one had occurred.

APPEARANCES: Wayne Yarnell, Ozark, Arkansas, pro se; Bruce Cryder, Esq., Field Solicitor, Office of the Field Solicitor, Kansas City, Missouri, Jeffrey C. Fereday, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Mar. 2, 1981, Wayne Yarnell (Yarnell) filed a notice of appeal from a Feb. 12, 1981, decision of Chief Administrative Law Judge L. K. Luoma. That decision was issued pursuant to the Board's order of Sept. 5, 1980, referring the case to the Hearings Division for an evidentiary hearing on the questions raised in Yarnell's appeal of a decision made by Office of Surface Mining Reclamation and Enforcement (OSM) Regional Director Raymond L. Lowrie. The decision below upheld OSM's determination not to take enforcement action against

Peabody Coal Company's (Peabody) Ozark, Arkansas, surface mine, permit 113. For the reasons set forth below, we are constrained to affirm that decision as modified in this opinion.

Background

On or about May 10, 1978, Yarnell began operating a dragline at Peabody's Ozark mine. In February of 1979, Yarnell asked the State to inspect the mine for possible violations of the Surface Mining Control and Reclamation Act of 1977 (Act).¹ Specifically, Yarnell complained that a highwall had not been reclaimed before being covered by a permanent water impoundment and that the maps that depicted where mining had been completed before May 3, 1978, were inaccurate. Although Yarnell spoke with a state inspector on two occasions, he was not permitted to accompany the inspector on an inspection. On Mar. 13, 1979, Yarnell was laid off.

Sometime in early 1980, Yarnell was on the minesite in reference to a union grievance. He alleges that at that time a Peabody foreman told him that the State had informed Peabody that it would take no action in regard to the complaint. Therefore, on Apr. 4, 1980, Yarnell requested an OSM inspection. On Apr. 14, 1980, an OSM inspector, without entering the permit area or speaking with any company representatives, viewed the highwall area

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

from a public road. His inspection report stated:

My investigation reveals that since the area in question has been reclaimed and an impoundment established to the land owners [sic] satisfaction, as indicated by written document dated March 28, 1979, there appears to be no environmental danger at present. I feel that any disturbance at this late date would not be warranted and could only be counter productive to the intent of Public Law 95-87.

I find no reason to dispute any claim that Mr. Yarnell has made. However, since so much time has elapsed and the area reclaimed I can see no benefit to be gained by pursuing the matter further.

On May 5, 1980, Yarnell requested the OSM Regional Director to review this determination, and on May 21, 1980, he accompanied OSM on a second inspection. During this inspection OSM talked with company officials about what was done to the highwall and observed the slope above the waterline in the impoundment. On June 4, 1980, the Regional Director affirmed OSM's determination not to take enforcement action, stating:

On the basis of [OSM's] investigation, I find that the available evidence does not support your allegation that Peabody Coal Company failed to backfill the highwall at the Ozark Mine. Because the area in question is now covered with water, I have relied on the observations and professional opinion of OSM staff who visited the site and on the statements of Marshall Mothersbaugh regarding the methods Peabody used to eliminate the highwall.

Yarnell appealed this determination to the Board on June 27, 1980. The Board referred the case to the Hearings Division pursuant to 43

CFR 4.1286(b) on Sept. 5, 1980. The referral order stated:

The Hearings Division shall hold a hearing and issue a decision on the following questions and any others that become apparent as a result of that hearing:

1. Was there a violation or violations of the Act and regulations, including but not limited to section 502 of the Act, 30 CFR 715.17(k) and 30 CFR 715.14, such as were alleged by Mr. Yarnell at Peabody Coal Company's Ozark Mine; and

2. If there was a violation or violations, should any enforcement action have been taken by OSM against the company.

A hearing was held on Oct. 15, 1980, and a decision was issued on Feb. 12, 1981. Because that decision upheld the Regional Director, Yarnell again appealed to the Board on Mar. 2, 1981. Both Yarnell and OSM filed briefs.

Discussion and Conclusions

[1] OSM's position throughout this proceeding has been that, even assuming everything Yarnell says is true, there is not enough evidence upon which to base any enforcement action. According to OSM the primary reason that there is not enough evidence is that too much time elapsed before it became involved in the complaint. The Board does not accept the proposition that elapsed time is in general a reason for failure to cite a violation of the Act and regulations that is discovered during an inspection. Although elapsed time may indicate that certain kinds of remedial action to correct a violation would be counterproductive or otherwise undesirable, OSM still has the obligation

to take appropriate enforcement action. The fact that a permittee manages to complete an illegal action between inspections does not of itself protect it against a citation for the violation.

[2] Elapsed time is also not an excuse for failure to conduct as thorough an inspection as is possible. The delay in this case may well have been, as Yarnell asserts, directly attributable to the State's failure to inform him that no action would be taken on his complaint. As the Board has consistently held, during the initial regulatory program, OSM has a responsibility to ensure that the states properly interpret and carry out the intent of the Act and regulations. *See, e.g., Little Byrd Coal Co., Inc.*, 3 IBSMA 136, 88 I.D. 503 (1981); *Ronald W. Johnson*, 3 IBSMA 118, 88 I.D. 495 (1981); *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).² This responsibility includes enforcement of the Act's citizen complaint provisions. OSM has a duty to investigate thoroughly a citizen's accusation that a state has failed to meet its obligations.

However, OSM's ability to discover and to prove some violations may diminish over time. When confronted with an action that was completed before the inspection, OSM must frequently rely upon the statements of company officials or circumstantial evidence in deter-

mining whether that action was taken in accordance with the Act and the regulations.

Here, OSM was told that the vertical highwall created during mining was dynamited to tip material into the impoundment and so create lesser slopes. Dynamiting may have occurred after water was being collected in the impoundment. Yarnell suggested at the hearing that spoil from other areas of the mine was dumped into the impoundment.³ Whatever techniques were used, and whenever they were done, by the time that a sonargram and soundings of the floor were taken, the slopes were approximately 45 degrees.⁴

[3] Yarnell first argues that before an impoundment is filled with water, the area must be returned to approximate original contour. Although the Act does, in general, require return to approximate original contour, *see Tollage Creek Elkhorn Mining Co.*, 2 IBSMA 341, 87 I.D. 570 (1980), some exceptions are made for certain approved post-

³ Considering the fact that spoil may contain toxic or acid-forming materials, it is at least interesting to note that an OSM inspector testified at the hearing that "[a]ll toxic materials would have been covered" (Tr. 33) by Peabody's reclamation technique.

⁴ The sounding and sonargram were taken only after Yarnell had appealed to the Board, more than a year and a half after the original complaint to the State, and almost 5 months after OSM's initial involvement. Because of this delay and because of the lack of evidence as to what, if anything, was done to the impoundment since the complaint, we hold that the soundings and sonargram may be used as evidence only of the configuration of the impoundment floor at the time they were taken. We note, also, that only the western half of the impoundment was surveyed.

² OSM's independent regulatory role during the initial program has been upheld by the U.S. Supreme Court. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 49 U.S.L.W. 4654, 4655 (U.S. June 15, 1981).

mining land use changes.⁵ Specifically, 30 CFR 715.14(e) provides that land be returned to an "appropriate" contour when a permanent water impoundment is to be the postmining land use. We do not here decide what constitutes an "appropriate" contour for a water impoundment in all cases;⁶ we do, however, hold that it is not synonymous with "approximate original" contour. Under the facts of this case, therefore, there was not a violation merely because the floor of the impoundment was not returned to approximate original contour.

[4] Yarnell also argues that the contours of the floor of an impoundment should be achieved before it is filled with water so that they can be inspected. In general, we would tend to agree; not only would this

permit an inspection of the contours of the impoundment, it would also allow a factual determination as to whether all toxic and acid-forming materials were covered sufficiently to prevent their contacting the water.⁷ On the evidence available in this case, however, we decline to hold that Peabody's methods, although perhaps not the best, were prohibited by the Act or regulations.⁸

[5] Yarnell's second area of complaint was that the maps submitted to OSM by Peabody to show the extent of mining that had occurred before May 3, 1978, were inaccurate.⁹ OSM stated at the hearing that it was forced to accept such maps as accurate in the absence of some evidence that they were incorrect because it did not have enough staff to check each map (Tr. 72). It would appear that an apparently honest eyewitness statement would constitute sufficient evidence of inaccuracy so as to obligate OSM to investigate a particular map. The record does not disclose how thorough an investigation of the map OSM conducted. We note, however, that apparently Yarnell's complaint, received in Apr. of 1980, was the first suggestion OSM had re-

⁵ See, e.g., 30 CFR 715.14(d), (e), and (g).

The Board originally questioned when this land use change had been approved by the State. The first OSM inspection report mentioned written documentation of the landowner's satisfaction dated Mar. 28, 1979, but no record of State approval appeared in the file sent to the Board by the Regional Director. From a later submission by Yarnell, however, it appears that the State approved the change on Apr. 30, 1979. We have previously held that OSM is justified in relying on official state records, even though inaccuracies in those records may later show that an enforcement action should be vacated. See *Marco, Inc.*, 3 IBAMA 128, 88 I.D. 500 (1981); *Grafton Coal Co., Inc.*, 2 IBSHA 316, 87 I.D. 521 (1980). In the same way, inaccurate or incomplete OSM records may result in an administrative decision against OSM. When state actions are a significant factor in a case OSM should at least note the occurrence of those actions in its files.

⁶ We are aware, however, that many factors enter into such a decision, including both the intended and unintended, but expectable, uses of the impoundment. The safety of members of the public who might gain access to the area, even if through a trespass, must be considered as well as the stability of the impoundment.

⁷ When the impoundment has been filled first, it is only possible to determine whether such materials have been adequately covered by continued monitoring of the water quality.

⁸ We do not here decide whether pushing or dumping material into an impoundment filling with water and having an outlet would violate the requirement of 30 CFR 715.17 to conduct surface coal mining and reclamation operations in a way that minimizes the potential for water pollution.

⁹ These maps are required by 30 CFR 715.11(c).

July 16, 1981

ceived that the map was inaccurate. Although that elapsed time in no way vitiates OSM's right or duty to challenge the map, it does make providing its inaccuracy much more difficult. OSM was entitled to conclude that it could no longer prove a violation, even if one had occurred.

Therefore, the Feb. 12, 1981, decision of the Hearings Division is affirmed as modified in this opinion. All motions not previously ruled upon are denied.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

UNIVERSAL COAL CO.

3 IBSMA 200

Decided *July 16, 1981*

Petition for discretionary review by Universal Coal Co. of a Sept. 8, 1980, decision by Chief Administrative Law Judge L. K. Luoma in Docket Nos. KC 9-6-R and KC 0-6-P finding that the initial program regulations became effective at the company's mine #051 in Randolph County, Missouri, on Feb. 3, 1978, and that the company violated 30 CFR 716.7(e) and 716.7(g) (1), relating to prime farmlands.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program

The initial program regulations are applicable to a surface coal mining operation immediately when a state permit for the operation is issued on or after Feb. 3, 1978.

2. Surface Mining Control and Reclamation Act of 1977: Prime Farmlands: Negative Determination

When a state does not issue a negative determination on the existence of prime farmlands at the time the permit is issued and OSM alleges a violation of the prime farmland regulations, the permittee must demonstrate that prime farmlands do not exist on the site.

3. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and Reclamation Act of 1977: Prime Farmlands: Negative Determination

A negative determination on the existence of prime farmlands issued by a state after the permittee has been cited by OSM for violating the prime farmlands regulations may be submitted as evidence of whether or not prime farmlands exist on the site, but it is not necessarily entitled to retroactive effect.

APPEARANCES: N. William Phillips, Esq., Phillips & Spencer, Milan, Missouri, for Universal Coal Co.; Gerald A. Thornton, Esq., Office of the Field Solicitor, Kansas City, Missouri, Walton D. Morris, Jr., Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY THE INTERIOR
BOARD OF SURFACE MINING
AND RECLAMATION
APPEALS*

Universal Coal Co. (Universal) has sought review of a Sept. 8, 1980, decision of Chief Administrative Law Judge L. K. Luoma in Docket Nos. KC 9-6-R and KC 0-6-P. That decision upheld enforcement actions taken against Universal by the Office of Surface Mining Reclamation and Enforcement (OSM) pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).¹ We affirm that decision.

Background

On July 11-12, 1979, OSM inspected Universal's pit #051 in Randolph County, Missouri. This mine was operated under a Missouri permit issued on Feb. 3, 1978, with an effective date of Jan. 1, 1978. As a result of the inspection, OSM issued Notice of Violation No. 79-IV-7-9 to Universal, alleging seven violations of the Act and its implementing regulations. Four of those violations remain at issue.² Universal sought administrative review of the notice of violation and of the

civil penalty that was subsequently imposed on the basis of the notice.

A hearing was held on Mar. 18-19, 1980. A decision upholding OSM's enforcement action, but reducing the civil penalty, was issued on Sept. 8, 1980. Universal appealed from the conclusion that it had violated the regulations, but did not seek review of the amount of the civil penalty if the fact of violation were upheld on appeal. Both parties filed briefs.

Discussion and Conclusions

Universal's first argument on appeal is that it was not required to comply with the initial regulatory program requirements until May 3, 1978. Therefore, Universal asserts that all work completed before that date, which includes everything challenged by OSM, may not be the subject of OSM enforcement actions. This argument is based on secs. 502(b) and (c) of the Act, 30 U.S.C. § 1252(b) and (c). Sec. 502(b) reads in pertinent part: "All surface coal mining operations * * * which commence operations pursuant to a permit issued on or after six months [Feb. 3, 1978] from the date of enactment of this Act [Aug. 3, 1977] shall comply, and such permits shall contain terms requiring compliance with, the provisions set out in subsection (c) of this section." Sec. 502(c) states in pertinent part that "[o]n and after nine months [May 3, 1978] from the date of enactment of this Act [Aug. 3, 1977], all surface coal mining oper-

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978). All citations to the Act are to Supplement II, 1978.

² Violation 3 alleged unauthorized construction of a stream channel diversion in violation of 30 CFR 715.17(d). Violation 5 was issued for mining off the permitted area which is prohibited by 30 CFR 710.11(a)(2). Violations 6 and 7 charged, respectively, that Universal had failed to provide the mining and restoration map for prime farmlands required by 30 CFR 716.7(e) and had failed to remove prime farmland soil horizons as required by 30 CFR 716.7(g)(1).

ations * * * shall comply with the provisions of [the listed] subsections." See also 30 CFR 710.11(a) (3) (i) and (ii).

These sections mean that the Act and regulations applied immediately to all surface coal mining operations that were issued new permits on or after Feb. 3, 1978. Operations that received their permits prior to Feb. 3, 1978, had an additional three months, *i.e.*, until May 3, 1978, to comply.

[1] Universal argues that although its permit was issued on Feb. 3, 1978, the effective date of the permit was Jan. 1, 1978. This fact, according to Universal, means that its permit was really issued on Jan. 1, 1978. The Administrative Law Judge correctly rejected this argument. Sec. 502(b) of the Act, 30 U.S.C. § 1252(b), makes the date of issuance controlling.³ Because the permit was issued on Feb. 3, 1978, Universal was required to comply immediately with all of the initial program regulations.⁴ Therefore,

³ This conclusion is strengthened by the testimony of the chief of the coal inspection and enforcement division of the Missouri Land Reclamation Commission. When questioned about the relationship between these two dates at the hearing, he testified that it had previously been normal practice in Missouri to issue permits on a calendar year basis and therefore "[t]he permit period was from January 1 until December 31. The permit was not actually valid until it was actually approved and issued upon receipt of bond by the company" (Tr. 278, 279).

It is further strengthened by the fact that the permit bore the statement regarding compliance with Federal regulations required by sec. 502(b) of the Act, 30 U.S.C. § 1252(b).

⁴ Under sec. 510(d) of the Act, 30 U.S.C. § 1260(d), and 30 CFR 716.7(a) (2) the prime farmland provisions apply to any permit issued on or after the date of enactment of the Act, *i.e.*, Aug. 3, 1977.

the decision below finding that all activities at this mine could be regulated is affirmed.

Universal's second argument is that violations 6 and 7 should be vacated because the State determined that prime farmlands were not involved at this site. Although the negative determination given to Universal was issued on Feb. 27, 1980, 2 years after the permit was issued and 7½ months after the notice of violation was written, Universal argues that a state's negative determination on prime farmlands is binding upon OSM regardless of when that determination is made.

[2, 3] 30 CFR 716.7 anticipates that prime farmlands will be identified during the permitting process for the operation so that proper measures can be taken to ensure that this valuable resource is protected and conserved. If a negative determination is not made at that time, the permittee is subject to an enforcement action for failure to comply with the prime farmland regulations.⁵ When OSM alleges a violation of 30 CFR 716.7, the permittee must demonstrate that prime farmlands do not exist on the site.⁶

⁵ Absent a showing of fraud or similar abuse in the granting of a negative determination, the Board will not lightly overturn a determination made during the permitting process and not challenged at that time.

⁶ In *Ronald W. Johnson*, 3 IBMSA 118, 88 I.D. 495 (1981), we remanded a citizen's complaint to OSM for a decision on whether a state regulatory authority had properly determined that a coal company had valid existing rights to mine certain areas within 300 feet of occupied dwellings. Similarly, in *Alabama By-Products Corp.*, 1 IBMSA 239, 86 I.D. 446 (1979), we remanded a case to the Hearings Division for a determination of whether an

—Continued

CARBON FUEL CO.

3 IBSMA 207

Decided July 17, 1981

Although a negative determination made by the State after a citation is issued may be submitted as evidence of the existence of prime farmlands, it is not necessarily entitled to retroactive effect.⁷ We have reviewed the record in this case and see no reason to disturb the Administrative Law Judge's findings that this site contains prime farmlands and that Universal violated the cited prime farmland regulations.

Therefore, the Sept. 8, 1980, decision of the Hearings Division is affirmed.

MELVIN J. MIRKIN

Administrative Judge

NEWTON FRISHBERG

Administrative Judge

WILL A. IRWIN

Chief Administrative Judge

Petition for discretionary review by the Office of Surface Mining Reclamation and Enforcement from the Jan. 8, 1981, decision of Administrative Law Judge Tom M. Allen in Docket No. CH O-172-P. That decision vacated Cessation Order No. 80-I-91-1 issued to Carbon Fuel Co. for allegedly violating 30 CFR 710.11(a)(2)(ii) by engaging in operations that resulted in a condition creating an imminent danger to the safety of the public.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

30 CFR 710.11(a)(2)(ii) prohibits operations that "result in" imminent danger to the public.

2. Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Imminent danger." A condition constitutes an imminent danger to the health or safety of the public when it creates the possibility of substantial injury that a rational person, cognizant of the danger involved, would choose to avoid.

3. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions

The Board declines to hold that the permit boundary, as identified in a state permit, protects a permittee in all cases from being required to abate the off-site detrimental consequences of its operations.

other state decision was timely. In these cases the Board recognized that the Act and regulations commit some decisions to state regulatory authorities during the initial program. In both of these cases, however, as distinct from the present case, the regulatory authority had attempted to carry out its responsibility at the time contemplated in the Act and Federal regulations. As the Board noted in *Johnson, supra*, and as the Supreme Court stated in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 49 U.S.L.W. 4654, 4655 (U.S. June 15, 1981), the Federal Government retains an independent regulatory role during the initial program. That role requires the Department to ensure compliance with the Act and regulations when a state fails to enforce those requirements or fails to take an action otherwise committed to it.

⁷ We do not here decide what weight should be given to negative determinations made after the permit is issued, but before a possible prime farmland area is disturbed, or when made after the disturbance of such an area but before a citation is issued. See *Hardly Able Coal Co.*, 2 IBSMA 270, 87 I.D. 434 (1980); *Carbon Fuel Co.*, 1 IBSMA 253, 86 I.D. 483 (1979); *Alabama By-Products Corp.*, *supra*.

July 17, 1981

APPEARANCES: William F. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, James M. McElfish, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Gregory R. Gorrell, Esq., and Mark C. Russell, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Carbon Fuel Co.

*OPINION BY THE INTERIOR
BOARD OF SURFACE MINING
AND RECLAMATION
APPEALS*

The Office of Surface Mining Reclamation and Enforcement (OSM) has petitioned for review of the Jan. 8, 1981, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-172-P. That decision vacated Cessation Order No. 80-I-91-1 issued to Carbon Fuel Co. (Carbon Fuel) for an alleged violation of 30 CFR 710.11(a)(2)(ii). For the reasons set forth below we reverse that decision.

Background

On Feb. 20, 1980, an OSM inspector was conducting aerial surveillance of surface coal mining operations in Kanawha County, West Virginia, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).¹ Because he observed what he thought was a problem at Carbon Fuel's permit H-145,

he inspected the area on the ground the next day. At the junction of the haulroad from Carbon Fuel's coal stockpile area with a public road, the inspector found that haulroad material had been tracked out onto the public road. While at the site, the inspector saw numerous vehicles, including a school bus, move into the opposite lane in order to avoid traveling through the mud, coal, and stones that had been deposited on the road. Because of this problem, he issued Cessation Order No. 80-I-91-1 to Carbon Fuel, alleging a violation of 30 CFR 710.11(a)(2)(ii) and requiring Carbon Fuel to clean the material off the public road and to take measures to prevent haulroad material from being tracked onto the public road in the future. The order was terminated the next day after a crew worked all night to clear the road.

Carbon Fuel sought review of this order and the case was submitted to the Administrative Law Judge on stipulated facts on Dec. 19, 1980. The decision vacating the cessation order was issued on Jan. 8, 1981. OSM petitioned for review of that decision and both parties filed briefs.

Discussion and Conclusions

Carbon Fuel was charged with a violation of 30 CFR 710.11(a)(2)(ii), which reads: "A person conducting coal mining operations shall not engage in any operations which result in a condition or constitute a practice that creates an im-

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978). All citations to the Act are to Supplement II, 1978.

minent danger to the health or safety of the public." The Administrative Law Judge apparently concluded that, in order to constitute a prohibited "operation," the activity cited must, in and of itself, constitute a "surface coal mining operation" within the meaning of sec. 701(28)(A) and (B) of the Act, 30 U.S.C. § 1291(28)(A) and (B). Because he could not construe the unintentional depositing of mud from the tires of coal trucks and other vehicles on a public road as a "surface coal mining operation," he concluded that the activity was not covered by the Act.

The Administrative Law Judge further found that there was no imminent danger to public safety. This conclusion was based on his reading of sec. 701(8) of the Act, 30 U.S.C. § 1291(8). He stated that this section requires that "the imminent danger must be of such a magnitude that it cannot be abated prior to causing substantial physical harms to persons outside of the permit area." Decision at 4 (*italics omitted*). The rational person test to be applied in these cases was equated with the "reasonable man" standard. Using the stipulated facts, the Administrative Law Judge concluded that the danger in this case "existed only in the mind of the inspector and absolutely nothing cried out for the issuance of a cessation order to protect the public health or safety." Decision at 5.

[1] These conclusions are not supported by the Act, regulations, or stipulated facts. 30 CFR 710.11(a)

(2)(ii) prohibits operations that "result in" imminent danger to the public. The hauling of coal was part of Carbon Fuel's surface coal mining operation. That hauling resulted in material being deposited on the public road, a condition that is prohibited if the deposits constitute an imminent danger.

[2] Contrary to the Administrative Law Judge's statement, sec. 701(8) of the Act, 30 U.S.C. § 1291(8), does not require that an imminent danger be so great that it *cannot* be abated prior to causing substantial harm. The statutory requirement is that the condition "could reasonably be expected to cause" substantial harm before being abated. That requirement is to be determined according to a rational person standard. Although we agree that the actions of ordinary citizens may suggest what a rational person might do under similar circumstances, we disagree with both the analysis of the stipulated facts set out in the decision below and the conclusion reached. The stipulated facts show that people using the public road avoided the deposited material unless faced with oncoming traffic. It is not necessary that traffic cease or that actual injury occur before a condition constitutes an imminent danger to the safety of the public. It is only necessary that the condition create the possibility of substantial injury that a rational person, cognizant of the danger involved, would choose to avoid. Under the circumstances of this case, the deposits on the public road

constituted an imminent danger to the public safety for which a cessation order was properly issued.

[3] Carbon Fuel argues, however, that the abatement action required here was improper because it involved doing work off its permit area. It is clear that the Act contemplates that the consequences of violations of its requirements may extend off the permit area. *See, e.g.*, sec. 515(b)(10), (21), (24), 30 U.S.C. § 1265(b)(10), (21), (24). Many of these potential off-site problems can be abated by actions taken on the permit area, such as treatment of acid drainage. Others can be prevented from recurring in the future by such orders as the one involved in this case to take measures to prevent haulroad material from being continually tracked onto the public road. Some violations, however, result in dangerous or environmentally undesirable conditions off the permit area. We decline to hold that the permit boundary, as identified in a state permit, protects a permittee in all cases from being required to abate the detrimental consequences of its operations. Under the circumstances of this case, in which the causal connection between the surface coal mining operation and the imminently dangerous condition was clear and uncontroverted, the condition occurred on immediately adjacent public property, and there was no evidence that a third party with legal control over that adjacent property objected to the work required, we hold that the remedial

work required was within OSM's enforcement authority.

Therefore, the Jan. 8, 1981, decision of the Hearings Division is reversed and Cessation Order No. 80-I-91-1 is reinstated and upheld.

MELVIN J. MIRKIN

Administrative Judge

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

AGNES S. SAMUELSON

56 IBLA 242

Decided July 22, 1981

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting a Native allotment application. AA 8051.

Set aside and remanded.

1. Alaska: Native Allotments

In sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), Congress provided that all Native allotment applications which were pending before the Department on Dec. 18, 1971, which describe either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve—Alaska, are approved on the 180th day following the effective date of that Act subject to valid existing rights, unless otherwise provided by other paragraphs or subsections of that section. Although only nonmineral land may be allotted, Congress has defined that term as used in the Native Allotment Act to include land valuable for deposits of sand and gravel.

2. Alaska: Native Allotments—State Selections

Applications for Alaska Native allotments in "core" townships of Native villages are subject to the statutory approval contained in sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, notwithstanding a State selection or tentative approval thereof for the same lands prior to Dec. 18, 1971.

APPEARANCES: Keith A. Christenson, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

INTERIOR BOARD OF LAND APPEALS

Agnes S. Samuelson has appealed from a Nov. 9, 1977, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application AA 8051, dated Dec. 10, 1970, because BLM determined that the land is mineral in character due to the presence of sand and gravel and that the land therefore is unavailable for allotment. The Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), *repealed*, 43 U.S.C. § 1617 (1976), authorizes only allotment of "non-mineral" land.

[1] Appellant raises several arguments against BLM's determination that the land is mineral in character because of the value of the sand and gravel deposits. It appears, however, that this controversy has been resolved by newly enacted legislation. In sec. 905(a)(1)

of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), Congress provided that all Native allotment applications pending before the Department on Dec. 18, 1971, which describe either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve—Alaska, are approved on the 180th day following the effective date of that Act subject to valid existing rights, unless otherwise provided by other paragraphs or subsections of that section. *Jack Gosuk (On Reconsideration)*, 54 IBLA 306 (1981). Although sec. 905(a)(3) provides that an allotment application is not approved if the land described therein is valuable for minerals, it further provides that the term "nonmineral," as used in the Native Allotment Act, "is defined to include land valuable for deposits of sand or gravel." Thus, presence of valuable deposits of sand or gravel does not preclude approval of a Native allotment application.

[2] We note that the Native allotment application conflicts with a state's selection application. Sec. 905(a)(4) of the Alaska National Interest Lands Conservation Act, *supra*, provides that an Alaska Native allotment application is not approved under sec. 905(a)(1) if the land is included in a State selection application but is not within a core township of a Native village. *Roselyn Isaac (On Reconsideration)*, 53 IBLA 306 (1981). However, a BLM status map for the State of Alaska issued in March

1974 indicates that appellant's land is within the core township of the Native village of Dillingham. Thus, it appears that the conflicting State selection application does not bar automatic approval of appellant's application.¹

The record shows no reason why appellant's allotment application is not now subject to approval under subsec. 905(a)(1), provided that her application was pending before the Department on Dec. 18, 1971.² The record discloses no valid existing rights in conflict with the application, and the land was not reserved on Dec. 13, 1968. Where a

¹ The Senate report explains:

"Applications for allotments in 'core' townships of villages certified as eligible for land selections under Section 11(b) of the Alaska Native Claims Settlement Act are, however, subject to the statutory approval contained in subsection (a)(1) notwithstanding a State selection or tentative approval of such core township lands prior to December 18, 1971." S. Rep. No. 96-413, 96th Cong., 2d Sess. 285, reprinted in [1981] U.S. Code Cong. & Ad. News 9130, 9289.

² The requirement that an application be pending before the Department on Dec. 18, 1971, must be met regardless of whether the application is approved under sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act or the Alaska Native Allotment Act, because the Native Allotment Act was repealed on that date and no application could be approved thereunder unless it was pending before the Department of the Interior on Dec. 18, 1971. 43 U.S.C. § 1617(a) (1976). Although appellant's application was dated Dec. 10, 1970, it was not filed with the Bureau of Land Management until June 9, 1972, when the Bureau of Indian Affairs (BIA) filed it on appellant's behalf. It appears that many Native allotment applicants had filed their applications or evidence with the BIA prior to Dec. 18, 1971, but that BIA held them past the time when they were required to be filed with the Bureau of Land Management. Such applications are deemed to be pending on Dec. 18, 1971. See, e.g., *Julius F. Pleasant*, 5 IBLA 171 (1972). On remand appellant should be required to establish that her application was filed with BIA prior to Dec. 18, 1971.

Native allotment applicant meets the requirements of subsec. 905(a)(1), failure to provide adequate evidence of use and occupancy does not bar approval of the allotment application. *Jack Gosuk (On Reconsideration)*, *supra*. The State Office, therefore, should consider appellant's application for approval, subject to any protest which may have been filed before the end of the 180-day period which would preclude approval under subsec. 905(a)(1) and require adjudication pursuant to the provisions of the Native Allotment Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further action consistent with this opinion.

ANNE POINDEXTER LEWIS
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

EDWARD W. STUEBING
Administrative Judge

BAR X SHEEP CO. ET AL.

56 IBLA 258

Decided July 24, 1981

Appeal from decision of Administrative Law Judge Robert W. Mesch, vacating in part District Manager's decisions temporarily suspending por-

tions of maximum allowable active grazing preferences in the Rock Springs District, Wyoming. W 4-79-1.

Reversed.

1. Grazing Permits and Licenses: Cancellation or Reduction

BLM may temporarily suspend portions of maximum allowable active grazing preferences under 43 CFR 4110.3-2(a) authorizing suspensions in cases of "drought, fire, or other natural causes," in order to provide forage for excess wild horses.

APPEARANCES: Marla E. Mansfield, Esq., Office of the Solicitor, Denver, Colorado, for appellant; Calvin E. Ragsdale, Esq., Green River, Wyoming, for appellees.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Robert W. Mesch dated Feb. 13, 1980, vacating in part decisions of the District Manager for the Rock Springs District, Wyoming, dated Mar. 30, 1979. The relevant portions of those decisions temporarily suspended portions of maximum allowable active grazing preferences for livestock and allocated the suspended grazing preferences to excess wild horses.¹ The decisions

involved 11 holders of grazing preferences (appellees herein)² and 5 grazing allotments.³

The District Manager placed the decisions in full force and effect as of Apr. 1, 1979, pursuant to 43 CFR 4160.3(c), in order to ensure the "orderly administration of the range."

The stated rationale for the temporary suspension was "for resource protection in accordance with 43 CFR 4110.3-2(a)(c) [43 CFR 4110.3-2(a) and (c)]." The applicable regulation, 43 CFR 4110.3-2(a), provides in pertinent part: "When authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment on a temporary basis: (1) Due to drought, fire, or other natural causes * * * grazing permits or leases may be suspended in whole or in part."⁴

A hearing on the matter was held before the Administrative Law Judge on Sept. 5, 1979, in Green River, Wyoming. At the hearing,

² The appellees are Bar X Sheep Co., Leonard Hay, Frank Mayo, White Acorn Sheep Co., Erramouspe Brothers, Magagna Brothers, Vernan Mrak, Blair and Hay Land and Livestock Co., Chilton Land and Livestock Co., Dearth Jamieson Sheep Co., and Burton H. and Ralph E. DeLambert.

³ The allotments are Bush Rim, Continental Peak, Red Desert, Sands, and Steamboat Mountain.

⁴ This provision may in part be derived from sec. 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1976), which provides in relevant part:

"During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists."

¹ The decisions also canceled portions of maximum allowable active grazing preferences, pursuant to 43 CFR 4110.3-2(b) (1979). That regulation was amended on July 11, 1980, 45 FR 47105; however, 43 CFR 4110.3-2(a) was not changed.

the District Manager and the Assistant District Manager expanded on the rationale for the decisions, as summarized by the Administrative Law Judge:

[T]hey determined there were excess wild horses within the allotments on the basis of inventory information within their office and information contained in an environmental impact statement; they do not as yet [almost eight years after the Secretary of the Interior was directed to manage wild horses] have any wild horse management plans within the district; it is anticipated that such plans should be developed within a couple of years; the plans will provide for removal of excess wild horses; the actual removal of the horses will not start, however, until funds and manpower are available; it is not known when the funds and manpower will be available—it could be three years or thirty years; the wild horses increase as much as 15 or 20 percent a year on a geometric basis * * *.

* * * * *

* * * [T]hey had not secured adequate funds to remove the excess wild horses from the allotments and in order to avoid an over obligation of the forage resources, they felt they had no alternative other than to make a temporary allocation of forage for the excess wild horses pending their removal from the range; they thought it best, since the condition appeared to be only temporary, and in order to insure that the livestock operators would not permanently lose their grazing privileges, to temporarily suspend the privileges under subsection (a) rather than cancel the privileges under subsection (b) of 43 CFR 4110.3-2; he construes the phrase "or other natural causes" in the regulation authorizing temporary suspensions of livestock grazing because of a decrease in the amount of available forage as including anything that might be termed an Act of God; he believes wild horses and any increases in their population are natural and if they

cause a decrease in the amount of available forage for livestock grazing this would be an Act of God or a natural cause.

(Decision at 5-6).

In his Feb. 13, 1980, decision the Administrative Law Judge made the following findings:

I agree with the appellants that 43 CFR 4110.3-2(a) does not grant the District Manager the authority to temporarily suspend livestock grazing use under the circumstances present in this case. The authorized grazing use exceeds the amount of forage available for livestock grazing, not because of drought, fire, or other natural causes but, because of the BLM's failure to manage the wild horses and remove the excess wild horses as authorized by the 1971 Act [Act of December 15, 1971, *as amended*, 16 U.S.C. § 1331 (1976)] and its failure to take any action to immediately remove the excess animals as mandated by the 1978 Act [Public Rangelands Improvement Act of 1978, P.L. 95-514, 92 Stat. 1803, 1808, 16 U.S.C. § 1333 (Supp. II 1978)]. While the wild horses may be the result of natural causes, the presence of excess numbers in the allotments and the decrease in the amount of available forage created by the excess animals are solely the result of, or due to, the BLM's failure to respond to the mandates of the 1971 and the 1978 Acts. This failure, for whatever reason, is not an Act of God or a natural cause creating a decrease in the amount of available forage.

(Decision at 6).

[1] The principal question in this case is whether 43 CFR 4110.3-2(a) allows the temporary suspension of livestock grazing preferences where there has been a decrease in available forage due to an increase in a competing population of wild horses.

In order to answer that question

we must analyze the phrase "or other natural causes." Appellant argues that the increase in the wild horse population was due to natural procreation. Appellees, on the other hand, assert that but for the failure of BLM to comply with its statutory mandates the population would not have increased. Appellees also urge the invocation of the doctrine of ejusdem generis. That rule, as stated by the court in *Gooch v. United States*, 297 U.S. 124, 128 (1936), "[o]rdinarily * * * limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation." See also 2A Sands, *Sutherland Statutes and Statutory Construction* 118 (1973).

Further investigation reveals that "other natural causes," as used in the regulation, should not be read as restrictively as appellees assert. The precursor of 43 CFR 4110.3-2(a) was 43 CFR 4125.1-1(i)(8) (1977). It read in pertinent part: "If necessary to rehabilitate the vegetative resources on the public land, the Authorized Officer may temporarily close the leased land to grazing or reduce livestock use whenever vegetal cover is depleted due to drought, epidemic, fire or any other cause, or for rehabilitation of the area."

In 1976 the Department proposed changes to the grazing regulations in an attempt to modernize them. 43 CFR 4110.3-2 (*Decrease in forage*) was proposed to read as follows:

When authorized grazing use exceeds the livestock forage available within a

grazing area or where reduced grazing use is necessary to facilitate multiple-use management objectives or protection of the environment, authorized grazing use and grazing preferences may be adjusted accordingly. Such adjustments will be equitably apportioned by the authorized officer or as agreed to among authorized users and the authorized officer.

41 FR 31506 (July 28, 1976). During the comment period, the Federal Land Policy and Management Act of Oct. 21, 1976, 43 U.S.C. §§ 1701-1782 (1976), was signed into law. Therefore, on July 8, 1977, grazing regulations were repropoed. In the reproposal 43 CFR 4110.3-2 was changed to require mandatory cancellation, stating in pertinent part: "When authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment or where reduced grazing use is necessary to facilitate achieving the objectives in the land use plans, grazing permits or grazing leases and grazing preferences shall be cancelled in whole or in part." 42 FR 35338 (July 8, 1977).

On July 5, 1978, final grazing regulations were published in the *Federal Register*. 43 CFR 4110.3-2 was separated into three subsections. Most importantly for the purposes of this case, 43 CFR 4110.3-2 (a) was changed to provide for discretionary suspension "[w]hen authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment on a temporary basis: (1) due to drought, fire, or other natural causes." 43 FR 29069 (July 5, 1978).

As explained in the preamble to

the regulations, this change was made in response to a comment:

The proposed regulations provided for cancellation of grazing permits or grazing leases and grazing preferences in whole or in part under § 4110.3-2 when the authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment. It was suggested that this should not apply when the amount of forage available is reduced on a temporary basis in the case of drought, fire, or other short term situation. In response to these suggestions, the regulations have been changed to provide for suspension of grazing permits or leases, instead of cancellation, when the authorized grazing use exceeds the amount of forage available for livestock grazing within an allotment on a temporary basis.

43 FR 29058 (July 5, 1978).

The regulatory history of the language of 43 CFR 4110.3-2(a) indicates that the Department intended to provide flexibility in the management of the range when "*in the case of drought, fire, or other short term situation*" the authorized grazing use exceeded the amount of available forage on a temporary basis. (Italics added). The emphasis of the regulation is on the discretionary ability of BLM to act when necessary to protect the range from possible deterioration. 43 CFR 4110.3-2(a) provides for suspensions, rather than cancellations, when the threat to the range is a temporary one.

In addition, 43 CFR 4110.3-2(a) takes its authority in part from the Federal Land Policy and Management Act of 1976 (FLPMA), *supra*, which provides for land management "under principles of multiple

use." 43 CFR 4100.0-3(b); *see also* 43 CFR 4100.0-2. The concept of multiple use was interpreted by the court in *American Horse Protection Association, Inc. v. Frizzell*, 403 F. Supp. 1206, 1221 (D. Nev. 1975), involving a conflict between the grazing rights of wild horses and cattle, to mean "that neither wild horses nor cattle possess any higher status than the other on the public lands."⁵ The court concluded that "[u]nder the multiple use * * * concept, then, the BLM had various alternatives available to them to alleviate the overgrazing on Stone Cabin Valley"; it could either act pursuant to the Act of Dec. 15, 1971, *as amended, supra*, to remove wild horses or act pursuant to the Taylor Grazing Act, *as amended, supra*, to restrict livestock grazing on overgrazed land. In the latter regard, the court cites the predecessor of 43 CFR 4110.3-2(a), *i.e.*, 43 CFR 4125.1-1(i)(8) (1977). The applicable regulation, 43 CFR 4110.3-2(a), also takes its authority from the Taylor Grazing Act, *as amended, supra*.

Appellees argue that once BLM determines that there is "an excess population [of wild horses] and a need for removal, the [Public Rangelands Improvement Act of 1978, *supra*] only gives [the District Manager] one course of action, to immediately remove the excess

⁵ While *American Horse Protection Association, Inc. v. Frizzell, supra*, applied the multiple use provisions of the Act of Sept. 19, 1964, 43 U.S.C. § 1411 (1970), the concept of multiple use was carried over into FLPMA, *supra*. See 43 U.S.C. §§ 1701(a)(7) and 1702(c) (1976).

horses in the priority and order stated" (Appellees' Answer at 15).⁶ Appellees argue not that the District Manager abused his discretion in taking the suspension action, but that "under the command of Congress in circumstances such as this, where he has made certain determi-

⁶ Sec. 14(b)(2) of the Public Rangelands Improvement Act of 1978, 16 U.S.C. § 1333(b)(2) (Supp. II 1978), provides:

"(2) Where the Secretary determines on the basis of (i) the current inventory of lands within his jurisdiction; (ii) information contained in any land use planning completed pursuant to section 1712 of title 43; (iii) information contained in court ordered environmental impact statements as defined in section 1902 of title 43; and (iv) such additional information as becomes available to him from time to time, including that information developed in the research study mandated by this section, or in the absence of the information contained in (i-iv) above on the basis of all information currently available to him, that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken, in the following order and priority, until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation:

"(A) The Secretary shall order old, sick, or lame animals to be destroyed in the most humane manner possible;

"(B) The Secretary shall cause such number of additional excess wild free-roaming horses and burros to be humanely captured and removed for private maintenance and care for which he determines an adoption demand exists by qualified individuals, and for which he determines he can assure humane treatment and care (including proper transportation, feeding, and handling): *Provided*, That, not more than four animals may be adopted per year by any individual unless the Secretary determines in writing that such individual is capable of humanely caring for more than four animals, including the transportation of such animals by the adopting party; and

"(C) The Secretary shall cause additional excess wild free-roaming horses and burros for which an adoption demand by qualified individuals does not exist to be destroyed in the most humane and cost efficient manner possible."

nations, he is without discretion" (Appellees' answer at 18).

We cannot agree with appellees. While sec. 14(b)(2) of the Public Rangelands Improvement Act of 1978, *supra*, dictates the immediate removal of excess animals, there is no indication that removal is the exclusive remedy for an overpopulation of wild horses. In addition, despite the specific directions in that section, the Act is not self-executing. Surely, until implementation of provisions for removal, BLM is not foreclosed from taking actions to preserve the quality of the Federal range. We find that 43 CFR 4110.3-2(a) provided the District Manager with an alternative method of dealing with the overpopulation problem.

Appellees have also argued that (1) the District Manager's decision was arbitrary, capricious, and an abuse of discretion because no time limit was set on the temporary suspension; (2) an environmental impact statement (EIS) was not prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 (1976), assessing the environmental impact of a temporary suspension of grazing preferences; and (3) the District Manager's decision with respect to holders of grazing preferences in the Continental Peak Allotment⁷ were arbitrary, capricious, and an abuse of discretion because no rationale was provided for plac-

⁷ In their notice of appeal, dated Apr. 30, 1979, appellants therein (appellees) indicated that Erramouspe Brothers and Magagna Brothers were pressing the appeal in this regard.

ing the decisions in full force and effect.

There appears to be no requirement in the law that a decision providing for a temporary suspension of grazing preferences specify a time limit for such suspensions. *See* 43 U.S.C. § 315b (1976); 43 CFR 4110.3-2(a). The suspension is by its nature dependent on causes whose duration is difficult to determine. The necessary implication of a suspension under 43 CFR 4110.3-2(a) must be that the suspension will be effective at least so long as the situation persists which gave rise to the action.

NEPA, *supra*, requires the preparation of an EIS with regard to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (1976). The record discloses that an EIS, known as the Sandy Grazing EIS, was prepared with respect to the subject allotments, in part assessing the balance between livestock and wild horse grazing (Tr. 91-92). However, a basic assumption in the EIS was the maintenance of the wild horse population at "management levels" and no consideration was given to temporarily allocating forage to excess wild horses (Tr. 90). Nevertheless, we do not believe that *temporarily* suspending the grazing preferences involved in this case can be construed as "a major Federal action significantly affecting the quality of the human environment." Appellees have failed to provide any evidence to support their claim that an in-

dividual EIS is needed, especially in view of the EIS already prepared. *See Julie Adams*, 45 IBLA 252 (1980); *Headwaters*, 33 IBLA 91 (1977). We cannot find that BLM was required to prepare an EIS prior to its actions in this case.

Finally, the question is presented whether the District Manager properly placed the decisions affecting the Continental Peak Allotment in full force and effect. At the time the decisions were made, the District Manager had the authority pursuant to 43 CFR 4160.3(c) to place the decisions in full force and effect "pending decision on appeal therefrom. * * * only if required for the orderly administration of the range or for the protection of other resource values." The regulations do not require that the District Manager specifically detail the reasons for such a determination. In this case the reasoning of the District Manager is implicit in his decisions. We find no error in the District Manager's determination to place the decisions in full force and effect.

We have carefully reviewed the record and it discloses a rational basis for the decisions to suspend temporarily livestock grazing preferences and to place those decisions in full force and effect at that time. Therefore, they will not be disturbed. *See Bert N. Smith*, 48 IBLA 385 (1980), and cases cited therein. The burden is on the one challenging the decision to show by substantial evidence that the decision is unreasonable. *Id.* In the present case, appellees have failed to do

so. Accordingly, we hold that the District Manager properly issued decisions temporarily suspending appellees' grazing preferences.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

UNIVERSAL COAL CO.

3 IBSMA 218

Decided July 28, 1981

Appeals by Jerry Crutchfield, Universal Coal Co., and the Office of Surface Mining Reclamation and Enforcement from the Jan. 30, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket No. KC 1-2-R granting temporary relief to the company from the abatement requirements in the fourth modification of Notice of Violation No. 80-4-4-6, which alleged a violation of the hydrologic balance protection requirements of 30 CFR 715.17.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications

Because temporary relief is an extraordinary remedy that may be requested in a pending case, an application for temporary relief not preceded or accompanied by an application for review of a notice, order, or civil penalty should be dismissed.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

A modification of a notice of violation can change obligations in any way necessary to ensure compliance with the Act and regulations so long as the specificity requirements of sec. 521(a)(5) of the Act are met.

3. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

OSM does not have authority to extend the abatement period in a notice of violation beyond 90 days.

APPEARANCES: Gary S. Dyer, Esq., and Stephen W. Jacobson, Esq., Lathrop, Koontz, Righter, Claggett & Norquist, Kansas City, Missouri, for Intervenor Jerry and Neta Crutchfield; N. William Phillips, Esq., Phillips & Spencer, Milan, Missouri, and George Anetakis, Esq., Frankovitch & Anetakis, Weirton, West Virginia, for Universal Coal Co.; and Bruce A. Cryder, Esq., Field Solicitor, Gerald A. Thornton, Esq., Office of the Field Solicitor, Kansas City, Missouri, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

July 28, 1981

*OPINION BY THE INTERIOR
BOARD OF SURFACE MINING
AND RECLAMATION
APPEALS*

Review has been sought of a Jan. 30, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket No. KC 1-2-R by all three parties below: Universal Coal Co. (Universal), the Office of Surface Mining Reclamation and Enforcement (OSM), and Intervenors Jerry and Neta Crutchfield (Crutchfield). The decision appealed from granted temporary relief to Universal from the abatement measures required in the fourth modification of Notice of Violation No. 80-4-4-6, issued to Universal by OSM pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act)¹ and its implementing regulations. Although we affirm the result reached below, we do so solely on the basis of the discussion set forth in this opinion.

Background

On July 11-12, 1979, OSM inspected Universal's pit #051 in Randolph County, Missouri. As a result of that inspection, OSM issued Notice of Violation No. 79-IV-7-9, alleging seven violations of the Act and regulations. Violation 3 charged that Universal had failed to design, construct, and maintain a stream diversion channel as required by 30 CFR 715.17(d). Uni-

versal sought review of this notice of violation in Docket No. KC 9-6-R, and the Administrative Law Judge noted that violation 3 was terminated after Universal "completed remedial action sufficient to make the structure acceptable as a temporary diversion on the understanding that the entire area would be reclaimed within 1 year" (Decision in KC 9-6-R at 7). Because OSM's authority to regulate the diversion was upheld, Universal appealed that decision to the Board. The decision was affirmed on July 16, 1981. *Universal Coal Co.*, 3 IBSMA 200, 88 I.D. 657 (1981).

The same diversion continued to cause problems and OSM inspected it again on Apr. 15-16, 1980, after receiving a complaint from downstream landowner Crutchfield. OSM served Universal with Notice of Violation No. 80-4-4-6 by mail on Apr. 24, 1980. The notice alleged that Universal had "failed to minimize disturbance to the prevailing hydrologic balance" in violation of 30 CFR 715.17, and required Universal either to redesign and reconstruct the diversion channel or to return the stream to its original channel. In either case plans were to be submitted to and approved by the State no later than May 19, 1980, with construction to be completed within 21 days following State approval. Because of problems with the designs submitted, OSM modified the notice on Aug. 22, Aug. 29, and Sept. 18, 1980, to require specific designs and to give additional time for abatement.

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978). All citations to the Act are to Supplement II 1978.

Universal did the work required under these modifications.

On Oct. 30, 1980, OSM modified the notice for a fourth time and required that Universal do abatement work within the stream channel off its permit area. Universal objected to this modification and filed an application for temporary relief with the Hearings Division. A hearing limited to temporary relief was held, and on Jan. 30, 1981, temporary relief was granted. All parties, including Intervenor Crutchfield, appealed from various parts of this decision and filed briefs.

Discussion and Conclusions

[1] In seeking review of this notice of violation, Universal filed one document entitled "Application for Temporary Relief." 43 CFR 4.1261 states that "[a]n application for temporary relief may be filed by any *party to a proceeding* at any time prior to decision by an administrative law judge." (Italics added.) This regulation is based on sec. 525(c) of the Act, 30 U.S.C. § 1275(c), which provides that:

*Pending completion of the [administrative] investigation and hearing required by * * * [sections 525(a) and (b)], the applicant may file with the Secretary a written request that the Secretary grant temporary relief from any notice or order issued under section 521 of this title * * * together with a detailed statement giving reasons for granting such relief. [Italics added.]*

Temporary relief is an extraordinary remedy that may be requested in a pending case. Therefore, a proper application for review of the

merits of a notice of violation, cessation order, or civil penalty must either precede or accompany an application for temporary relief. An application for temporary relief standing alone should be dismissed.

The Administrative Law Judge's acceptance of Universal's application for temporary relief can only be justified by construing pages 3 and 4 of the document as also being an application for review sufficient under 43 CFR 4.1164. Such applications, however, should conform to the requirements of the regulations; parties should not depend on our going to extra lengths to construe them as sufficient when they are not apparently so.

Universal has only sought review of modification 4 of the notice of violation. The Administrative Law Judge granted temporary relief from that modification on the grounds that Universal had shown that it was likely to succeed on the merits of its case.

[2] In reaching his conclusion, the Administrative Law Judge used the *Webster's* dictionary definition of "modification" to find that it can only decrease obligations, not increase or add new requirements. We do not agree. "Modification" under the Act and regulations encompasses any change, whether it increases or decreases obligations.²

² See, e.g., *American Telephone and Telegraph Co. v. FCC*, 503 F.2d 612, 613-14 (2d Cir. 1974):

"The petitioner urges that the FCC statutory power to 'modify' its requirements must be constructed to mean that the Commission has only the authority to shorten, but not to extend the public notice requirement. We are persuaded that the word 'modify' used in the

—Continued

The Secretary and his authorized representatives have the authority to issue notices of violation and cessation orders and to modify those notices and orders as experience and changing circumstances required.³ See sec. 521(a)(5) of the Act, 30 U.S.C. § 1271(a)(5). So long as a modification meets the specificity requirements of sec. 521(a)(5), it can change obligations in any way necessary to ensure compliance with the Act and regulations.⁴

[3] The Board notes, however, that modification 4 was written on Oct. 30, 1980, 189 days after service of the original notice of violation.⁵ The modification states that all remedial work previously required was completed, and then orders abatement work not previously specified. Sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3), provides that "a reasonable time but not

more than ninety days" shall be fixed for abatement of a violation. However that section might have been construed, 30 CFR 722.12(d) clearly states that "[t]he total time for abatement *as originally fixed and subsequently extended* shall not exceed 90 days." (Italics added.) The preamble to the initial program regulations states that the Secretary interpreted the Act as providing no authority to extend an abatement period beyond 90 days:

13. Numerous comments were received regarding the prohibition contained in § 722.12(c) [now (d)] of the proposed regulations against extending beyond 90 days the time for abatement as originally fixed and subsequently extended. It was stated that the 90-day limit will create unnecessarily harsh results especially when considered with the provisions of § 722.16 [now 722.17] relating to inability to comply. * * * Several commenters urge that such a result [extending the period beyond 90 days] is authorized by § 521(a)(3) of the Act.

* * * * *

These comments were rejected because § 521(a)(3) is interpreted as prohibiting the setting of an abatement time, initially or as extended, beyond 90 days. * * * Additionally, the legislative history of the Act clearly states that while an inspector may extend the initial abatement period, the total abatement period cannot exceed 90 days.

42 FR 62667 (Dec. 13, 1977).

Therefore, we hold that modification 4 of Notice of Violation No. 80-4-4-6 was not effective, and Universal is not required to comply with it. Since abatement previously ordered had been completed in this

statute plainly gives the FCC the power to alter or change the notice period whether it results in an increase or decrease of time involved." See also the numerous cases collected under "modify" in *27 Words and Phrases* 662 (1961) and the 1981 cumulative pocket part, as well as the definitions for "modification" and "modify" in *Black's Law Dictionary*, 905 (5th ed. 1979).

³ If a person objects to any modification, review of that modification is possible without regard to the underlying notice or order under 43 CFR 4.1162.

⁴ The Administrative Law Judge also concluded that OSM was without authority to order a permittee to take abatement action off the permit area and that such an order would force the permittee to engage in an illegal activity, i.e., to conduct surface coal mining and reclamation operations without a permit. The fact that this opinion does not reach these issues does not mean that the Board agrees with the Administrative Law Judge's conclusions.

⁵ This fact was not raised by the parties or addressed by the Administrative Law Judge.

case, OSM might have issued a new notice of violation requiring the same abatement as modification 4.⁶ OSM did not have authority, however, to extend the abatement period in this notice of violation beyond 90 days.⁷ The Jan. 30, 1981, decision of the Hearings Division is affirmed as modified in this decision.⁸

NEWTON FRISHBERG

Administrative Judge

WILL A. IRWIN

Chief Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN CONCURRING:

Although I fully concur, even had the 90-day limitation not expired I would find it difficult to hold that OSM had anything to modify at the time it attempted the fourth modification. At that time Universal had completed everything it was asked to do. Had it not, there might have been something to modify. As it was, the only thing OSM had to

⁶ We do not decide whether such a notice would be upheld substantively after administrative review.

⁷ We note that this could be a rather harsh conclusion, in this case for OSM, and in other cases for a permittee. We feel, however, that it is compelled by 30 CFR 722.12(d).

⁸ Because of this disposition we do not reach the Administrative Law Judge's failure to make a finding as to whether the granting of temporary relief would adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. Such a finding is required by sec. 525(c)(3) of the Act, 30 U.S.C. § 1275(c)(3), and *Mauersberg Coal Co.*, 2 IB SMA 63, 87 I.D. 176 (1980).

We also do not address the Administrative Law Judge's decision on the merits in a temporary relief proceeding. Such a decision was vacated in *Cravat Coal Co.*, 2 IB SMA 136, 87 I.D. 308 (1980).

do was to admit the abatement required by the notice of violation and its first three modifications had been satisfied. If something were then still amiss, it would seem to me that issuing a new notice of violation would be the proper procedure.

MELVIN J. MIRKIN

Administrative Judge

ESTATE OF MATTHEW COOK

9 IBIA 52

Decided July 29, 1981

Appeal from order determining heirs by Administrative Law Judge Robert C. Snashall.

Reversed.

1. Indian Probate: Divorce: Indian Custom

Where no evidence was received at probate hearing to show the customs of any Indian tribe concerning regulation of the domestic relations of members of the tribe, a ruling by an Indian probate Administrative Law Judge that he could officially notice the existence of divorce by Yakima tribal custom was error. Since no evidence was offered to show that decedent, who was of Nez Perce and Yakima ancestry, and appellee, of Alaskan Native descent, lived in tribal relations under the jurisdiction of the Yakima tribe, it was error to conclude they were nonetheless married in accordance with Yakima customary law.

2. Indian Probate: Marriage: Common Law and Indian Custom Distinguished

A holding that decedent and appellee were married by operation of tribal custom based upon a conclusion that the

July 29, 1981

birth of nine children to the couple required a finding they were married was erroneous where the record affirmatively showed decedent was married to another woman at the time of his cohabitation with appellee.

APPEARANCES: Tim Weaver, Esq., for appellant Mary Cook Jack; Kurt Engelstad, Esq., for appellee Sarah Peele Cook.

*OPINION BY
ADMINISTRATIVE JUDGE
ARNESS*

*INTERIOR BOARD OF
INDIAN APPEALS*

Following decision by this Board on May 5, 1978,¹ a rehearing in the probate of decedent Matthew Cook's estate was held on June 21, 1979, to receive evidence concerning the marital status of decedent at the time of his death in 1976. On Nov. 16, 1979, the Indian probate Administrative Law Judge affirmed his original order of June 27, 1977, declaring that appellee Sarah Peele Cook was married to decedent by operation of an Indian custom marriage established in 1946 and continuing until decedent's death.

Evidence taken at the rehearing, including testimony from appellee, establishes that appellee met decedent at Portland, Oregon, in 1945 (or possibly earlier) and they began to live together in Celilo Falls in 1945. From 1945 until 1953 they lived continuously together in Celilo Falls, and at Vancouver,

Washington; Gresham, Oregon; and Ketchikan, Alaska. Appellee bore decedent nine children. Appellee and decedent were separated intermittently for 4 years beginning in 1953, during which time appellee bore a child by another man. At the time of decedent's death appellee was living in Alaska and had been separated from decedent for about 3 years. Appellee testified that she was unfamiliar with the concept of marriage by tribal custom, but considered that she and decedent were married by operation of common law, since it was her belief that the State of Alaska recognized common law marriage.²

Decedent married Irene M. Bruno in a civil ceremony at The Dalles, Oregon, on Sept. 24, 1943. The marriage was terminated by divorce decreed by an Oregon circuit court on Jan. 7, 1957. (According to the decision below, it was in fact terminated prior to 1946 by way of an "Indian custom" divorce.)

The testimony at rehearing establishes that no Yakima Indian wedding ceremony was celebrated for decedent and appellee. However, the record is silent concerning specific customs of the Yakima tribe concerning domestic relations. There is no dispute that on Dec. 16, 1953, the Yakima governing body enacted a

² Tr. 32-33. The record does not establish the dates when decedent and appellee lived in Alaska. It appears they were there for 11 months sometimes after the birth of the child Elizabeth in 1952. Contrary to appellee's belief, the State of Alaska did not allow marriage by common law in the 1940's or 1950's, nor anytime thereafter. See Alaska Stat. § 25.05.011.

¹ *Estate of Matthew Cook*, 7 IBIA 62 (1978).

written law respecting domestic relations. Neither party relies upon the Dec. 16, 1953, tribal enactment, which, although not in the record, has been previously characterized by the Department as precluding marriage or divorce by Indian custom, and it appears that both parties take the position that whatever changes it made in the customary law are not relevant here.³

³ The authority of the tribe to regulate domestic affairs is recognized by the Department at 25 CFR 11.28, *Tribal custom marriage and divorce*. For an exposition of the principles involved in terms of congressional policy, see *United States v. Quiver*, 241 U.S. 602, 605-606 (1916). The trier of fact below, commenting upon the Board's prior decision upon remand, stated at the hearing (Tr. 3): "If, however, their language that they used means what it simply states, that you have to prove in each case what the law of the Yakima Tribe was at the time when somebody supposedly went through one of these [Indian custom marriage or divorce] that's absurd because we've gone through probably two hundred thousand of these cases where there are Indian custom divorces on the Yakima Reservation and they are all of them quite explicit as to what has to be done to satisfy it." The Board's decision did, in fact, mean exactly what it said. Since Indian probate proceedings are required to conform to the strictures of the Administrative Procedures Act, Act of Sept. 6, 1966, 80 Stat. 378, 387 (6 U.S.C. § 557) (1976), concerning the perfection of a record sufficient to support the decision of the employee conducting the initial hearing, any decision determining heirship which is based upon a finding that there was an Indian custom marriage or divorce must be supported by a record which contains proof of the custom relied upon. It is not sufficient that the factfinder be satisfied in his own mind that there is such a custom and that it was effectively relied upon by the parties in a particular instance.

If and when the Administrative Law Judge adjudicates a case in which proof of specific Yakima tribal customs regarding divorce or marriage is established, including the factor or factors commonly looked upon by the tribe and tribal members as necessary to consummate a custom marriage or divorce, reliance on such an adjudication in other cases, when properly noticed to the parties, would not be objectionable.

The record is also silent concerning actions indicating decedent's recognition of tribal jurisdiction over his domestic affairs or the degree of control exercised over him by the tribe. It appears decedent was born in Idaho, at some distance from the Yakima Reservation. Although decedent was an enrolled member of the Yakima tribe, agency records indicate he was "1/4 Yakima, 5/8 Nez Perce, 1/8 white." It is established that prior to 1945 he served in the U.S. Army and later worked for a railroad. His financial dealings were conducted with commercial banks in Vancouver, Washington, rather than with the Yakima tribe. He appeared in a child custody contest in a state court divorce action brought against him by Irene M. Bruno. The only evidence concerning decedent's conformity to tribal customs of the Yakima tribe was elicited from a witness who identified himself as a member of the "Shoshone-Bannock" tribe. He testified that tribal domestic custom was a "family affair" concerning which there was no consensus.

The Administrative Law Judge held that decedent had divorced Irene M. Bruno prior to 1953 according to customs of the Yakima tribe and had married appellee in 1946 by operation of tribal customary law and that this second marriage continued until decedent's death in 1976. Underlying the Administrative Law Judge's holding that appellee is decedent's widow is his opinion that "it would be absurd

to hold that 30 years of living together and nine children are not substantial evidence of an intended marital situation."⁴ This conclusion rests upon a previous finding that "no showing is necessary as to what constitutes an Indian custom divorce (or marriage) under said tribal law as this forum takes judicial notice of the myriad cases defining and explaining what constitutes such actions under said tribal law * * *." This premise and stated conclusion are error which require reversal of the order determining appellee to be an heir of decedent.⁵ This reversal is not surprising inasmuch as the Board's prior order of May 5, 1978, expressly remanded this case to the Administrative Law Judge for, *inter alia*, failure to adduce "with any specificity what factors were regarded as necessary

to effect an Indian custom divorce prior to December 16, 1953."

[1] While there are many cases, most of them old,⁶ which discuss the recognition which the Department must give to the customary laws of the various tribes, there are few cases which discuss the actual laws of the tribes themselves. The questions which arise in cases where it is asserted that there had been a marriage or divorce by tribal customary law are questions of conflict of laws, as Cohen points out in the *Handbook of Federal Indian Law* at page 120:

[T]he state has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the Federal Government. Thus Indian marriage and divorce * * * are matters over which the state cannot

⁴ Order dated Nov. 16, 1979, page 2. The reported cases contain very little explanation or description of tribal customs. (Compare, in contrast, the unreported decision of Administrative Law Judge Patricia McDonald in the matter of the *Estate of San Juanito Toledo, or Fatty, or Ush You Holy Wot*, Indian Probate No. IPGA 21G 76 dated Aug. 10, 1979). One source for discovering tribal customs is found in anthropologic works such as *The World of the American Indian*, National Geographic Society (1974), where various marriage customs of different tribes are discussed (see pp. 90, 95, 104, 117, 124, 162, 169, 180, 227, 286, 291). The anthropologic studies reported indicate great variety in the marriage customs of the tribes. Tribal elders are also a source of such evidence.

⁵ The Nov. 16 order also recites that the evidence "on the question to be determined" was "at best equivocal and conflicting." Despite this finding, which requires a conclusion that there was a failure of proof, the order then finds that a continuing marriage was proved by a "preponderance of the evidence." Such a finding and conclusion are incorrect as a matter of law. (See Administrative Procedure Act, Act of Sept. 6, 1966, 80 Stat. 386, 5 U.S.C. § 556(d) (1976), *as amended*.)

⁶ For example, *Cohen's Handbook of Federal Indian Law* (1941), notes at page 138 and fn. 121 that:

"Recognition of the validity of marriages and divorces consummated in accordance with tribal law or custom is found in numerous cases:

Johnson v. Johnson, 30 Mo. 72 (1860); *Boyer v. Dively*, 58 Mo. 510 (1875); *Earl v. Godley*, 42 Minn. 361, 44 N. W. 254 (1890); *People ex rel. LaForte v. Rubin*, 98 N. Y. Supp. 787 (1905); *Ortley v. Ross*, 78 Nebr. 339, 110 N. W. 982 (1907); *Yakima Joe v. To-is-lap*, 191 Fed. 516 (C. C. Ore. 1910); *Oyr v. Walker*, 29 Okla. 281, 116 Pac. 931 (1911); *Buck v. Branson*, 34 Okla. 807, 127 Pac. 436 (1912); *Butler v. Wilson*, 54 Okla. 229, 153 Pac. 823 (1915); *Carney v. Chapman*, 247 U. S. 102 (1918); *Hallotwell v. Commons*, 210 Fed. 793 (C. C. A. 8 1914); *Johnson v. Dunlap*, 68 Okla. 216, 173 Pac. 359 (1918); *Davis v. Reeder*, 102 Okla. 106, 226 Pac. 880 (1924); *Pampey v. King*, 101 Okla. 253, 225 Pac. 175 (1924); *Proctor v. Foster*, 107 Okla. 95, 230 Pac. 753 (1924); *Unussee v. McKinney*, 133 Okla. 40, 270 Pac. 1096 (1928); and *cf. Connolly v. Woolrich*, 11 Lower Can. Jur. 197 (1867). See, also, *Parr v. Colfax*, 197 Fed. 302 (C. C. A. 9, 1912); *Porter v. Wilson*, 239 U. S. 170 (1915); and see Wharton, *Conflict of Laws* (3d ed. 1905), vol. 1, sec. 128a."

exercise control, so long as the Indians concerned remain within the reservation. [Footnotes omitted.]

The discussion of tribal regulation of domestic relations appearing at page 137 of the *Handbook* considers the nature of Indian custom marriage and divorce, observing in a pertinent analysis that:

The Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members. Indian custom marriage has been specifically recognized by federal statute, so far as such recognition is necessary for purposes of inheritance. [Act of Feb. 28, 1891, 26 Stat. 794, 795 (25 U.S.C. § 371 (1976))] Indian custom marriage and divorce has been generally recognized by state and federal courts for all other purposes. Where federal law or written laws of the tribe do not cover the subject, the customs and traditions of the tribe are accorded the force of law, but these customs and traditions may be changed by the statutes of the Indian tribes. In defining and punishing offenses against the marriage relationship, the Indian tribe has complete and exclusive authority in the absence of legislation by Congress upon the subject. No law of the state controls the domestic relations of Indians living in tribal relationship, even though the Indians concerned are citizens of the state. [Footnotes omitted.]

Prior decisions by the Department uniformly hold that the burden to prove a marriage or divorce by operation of Indian custom is on the proponent of the claimed marriage or divorce. To satisfy established evidentiary requirements there must be proof offered to show the customs of the tribe concerning the domestic relations of its members (especially so, where, as here, a party has requested an opportu-

nity to show evidence contradicting an agency decision which rests on official notice of Indian customs).⁷ It must also be shown that the marriage partners were "living in tribal relations," that is, a sufficient connection between the parties and a particular tribe must be shown to have existed in order to give the tribal government an interest in, and control over, the marriage and the parties to the marriage, much in the same way that a divorce action in a state court must be based upon an alleged and proved jurisdiction over the subject matter and the parties to a divorce proceeding.⁸ As was the Administrative Law Judge, appellee in this case and her counsel were on notice through the Board's remand order that any party intending to prevail as an heir of the decedent based on evidence of an Indian custom marriage or divorce should be prepared to establish the existence of the customs in question and compliance therewith. This the appellee failed to do.

Finally, decedent's known conduct of his affairs is inconsistent with a finding that he intended to live according to tribal custom. He married according to state law, and sought to obtain child custody benefits from a divorce action involving

⁷ See Act of Sept. 6, 1966, 80 Stat. 387, 5 U.S.C. § 556(e) (1976). The pertinent part of the statute provides: "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." (The APA controls Indian probate proceedings. *Estate of Ireland*, 1 IBIA 67, 78 I.D. 66 (1971).)

⁸ *Estate of Humpy*, 7 IBIA 118, 86 I.D. 213 (1979).

his marriage to Irene M. Bruno by active intervention in a state divorce proceeding. Nothing in the record indicates that he gave similar credence to the customary domestic relations laws of the Yakima tribe, or that he knew what the tribal customs were.⁹

[2] The opinion below confuses Indian custom marriage with common law marriage. The Administrative Law Judge states the issue before him concerning the marital status of decedent to be (Tr. 9-10): "What we need to establish here is whether there was a common law or Indian custom marriage or an actually Anglicized-type marriage here." Common law marriage is a creature of state law, as is the civil marriage apparently referred to by the trier of fact. Indian custom marriage is a creature of tribal law: Thus, one cannot presume that a tribe recognized marriage based simply upon a projection of current American domestic relations law without proof of the mechanics of that recognition.¹⁰ There is an unstated reasoning by analogy to principles of American domestic relation law

present in the fact-finder's conclusion that a marriage should be presumed from the birth of nine children which is without foundation in fact in the record. Since decedent was still married to another at the time he fathered appellee's children, neither a presumption that there was a marriage based upon common law principles nor an inference that unknown Yakima custom would have reached a similar result can support the findings made by the Administrative Law Judge. Decedent was married in 1943 to another woman from whom he was not divorced until 1957. The record fails to show that decedent and appellee took any action to enter into a marriage after decedent's 1957 divorce. While it is conceivable that, in a given instance, a tribe's customs may result in recognition of marriage in situations identical to those which the common law of a state recognized to result in marriage, such a concordance needs to be proved.¹¹ It was not proved in this case. Nor can appellee be found to be the surviving spouse of decedent by virtue of a common law marriage. None of the states in which decedent and appellee cohabited (Oregon, Washington, and Alaska) allow marriage by common law.¹²

⁹ Implied in the decision below is an assumption that a general and uniform Indian custom marriage or divorce custom prevails throughout North America. Contrary to this assumption, each tribe that regulates domestic relations matters is exclusive to itself, in the same manner as the states of the United States exercise exclusive jurisdiction over domestic relations in their respective jurisdictions. Thus, the customs of a tribe said to control a particular marriage must be proved to support a finding of marriage (or divorce). *Estate of Humpy*, above n.6.

¹⁰ *Estate of Roubedeaux*, 7 IBIA 254 (1979); *Estate of Toobisgah*, 4 IBIA 189, 82 I.D. 541 (1975).

¹¹ *Estate of Senator*, 2 IBIA 102, 80 I.D. 731 (1973). In *Senator*, this Board reversed an order containing language almost identical to that used by the fact-finder below. The Board held there, as it does here, that a showing of "mere cohabitation" may not be equated to marriage.

¹² Alaska Stat. § 25.05.011; Or. Rev. Stat. § 106.041; Wash. Rev. Code § 26.04.120.

The facts of record suggest decedent was a contemporary member of American society who generally lived in the state community by which he was surrounded. He and appellee, while they had some contacts with the Yakima tribe, and were both of Indian descent, were not proved to be so immersed in the Yakima culture and society that they could be said to have been living in "tribal relations" as that term has been used to define persons controlled and affected by tribal customary law. No evidence tending to show either decedent's divorce from Mrs. Bruno prior to 1957 or marriage by Indian custom to appellee was offered at the probate hearing. It is concluded appellee was not married to decedent at the time of his death.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed. The Administrative Law Judge is directed to amend the order determining heirs by deleting the name of appellee from the list of persons eligible to inherit.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

TED DILDAY

56 IBLA 337

Decided July 30, 1981

Appeal from decision of the Idaho State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. I MC 42835 through I MC 42850.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Abandonment

Deficiencies under the regulations in the content of an affidavit of assessment work or notice of intention to hold filed with the Bureau of Land Management with respect to an unpatented mining claim may be considered curable and do not result in a conclusive presumption of abandonment of the claim where the filing meets the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Abandonment

With respect to the unpatented mining claims located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either notice of intention to hold the claim or evidence of assessment work with the local recording office where the notice of location is recorded and a copy thereof with the Bureau of Land Management prior to Dec. 31 of the year following the calendar

year in which the claim was located under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

APPEARANCES: Ted Dilday, pro se.

*OPINION BY
JUDGE GRANT
INTERIOR BOARD OF
LAND APPEALS*

Ted Dilday appeals from a decision of the Idaho State Office, Bureau of Land Management (BLM), dated Jan. 16, 1981, as later modified by a decision dated Feb. 12, 1981, declaring the appellant's unpatented mining claims, I MC 42835 through I MC 42850, abandoned and void for failure to properly file evidence of assessment work or a notice of intention to hold the claims as required by sec. 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and regulations at 43 CFR 3833.2 and 43 CFR 3833.4(a).

Appellant's mining claims were located on Sept. 1, 1979, and recorded with BLM on Oct. 24, 1979. In its decision dated Jan. 16, 1981, BLM erroneously declared appellant's mining claims abandoned and void because he failed to file notice of intention to hold the subject claims or evidence of assessment work on or before Oct. 22, 1979. For unpatented mining claims located after Oct. 21, 1976, sec. 314 of FLPMA and the regulations adopted thereunder require filing with

BLM of a notice of intention to hold or proof of assessment work on or before December 30 of the year following the year in which the claim was located—Dec. 30, 1980, in this case. 43 U.S.C. § 1744(a) (1976); 43 CFR 3833.2-1(c). When the error in this decision was brought to the attention of BLM, an amended decision of Feb. 12, 1981, was issued modifying the earlier decision. The latter decision stated in part:

Your Notice of Intention to hold your unpatented mining claims was not filed properly. In order to have a valid Notice of Intention, you should have filed a copy of a letter signed by the owner and recorded in the county recorder's office. * * * Your Notice of Intention did not include the statements as set forth in [43 CFR 3833.2-3(a)(1) (iii), (iv), and (v)].

Reference to the case file discloses that the documents submitted by appellant as notices of intention to hold are copies of lists supplied to him by BLM which give the names and corresponding serial numbers assigned to each of his 16 Wooden Nickel claims. In the upper right-hand corner appellant's name and address appear in script. At the bottom of the same page someone, presumably appellant, has printed "INTEND TO HOLD." There is no indication on the documents themselves that they have been recorded in the county recorder's office.

Appellant asserts in his statement of reasons for appeal that no proof of labor was required to be

filed with the BLM for the subject claims for the assessment year from Sept. 1, 1979, to Sept. 1, 1980, because under the mining law assessment work is not required until the first assessment year commencing after location of the claims which would be the assessment year running from Sept. 1, 1980, to Sept. 1, 1981. Further, appellant alleges that notice of intent to hold was not applicable because no deferment of assessment work was involved. Appellant contends that the copies of the location notices recorded with the county recorder's office should be accepted in lieu of proof of labor or notice of intention to hold for the discovery year.

[1] Sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1976), provides in pertinent part, that:

The owner of an unpatented lode or placer mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on [sic] a detailed report provided by section 28-1 of title 30, relating thereto.

(2) File in the office of the Bureau designated by the Secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

Thus, claimant is required by statute to file with local recording office where the notice of location is recorded either a notice of intention to hold the claim or an affidavit of assessment work and, further, to file in the proper BLM office a copy of the instrument filed in the local recording office prior to December 31 of the year following the calendar year in which the claim was located. The notice of intention to hold filed with BLM must be an exact legible reproduction or duplicate of the instrument filed for record in the local jurisdiction of the state where the claim is located and recorded. 43 CFR 3833.2-3; *Pacific Coast Mines, Inc.*, 53 IBLA 200 (1981). Although the notice which appellant filed with BLM is defective for failure to include a statement that the claim is held and claimed for the valuable mineral contained therein, a statement that the owners intend to continue development of the claim, and the reason that the annual assessment work has not been performed, as called for by the regulation at 43 CFR 3833.2-3(a)(1)(iii) through (v), these requirements go beyond the requirements of the statute and the deficiency is in the nature of a curable defect which would not support a conclusive presumption of abandonment under sec. 314 of FLPMA. See *Topaz Beryllium Co. v. United States*, Civ. No. 79-2255, slip op. at 6 (10th Cir. May 21, 1981); *Feldslite Corporation of America*, 56 IBLA 78, 81-82, 88 I.D. 634 (1981). However, in cases such as this one

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where it is clear the notice submitted was not a copy of a notice of intention to hold the claim filed in the local recording office as required by the terms of the statute, the statutory filing requirements have not been complied with and the claim is conclusively presumed abandoned under sec. 314 of FLPMA. *See Pacific Coast Mines, Inc., supra* at 202.

[2] It is true, as appellant alleges, that the mining law does not require performance of assessment work until the assessment year commencing on the first day of September succeeding the date of location of the claim. 30 U.S.C. § 28 (1976). Thus, appellant was not required to perform assessment work until sometime during the year running from Sept. 1, 1980, to Sept. 1, 1981. However, this does not obviate the necessity for compliance with sec. 314 of FLPMA requiring filing of either an affidavit of assessment work or notice of intention to hold with both the local recording office and BLM by December 30 of the year following the calendar year in which the claim was located. *See Silvertip Exploration & Mining*, 43 IBLA 250, 252 (1979); *Charlie Carnal*, 43 IBLA 10, 12 (1979). The filing with BLM of a copy of the location notice filed with the local recording office cannot suffice as a notice of intention to hold the claim. *Don Sagmoen*, 50 IBLA 84, 86 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

C. RANDALL GRANT, Jr.

Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES

Administrative Judge

JAMES L. BURSKI

Administrative Judge

CONSOLIDATION COAL CO.

3 IBSMA 228

Decided July 31, 1981

Appeal by Consolidation Coal Co., from a Dec. 2, 1980, decision by Administrative Law Judge Tom M. Allen in Docket No. CH 0-301-R upholding Notice of Violation No. 80-I-28-33 issued to the company for an alleged violation of 30 CFR 717.17(h)(2), failure to monitor certain hydrological aspects of underground mining in a manner approved by the regulatory authority.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Underground Operations: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Underground operations." Because of the definition of "underground operations" in 30 CFR 717.11(a)(1), the ground water monitoring requirements

of sec. 717.17(h)(1) and (h)(2) of 30 CFR do not apply to an inactive mine where the only underground activity is the mechanical removal of accumulated water.

APPEARANCES: Thomas L. Hindes, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., Alice Hearst, Esq., and Marcus P. McGraw, Assistant Solicitor, Office of the Solicitor, Washington, D.C., for Appellee, Office of Surface Mining Reclamation and Enforcement; Daniel E. Rogers, Esq., Pittsburgh, Pennsylvania, for Appellant Consolidation Coal Co.

*OPINION BY THE INTERIOR
BOARD OF SURFACE MINING
AND RECLAMATION
APPEALS*

The question presented for our review in this case is whether 30 CFR 717.17(h)(2) applies to an inactive underground mining operation. For the reasons set forth below, we hold that the regulation did not apply to this operation and we reverse.

*Factual and Procedural
Background*

The Administrative Law Judge decided this proceeding on the basis of a stipulation of facts and joint motion for judgment. The facts pertinent to our consideration are discussed below.

Consolidation Coal Co., (Consolidation) is the permittee of the Williams No. 98 underground coal mine near Wyatt, West Virginia. Consolidation ended active extraction

activities there in 1979, but left on the surface of the minesite a raw coal stockpile and a refuse disposal area that was subject to reclamation. On July 9, 1980, an inspector for the Office of Surface Mining Reclamation and Enforcement (OSM) issued Notice of Violation (NOV) No. 80-I-28-33 to Consolidation under the authority of the Surface Mining Control and Reclamation Act of 1977 (Act).¹ The NOV charged two violations of the Act and initial program regulations, only one of which is at issue in this appeal. The violation before us is an alleged failure to monitor ground water in accordance with 30 CFR 717.17(h)(2).

Consolidation had set up and was operating a system for removing accumulated water in the underground workings by piping it to an acid mine drainage treatment plant near Wyatt. Consolidation's purpose in doing so was to relieve water pressure buildup in the old workings because that presented a danger to Consolidation's operation of an adjacent active mine. The water in the mine came from two sources, ground water naturally accumulating underground and water drained from a sedimentation pond which was receiving drainage from the surface area of the mine. Consolidation was aware of some characteristics of the water involved, including rate and direction of flow, levels within the mine, and quantity and quality of the water leaving the

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1325 (Supp. II 1978).

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mine and the treatment plant, but it was not monitoring ground water by using wells that could adequately reflect changes in ground water quantity and quality, as specified by the cited regulation. Nor had it submitted any monitoring plan to the regulatory authority.

The Administrative Law Judge vacated the NOV in a decision issued on Dec. 5, 1980. He reasoned that since the Secretary had, in his view, indicated that a similar ground water monitoring requirement did not apply to underground mines during the permanent regulatory program, then 30 CFR 717.17(h) would not apply during the initial regulatory program.² In addition, he stated that the "unattended mechanical removal of water from the mine by a pump * * * can hardly be classed as underground coal mining operations."³

On Dec. 12, 1980, however, the Administrative Law Judge issued an amended decision vacating his earlier decision and affirming the notice of violation. He did so after receiving the Nov. 20, 1980, *Federal Register* containing comments that the Secretary was deleting only one of several monitoring requirements applicable to underground operations during the permanent regulatory program.⁴

Regarding the second reason for his December 5 decision, the Administrative Law Judge stated in his amended decision:

The fact that the underground mine had been closed for 11 months would not necessarily relieve the applicant from monitoring ground water as required by 30 CFR 717.17(h) (2) even though the activities being conducted at that time (mechanical removal of water from the mine by a pump) cannot be classed as an underground coal mining operation by the undersigned. [5]

Thus, although he did not change his view that merely pumping water from the mine was not an underground operation, the Administrative Law Judge did come to a different conclusion concerning the applicability of 30 CFR 717.17(h) (2). He did so, apparently, because of his belief that since there was "no completion of reclamation on the underground mine, or abandonment of the site, the provisions of 30 CFR 717.17(h) (2) must be complied with until otherwise permitted by a proper authority."⁶

Consolidation appealed.

Discussion and Conclusions

It is true that "[a]ll underground coal mining and associated reclamation operations conducted on lands where any element of the operations is regulated by a State shall comply with the initial performance standards of [Part 717 of 30 CFR] according to the time schedule speci-

² The Administrative Law Judge had based his view on a statement in the opinion of the U.S. District Court in *In Re: Permanent Surface Mining Regulation Litigation*, No. 79-1144, slip op. at 16 (D.D.C. May 16, 1980).

³ Dec. 5, 1980, decision in Docket No. CH 0-301-R at 5.

⁴ 45 FR 76933 (Nov. 20, 1980).

⁵ Dec. 12, 1980, amended decision in Docket No. CH 0-301-R at 1.

⁶ *Id.*

fied in § 710.11.”⁷ The time schedule specified there for all surface coal mining operations, including the surface impacts incident to an underground mine, requires a person to comply with the obligations of the initial regulatory program “until he has received a permit to operate under a permanent State or Federal regulatory program.”⁸ Alternatively, if mining and reclamation operations have been terminated, the obligation to comply with the initial performance standards ends when an operation is no longer subject to regulation by a state with respect to any requirements of the initial program.⁹

But in order for the monitoring requirements set forth in 30 CFR 717.17(h)(2) to apply to Consolidation, its operations must fall within the definition of “underground operations” contained in Part 717. That is because 30 CFR 717.17(h)(1) provides: “(h) *Ground water systems.* (1) *Underground operations* shall be conducted to minimize adverse effects on ground water flow and quality, and to minimize offsite effects. The permittee will be responsible for performing monitoring according to paragraph (h)(2) of this section to ensure *operations* conform to this requirement.” [Italics supplied.]

“Underground operations,” in turn, is specially defined in 30 CFR 717.11(a)(1). That section reads as follows: “(1) For the purposes of this part, *underground coal mining and associated reclamation opera-*

tions mean a combination of *surface operations* and *underground operations*. * * * *Underground operations* include underground construction, operation, and reclamation of shafts, adits, underground support facilities, underground mining, hauling, storage, and blasting.” (Italics in original.)

Thus, the monitoring requirements of 30 CFR 717.17(h)(2) are made applicable to underground operations, as defined in 717.11(a)(1), by 717.17(h)(1).¹⁰ In this context the issue becomes whether pumping water out of an otherwise inactive underground mine is an “underground operation.” We believe it is not. That activity is not sufficiently related to those included in 717.11(a)(1) to fall within the scope of that definition.

We conclude that 30 CFR 717.17(h)(2) did not apply to Consolidation’s Williams No. 98 mine when the notice of violation was issued.¹¹ We therefore reverse the Adminis-

¹⁰ The phrase “underground coal mining operations” in 717.17(h)(2) is not separately defined. A nearly identical phrase—“underground coal mining and associated reclamation operations”—is contained in 717.11(a)(1) and is defined there in terms of “underground operations.” It is therefore reasonable to interpret the operations covered by 717.17(h)(2) as underground operations within the meaning of 717.11(a)(1).

¹¹ We note OSM’s argument that, since Consolidation was pumping water from the Williams No. 98 underground mine to relieve pressure that potentially threatened operations at the adjacent active surface mine, the underground mine should properly be regarded as part of the disturbed area of that adjacent mine. Whatever the merits of that suggestion might be under other circumstances, in this case the notice of violation was not addressed to the adjacent surface mine or obligations under 30 CFR 715.17(h)(3). See *Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980). Similarly, other possible violations suggested by the facts of this case, e.g., of 30 CFR 717.17(l), are not before us.

⁷ 30 CFR 717.11(a).

⁸ 30 CFR 710.11(a)(3) (iii).

⁹ *Grafton Coal Co., Inc.*, 3 IBSMA 175, 181, 88 I.D. 613, 616 (1981).

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trative Law Judge's Dec. 12, 1980, decision and vacate the notice of violation.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

APPEALS OF PHILLIPS CONSTRUCTION CO.

IBCA-1295-8-79 & 1296-8-79

Decided July 31, 1981

Contract No. YA-511-CT7-163, Bureau of Land Management.

Appeals sustained and remanded.

1. Contracts: Disputes and Remedies: Termination for Default: Generally— Contracts: Performance or Default: Excusable Delays

Where the contractor established that a critical diesel fuel shortage prevented timely completion of the contract, and that such shortage was unforeseeable, beyond the control, and without the fault or negligence of the contractor or its subcontractors or suppliers, the Board held that the contractor proved excusable cause for delay.

2. Contracts: Construction and Operation: Notices

Where the Board found that the contracting officer had actual notice of the claim for delay based on a diesel fuel shortage, but declined to make the investigation required by Clause 5(d)(2) of the General Provisions of the Standard Form 23A construction contract because of the erroneous belief that a fuel shortage was

not a sufficient legal ground to justify an extension, the Board further found that the Government was not prejudiced by alleged untimely notice of delay and refused to foreclose the contractor from asserting the defense of excusable cause for delay.

3. Contracts: Disputes and Remedies: Jurisdiction

The Board held that since its jurisdiction is appellate only, it may not consider claims presented to it without such claims first having been submitted to the contracting officer for consideration and decision.

APPEARANCES: Milton Datsopoulos, Esq., Datsopoulos, McDonald & Lind, Missoula, Montana, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

The subject contract was awarded to J. W. Phillips Construction Co. (Phillips, contractor, or appellant) of Missoula, Montana, by the Bureau of Land Management (BLM), on Sept. 16, 1977. The work to be performed consisted of reconstructing approximately 5 miles of existing road and constructing approximately 3 miles of new road, together with related work and appurtenances, pertaining to the Chamberlain Creek road in Powell County, Montana. The contract price was originally for \$228,947.85.

The completion time on the contract was initially 240 days, but by

subsequent contract modifications, including hunting season and winter shutdowns, the completion time was extended to 303 calendar days from the date of the notice to proceed on Sept. 30, 1977. The contract provided for liquidated damages at the rate of \$250 per day for each calendar day of delay beyond the date fixed for completion of the contract. There was some confusion in the record regarding the correct completion date. The contracting officer (CO), Mr. Johnnie Bubany, calculated the date to be July 23, 1979 (Tr. 65). The owner of the appellant, Mr. James W. Phillips, thought it was Aug. 15, 1979 (Tr. 124). Although the CO's authorized representative (COAR) referred to the July 23 date in his testimony (Tr. 22), he notified appellant on June 26, 1979, in instruction No. N-7, that as of June 22, 1979, there were 44 days remaining to complete the job. This would make the completion date Aug. 5, 1979.

It is undisputed that the construction season for 1979 commenced on May 15 at about which time a diesel fuel shortage developed nationwide and became especially critical in the State of Montana; that prior to that time, the work of the contractor had progressed relatively according to schedule; that after that time, until June 25, appellant did not work on the contract at all; that from June 25 to July 11 appellant obtained enough fuel to work only 11 days; that on July 10, 1979, the contractor wrote a letter addressed to the COAR with a copy to the CO requesting a 60-day extension of time because of the fuel shortage;

that on July 20, 1979, the CO issued findings of fact and decision whereby the requested extension was denied; and that on Aug. 3, 1979, the CO sent a telegram to the appellant terminating the contract for default.

The project was completed by Richard's Construction Co. of Seeley Lake, Montana, the subcontractor for Fireman's Fund Insurance Co., the surety for the appellant. This completing subcontractor performed the remaining work in approximately 25 days after mobilization, the completion date being Oct. 5, 1979 (Tr. 25).

The contractor filed two appeals with the Board. The first appeal, Docket No. IBCA-1295-8-79, is from the termination for default by the CO on Aug. 3, 1979, and is based on a theory of excusable cause for delay resulting from the diesel fuel shortage. The second appeal, Docket No. IBCA-1296-8-79, relates to seven claims for equitable adjustment totaling \$133,275.08, which appellant concedes (Appellant Brief at 25-27) were not submitted to the CO for decision.

The Termination for Default Appeal

The two principal issues raised by this appeal are: (1) whether appellant has made out a case of excusable cause for delay because of the diesel fuel shortage, and (2) whether appellant has been foreclosed from asserting such defense because of failure to give timely notice as required by Clause 5 of the General Provisions of the contract.

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The pertinent subparagraphs of Clause 5 are as follows:

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

"(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

"(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay."

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract

does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

The subject contract does contain a clause providing for termination for the convenience of the Government. It is Clause 18 which provides as follows:

18. Termination for Convenience of the Government

If not physically incorporated elsewhere, the clause in Section 1-8.703 of the Federal Procurement Regulations, or paragraph 7-602.29(a) of the Armed Services Procurement Regulation, as applicable, in effect on the date of this contract is hereby incorporated by reference as fully as if set forth at length herein.

The burden of proof questions raised by this appeal are well settled by the case law. Generally, the Government must prove the contractor's default, while the contractor must undertake the task of showing that the failure to perform was excusable under the terms of the contract. *Woodside Screw Machine Co., Inc.*, ASBCA 6939, (Feb. 27, 1962) 1962 BCA par. 3,308; *Racon Electric Co., Inc.*, ASBCA 8020, (Oct. 3, 1962) 1962 BCA par. 3,528. The contractor must show that the alleged cause of delay actually existed. *Larsen-Meyer Construction Co.*, IBCA-85 (Nov. 24, 1958), 65 I.D. 463, 58-2 BCA par. 1,987. He must then go on to allege and prove that the failure to complete the contract work on time was due to causes that were

unforeseeable, beyond his control, and that neither he, his subcontractor, nor his supplier were at fault or negligent. *Industrial Service & Engineering Co.*, IBCA-235 (July 28, 1960), 67 I.D. 308, 60-2, BCA par. 2,701; *Eagle Construction Corp.*, IBCA-230 (July 18, 1960), 67 I.D. 290, 60-2 BCA par. 2,703.

Evidence of a severe fuel shortage, particularly critical in the State of Montana during the construction season of 1979, was presented in the record by Exhibit 11 of the appeal file, consisting of various newspaper clippings, a letter from Deano's Truck Shop, appellant's principal supplier, and a letter dated Aug. 2, 1979, from appellant. The existence of the fuel shortage was corroborated by the testimony of James W. Phillips, owner of appellant (Tr. 102-44) and various representatives of petroleum products suppliers as follows: Clint Baertsch, general manager of Western Montana Cop (Tr. 71-77); Robert E. Tremper, Secretary-Treasurer of Tremper, Inc., a Conoco distributor (Tr. 88-92); and Dean Clinkenbeard, owner of Deano's, Inc., a self-service truck stop (Tr. 93-100). The testimony of these witnesses further established that, from approximately May 13, 1979, through the first week in August 1979, because of the fuel shortage, the fuel suppliers were required by a Department of Energy regulation to give priority allocation to farmers, ranchers, home heating customers, and loggers, and since construction was at the bottom of the priority list (Tr. 74) they were, therefore, unable to supply

diesel fuel to appellant for the construction project. All of the suppliers testified that the shortage was unforeseeable, beyond their control and the control of Phillips, and that Phillips had requested fuel on several occasions but had to be denied because of a reduced fuel supply of from 40 to 60 percent.

The Government argues that the principal reason Phillips could not get fuel from Western Montana Cop was not because of the shortage, but rather, because Phillips was in arrears on its account and that according to a Mr. Davis, a substation manager for Western, Phillips would have been serviced on a cash basis (Govt. Brief at 7-8). However, the Government did not produce Mr. Davis as a witness. The source of the allegation was the testimony of Mr. James Norris, the contracting officer's representative (COR), who testified that the conversation with Mr. Davis took place by way of a telephone call on Sept. 13, 1979, and a personal conversation with him on Sept. 18, 1979, which was after the termination for default on Aug. 3, 1979. Mr. Norris also testified that he received written notice of the claim of excusable delay on June 10, 1979 (Tr. 23) and that he did not make, nor was he requested to make an investigation of the fuel shortage prior to July 20th (Tr. 34, 35).

Mr. Johnnie Bubany, the CO, testified under direct examination (Tr. 56-60) that he had made an investigation of the question whether Phillips was delayed by a fuel shortage; that the investigation consisted of a telephone call to Mr. Al Heinle

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of Western Montana Co-op on Sept. 14, 1979; that the fuel shortage was discussed; that Phillips was supplied by Western Co-op; that Heinle said there was a shortage of fuel with supply limited but that they were taking care of their customers; and that Heinle said he would confirm this in writing. Under cross-examination, Mr. Bubany admitted that his findings of fact and decision of July 20, 1979, denying appellant's request for a time extension of 60 days, were not based upon an investigation of the alleged fuel shortage, but rather, "on the contract documents and the Inspector's Log and the records and in accordance with Clause 5 of the contract General Provisions" (Tr. 60). He further testified that, as far as he was concerned, a fuel shortage was not excusable cause of delay (Tr. 61); and that that was why he did not investigate it between July 10 and July 20. When asked why he then made the telephone call to Western Co-op on September 14 after the fact, he responded that it was on advice of his solicitor (Tr. 62).

The testimony of the CO and his authorized representative, including the statement attributed to Mr. Davis regarding the availability of fuel to Phillips on a cash basis, was offset by the testimony of both Mr. Baertsch and Mr. Heinle of Western Montana Co-op.

Mr. Baertsch, the general manager, explained that Jim Phillips and his construction business had a business relationship with Western for 14 years in that Phillips bought part of his fuel, gasoline and oil, on

an off and on basis; that he valued the business relationship but that Phillips was not a regular customer with respect to diesel fuel; that he told Jim Phillips, when he made an effort to obtain diesel fuel during the period of the shortage, that Western had fuel available only for its present customers if any was left over after taking care of the agricultural accounts; and that if Jim had come in with a bag full of cash at that time he could not have supplied him with diesel fuel. With regard to the Davis statement, Mr. Baertsch stated that he did not know where Davis came up with it because Davis was a substation manager who "answers directly to me," and was instructed to take care of present customers and agricultural accounts and not to take any new accounts (Tr. 73-76).

Mr. Al Heinle, credit manager for Western Co-op, recalled the telephone conversation with Mr. Bubany, the CO, on Sept. 14, 1979, and testified that Mr. Bubany had requested him to write a letter to say that there was a shortage and also to say that Phillips had credit problems and that is why he (Phillips) could not get fuel. Mr. Heinle further stated that he told Mr. Bubany that he could not do that because "Mr. Phillips' credit has always been good." Mr. Heinle also testified that he did prepare the requested letter for the signature of Mr. Baertsch on the same day of the telephone conversation, but did not comply with the request to state that Mr. Phillips had credit problems because it was not true (Tr. 81-82). Under examination by the hearing

officer, cross-examination by Government counsel, and redirect examination by counsel for appellant, Mr. Heinle's testimony remained intact (Tr. 82-87).

A copy of the letter referred to by Mr. Heinle, dated Sept. 14, 1979, and addressed to the BLM at Denver, Colorado, was admitted into evidence without objection, as appellant's Exhibit 2, and reads as follows:

Gentlemen:

During the period May through August 1979 diesel fuel was denied Jim Phillips Construction of Missoula due to scarcity of commodity. First priority at that time was for agricultural purposes.

Very truly yours,

CLINT BAERTSCH

Manager

cc: Jim Phillips

Mr. Bubany was not recalled to the stand to rebut any of the testimony of appellant's witnesses. In fact, at the end of the hearing on this appeal, the Government offered no rebuttal evidence after being given the opportunity to do so.

The testimony of the suppliers regarding the unavailability of diesel fuel to Phillips preventing timely completion of the project was supplemented by extensive testimony of James W. Phillips, owner of Phillips Construction Co. He pointed out that he had been in business as a contractor since 1971, and that his principal supplier had been Western Montana Co-op until the spring of 1976, at which time Deano's Truck Stop began business; that Deano's was located close to his home and business operation and, therefore, he converted a large portion of his fuel purchases from Western Co-op to Deano's; that he

first learned of the fuel shortage at Deano's around the middle of May 1979; that in addition to contacting the suppliers who testified in an effort to obtain fuel, he also contacted Chuck Hart, the Chevron distributor and others, but none had fuel available for him; and that all the suppliers figured that the shortage was nothing to get excited about and they all advised him that they thought he could probably get fuel momentarily (Tr. 102-09). Among other things, Mr. Phillips also testified that his bonding company, after the termination for default, took over the completion of the contract by contracting with Richard's Construction Co., which was for completion of the new road and about \$10,000 worth of minor clean up work and a little shaping on the lower 5 miles of the project, for the contract price of \$125,000; that the result was that the completing contractor performed the remaining work on the project for \$115,000 which Phillips had subcontracted with Evensen, Inc., to do for the contract price of \$23,500 (Appellant Exh. 3) (Tr. 128-31).

[1] Based upon the evidence above-recited, together with our review of the entire evidence of record in this proceeding, we hold that the preponderance favors appellant, and find specifically as follows:

1. That during the construction season of 1979, from May 15 through the first week in August, a critical diesel fuel shortage occurred in the State of Montana which prevented appellant from timely completing the contract work; and

2. That the fuel shortage was un-

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foreseeable, beyond the control, and without the fault or negligence of the contractor or its subcontractors or suppliers.

In consideration of the foregoing findings of fact, we conclude that appellant sustained its burden of proving that the failure to perform timely was caused by an excusable delay under the terms of the contract.

The Notice of Delay

The Board must now deal with the second issue of this appeal. The Government argues that appellant did not give the notice of delay to the contracting officer as required by Clause 5(d)(2) of the General Provisions of the contract, and by his failure to do so, lost his right to pursue a claim for excusable delay based on the fuel shortage. It is contended that appellant knew of the fuel shortage in May of 1979, but did not notify the CO that he considered himself being delayed because of it until July 10, 1979; that appellant's excuse for not filing the required notice was that he believed he had plenty of time in which to complete to work (Tr. 113); that the contractor sat on his rights for 56 days (May 15 to July 10) before giving the required notice; and that by this late date there was not enough time left to complete timely the contract work.

Appellant argues in effect that the contractor must notify the CO of any event, which he is alleging as excusable delay, within 10 days of the time from which the event will cause a delay in the completion

of work under the contract; that here Phillips estimated that he needed about 3 weeks to complete the contract in 1979; that this estimate turned out to be fairly accurate, since the evidence of record shows that 25 days were used by the completing contractor to finish the work; that if he had obtained the necessary fuel, he would have been able to complete the contract on or about August 4, 25 days from the date of the notice on July 10, and that, therefore, under such interpretation of Clause 5(d)(2), appellant complied with the notice requirement, since he believed the completion date to be August 15.

We recognize that there was some confusion in the record regarding the completion date, and, as previously discussed, we calculated the completion date to be Aug. 5, 1979. However, appellant also argues that the notice was sufficient on another ground. The contractor had discussed the fuel shortage with the COAR on at least four different occasions during the period May 15 to July 10, 1979, and on June 13, 1979, told the COAR that he had "about enough fuel to move around the yard," which quote, the COAR inserted into his daily log (Tr. 39). Appellant contends that the COAR thus had actual notice of the delay long before July 10 which should be imputed to the CO.¹

¹ Clause 1(b) of the General Provisions of the subject contract defines the term, "Contracting Officer," as follows: "The term 'Contracting Officer' as used herein means the person executing the contract on behalf of the Government and includes a duly appointed successor or authorized representative." See also *Environment Consultants, Inc. IBCA-1192-5-78* (June 29, 1979), 86 I.D. 439, 357, —Continued

We find it unnecessary to reach the merits of appellant's first argument and although we see merit in the imputed notice argument, neither need we rely on it for our finding in view of the testimony of the CO himself. Mr. Bubany admitted that he noted in May, and again in June, in the COAR's documents, the allegation of a fuel shortage (Tr. 65). He also testified under cross-examination (Tr. 62-63) as follows:

Q. So, the fact of the matter is, there was no investigation and no effort to determine whether there was a fuel shortage when you made your decisions as you recited in your letter of July 20, 1979?

A. As I stated earlier, I based my decision on the records and on the Inspector's Log and in the Inspector's Log I saw notations where Jim had claimed fuel shortage, but I did not have a request from Jim for a time extension other than the day of July the 10th when I got his letter for request for time extension. Prior to that it was all hearsay as far as I was concerned.

At Tr. 61-62 his testimony was as follows:

Q. Yes, you became concerned that you couldn't justify that decision, didn't you, Mr. Bubany?

A. No, I based my decision on Clause 5 of the contract; fuel shortage, as far as I was concerned, was not excusable cause of delay. It was something that I couldn't justify giving a contractor, Mr. Phillips, a time extension based on.

Q. Let's take that line of thinking.

A. Okay.

Q. Let's presume, as a hypothetical, that there was no question that there was a fuel shortage and that Phillips could not get fuel to proceed. Let's presume and assume that that is a fact. Okay, and that was what you had concluded, be-

tween July 10th and July 20th, 1979. Then, you are telling us that you still would have rejected his request for an extension?

A. Yes, sir.

Q. So, it is your position that you made a legal decision based on your knowledge of the contract that no matter whether there was or was not a fuel shortage, and even if there was one, Phillips did not have a right to an extension?

A. Yes, sir.

Q. Okay, and for that reason, you really didn't care whether there was a fuel shortage or not. That is why you didn't investigate it between July 10th and July 20th?

A. That's right.

[2] It is apparent to the Board, and we so find, that the CO in this case had actual notice of the claim for delay based on a diesel fuel shortage, but declined to make the investigation required by Clause 5 (d) (2), because he had erroneously decided that a fuel shortage was not sufficient legal ground to justify an extension. It is equally apparent, since the CO had actual notice, and we so find, the Government was in no way prejudiced by the failure of appellant to give written notice of the claim of excusable delay sooner than July 10, 1979.

In *Allied Contractors, Inc.*, IBCA-265 (May 16, 1961), 68 I.D. 145, 61-1 BCA par. 3,047, where a CO had actual knowledge of the weather conditions constituting the cause of delay the Board would not dismiss an appeal for noncompliance with the technical 10-day notice requirement of Clause 5 of the General Provisions of the Standard Form 23A construction contract.²

² Cf. *J.A. LaPorte, Inc.*, IBCA-1014-12-73 (Sept. 29, 1975), 82 I.D. 459, 481, 75-2 BCA par. 11,486 at 54,779 and 54,780, where this Board found that the 20-day notice provision

79-2 BCA par. 13,937 at 68,396, where the Board imputed any knowledge of a potential claim for extra costs of the COAR to the CO.

July 31, 1981

Likewise, we will not here, and particularly in the circumstances of this case, foreclose appellant from asserting the defense of excusable cause for delay simply because of the alleged technical inadequacy of the written notice.

Therefore, we hold that the CO improperly denied appellant's request for an extension of time within which to complete the contract, that appellant was wrongfully terminated for default, and that it is entitled to have the termination for default converted to a termination for the convenience of the Government.

Decision

Accordingly, it is the decision of this Board that the delay of appellant caused by the fuel shortage was excusable under the provisions of Clause 5(d) of the subject contract and that the termination for default be, and hereby is, converted to a termination for the convenience of the Government. The CO, or his successor, is directed to equitably adjust the contract to compensate appellant for the wrongful termination for default in accordance with the provisions of the Termination for Convenience Clause and the applicable regulations.

Appeal for an Equitable Adjustment of Claims

This appeal, treated by the Board and the parties as Docket No.

of the changes clause should not preclude consideration of a claim on the merits where no one action could be pointed to as the identifiable event from which the contractor's delay in presenting the claim could be measured.

IBCA-1296-8-79, involves seven claims for equitable adjustment totaling \$133,275.08. Although conceding that these claims were never submitted to the CO for decision, appellant makes several arguments to the effect that the Board has jurisdiction to decide the claims and should do so without the benefit of their consideration by the CO.

These arguments are substantially as follows:

1. Based upon the actions of the Government's agents in persuading the appellant not to file his claims until completion of the job, and then terminating the contract prior to appellant's completion, the Government has waived the requirement that the claims be filed with the CO prior to being heard by the Board.

2. Even if the Government has not waived its right to have claims made to the CO rather than the Board, it should be equitably estopped from asserting that the technical requirements of the contract bar a recovery of the claims, since all of appellant's claims were the direct result of action or omission by the Government or its agents.

3. It is proper for the Board to rule on the claims by virtue of two of the Board's own rules which provide: (a) "[T]he Board may in its discretion hear, consider and decide all questions of law necessary for the complete adjudication of the issue" and (b) "the rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay."

4. There is a question as to whether the CO has the authority to rule on claims under a contract which has been terminated, and the likelihood of the claims resurfacing before the Board is great.

5. The claims for additional contract work are claims which appellant was not given an opportunity to settle due to the improper termination by the CO. By terminating the contract, the CO has constructively denied all of appellant's claims, thus giving jurisdiction to the Board to adjudicate them.

In the alternative, appellant requests that the claims be remanded to the BLM CO with instruction for each to be given due consideration and that the contract be equitably adjusted in accordance with his findings.

[3] Government counsel contends that none of the five above-listed arguments of appellant have merit. He asserts that this appeal involves not simply a procedural matter, but a jurisdictional one. He points out that the Board has consistently held that its jurisdiction is appellate only and that it may not consider claims presented for the first time in the notice of appeal or documents filed thereafter with the Board. *VTN Colorado, Inc.*, IBCA-1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542; *A. S. Wikstrom, Inc.*, IBCA-466-11-64 (Mar. 23, 1965), 65-1 BCA par. 4,725. He further contends that under Clause 3(e) of the General Provisions of the contract, the contractor knew that he must submit any claims to the CO within 30 days

after the change occurred, or in any event, prior to final payment, and that appellant is also charged with knowledge of the Disputes Clause which required claims to first be decided by the CO (Clause 6(a)).

Government counsel also states in his brief, contrary to the assumption of appellant, that the Government's position is *not* that the claims are barred by appellant's neglect to follow the proper procedure, but only that they should first be submitted for decision to the CO. He suggests that the proper course to follow to cure the jurisdictional problem, without necessitating a possible future hearing before the Board, is to remand the claims to the CO for his consideration. By way of a footnote, counsel points out that since the hearing, Mr. Burbany has left BLM and that the successor CO is Mr. Edward Fritch.

We agree with both the arguments and the suggested course of action set forth in Government counsel's brief.

Decision

Wherefore, the claims for equitable adjustment submitted by appellant in this appeal to the Board are hereby remanded to the CO for consideration and decision.

DAVID DOANE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

OIL AND GAS WELLS

November 24, 1980

**WHETHER THE U.S. GEOLOGICAL
SURVEY MAY MAKE PUBLIC
CERTAIN INFORMATION ABOUT
OFFSHORE OIL AND GAS
WELLS***

M-36925

November 24, 1980

**Outer Continental Shelf Lands Act:
Oil and Gas Information Program:
Generally**

30 CFR 250.3, requiring the U.S. Geological Survey to release a lessee's well logs two years after they are submitted, is a reasonable exercise of the Secretary's discretion. It does not apply to the Survey's findings of producibility under OCS Order No. 4; such findings may consequently be released immediately.

The history and text of the 1978 Amendments show that "privileged or proprietary information" is a term to be defined by the Secretary after balancing competing interests of disclosure and confidentiality.

Freedom of Information Act

FOIA's exemptions do not prevent USGS from publishing its finding that a well is producible or from releasing well logs.

USGS finding that a well is producible is a central event in the operation of the Outer Continental Shelf Lands Act, *as amended*. Therefore, FOIA requires USGS to release this finding to the public.

Well logs and findings of producibility are not "trade secrets" within the meaning of 18 U.S.C. § 1905 (1976).

Sec. 1905 allows disclosures authorized by law. 30 CFR 250.3, promulgated pursuant to 43 U.S.C. § 1352(c) (Supp. II

1978) and the Administrative Procedure Act, is adequate authority for disclosure of a lessee's well log after a two-year period of confidentiality.

**OPINION BY OFFICE
OF THE SOLICITOR**

To: SECRETARY

FROM: SOLICITOR

SUBJECT: WHETHER THE U.S. GEOLOGICAL SURVEY MAY MAKE PUBLIC CERTAIN INFORMATION ABOUT OFFSHORE OIL AND GAS WELLS

You have asked for my interpretation of several statutes invoked by Exxon Co., U.S.A., and Shell Oil Co., in their appeals to the Director, U.S. Geological Survey (USGS). Exxon says that the Survey must keep confidential the Survey's findings that several of Exxon's wells are "producing", that is, are capable of producing oil or gas in paying quantities. Shell says that the Survey may not let the public see certain of its "well logs", that is, geological data and information on the wells Shell has drilled offshore. The Survey has kept these logs confidential for 2 years (as required by regulation), but now wishes to release them to the public. All the wells in these appeals are in the Gulf of Mexico.

Background

I began with Exxon's appeal. Under recently revised OCS Order No. 4, effective Jan. 1, 1980, lessees must apply to the USGS District

*Not in chronological order.

Supervisor for a determination of each new well's capability of producing oil and gas in paying quantities. Like former OCS Order No. 4, the current Order permits two methods by which this determination may be made: the first is by a production test, usually witnessed by a USGS representative; the second is by other evidence that the well is capable of production—technical data that are gathered and submitted by the lessee. Also like the former version of the Order, the current version ends the lessee's duty to file these applications once any well on the leased area is determined to be "producing". On a given lease, one determination that a well is producing is enough. Unlike former OCS Order No. 4, however, the current Order requires that each application be filed within 60 days after the drilling rig has been moved from the well; formerly, lessees could wait until the primary term of the lease neared its date of expiration.

Once the USGS has determined that a well is producing, it places this finding in three documents available for public inspection. One is a computer printout listing the status of each lease. Specifically, the printout reveals the lease number and describes each lease merely as being "producing" or "producing," or lists the date on which the lease is due to expire. The second document is a Monthly Report which contains two additional details: the well numbers of producing or producing wells, and whether it is oil or gas that has been

found. The Survey has listed new producing wells in this report since December 1970. The third is a "Field Names List," which lists producing leases in oil and gas fields. The Survey has been making this list public since Aug. 30, 1972. None of the documents reveals any of the technical data from which USGS has determined that a well is producing. None reveals the method used to determine productivity.

On Feb. 29 and Apr. 3, 1980, Exxon Co., U.S.A., wrote to the USGS, submitting technical data showing that one of its wells in the Gulf of Mexico is producing. In the letter dated April 3, Exxon asked that USGS not publish its determination that the well is producing, asserting that USGS had no right to release this "trade secret" without Exxon's consent. The USGS disagreed. However, USGS agreed not to publish its finding while Exxon's appeal to the Director, USGS, was pending.

The facts in Shell's appeal differ slightly from those in Exxon's. Shell drilled three exploratory wells on its lease in 1978. It gathered data and information from these wells, some of them in the form of well logs. Shell submitted copies of these logs, as required by 30 CFR 250.95, in May and June of 1978. Two years later, the Survey's Conservation Manager for the Gulf of Mexico proposed to release these logs to the public. Shell appealed this decision and was granted a stay by the Chief of the Conservation Division.

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CONCLUSIONS

The Survey's finding of producibility is neither proprietary information nor a trade secret. Because the finding is central to the operation of the Act, FOIA requires the Survey to disclose it. Well logs are not trade secrets. Although they do not have to be disclosed under the Freedom of Information Act, 30 CFR 250.3 is not unreasonable in permitting their release to the public at the end of two years. The Geological Survey is authorized to release both types of information involved in these appeals.

ANALYSIS

A Federal agency may not release information to the public if the release is "not in accordance with law." *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (interpreting Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). Consequently, I must determine whether the release of well logs and findings of producibility is barred by the Outer Continental Shelf Lands Act, the Trade Secrets statute, or the Freedom of Information Act. If not, I then must determine whether the Freedom of Information Act requires the release of this information.

1. *The Outer Continental Shelf Lands Act, As Amended.*

A. Agency Regulation Under the Original Act.

The Department of the Interior

was given authority over mineral leasing on the Outer Continental Shelf in 1953. Within a year, the Department issued substantive rules regulating how lessees drilled for and produced oil and gas. These rules were issued under the Secretary's general rulemaking authority in sec. 5(a) of the OCS Lands Act. 43 U.S.C.A. § 1334(a)(1) (1964).

Several of the rules required lessees to file data, including geological and geophysical data,¹ with the Survey. But only one rule offered confidential treatment. 30 CFR 250.34 required lessees to file a drilling plan with the Survey before drilling on their leases. Lessees had to include in the plan their scientific opinion on how the rock strata beneath the seafloor were arranged. These opinions were called "structural interpretations" and were to be based on "available geological and geophysical data." See. 250.34 (c) offered to keep some of these interpretations secret:

In order to protect the interests of the lessee, geological and geophysical interpretations *required by this section*, shall, upon request of the lessee, be classified as not available for public inspection until such time as the supervisor determines the release of such information is required and necessary for the proper development of the field or area. (Italics added.)

¹ See former 30 CFR 250.34, .37, .38, .92, and .93, 19 Fed. Reg. 2655-61 (May 8, 1954). Since 1954, it has become the fashion among geologists and geophysicists to refer to "data and information," giving different meanings to each.

19 Fed. Reg. 2658 (May 8, 1954). The language of the 1954 rules implied that all geological and geophysical data were available to the public and that interpretations required by other sections of the rules were also available.

In 1969, the Department revised many of these rules, again based on its general authority in sec. 5(a) of the Act. The Department dropped the limited confidentiality provision in § 250.34(c) and added a broad new § 250.97:

Geological and geophysical interpretations, maps, and data required to be submitted *under this part* shall not be available for public inspection without the consent of the lessee so long as the lease remains in effect or until such time as the supervisor determines that release of such information is required and necessary for the proper development of the field or area. (*Italics added.*) 34 Fed. Reg. 13548 (Aug. 22, 1969.)

Until 1974, however, the rules on reporting and disclosing geological and geophysical data applied only to companies holding offshore leases. Permittees—companies with exploration permits under sec. 11 of the Act—did not have to show their data to the Survey. But on December 16 of that year, the Department announced that future permits under sec. 11 would require explorers to give the Survey the geological and geophysical data and processed geophysical information that they gathered. The Department agreed to keep this data and information confidential for 10 years. The Department, however, did not require permittee to submit

their interpretations. 39 Fed. Reg. 43562 (Dec. 16, 1974.)

In 1976, the Department again revised its rules on disclosing this data and information to the public. Sec. 250.97, applying only to lessees, was given a new twist. All geological and geophysical data, information, and interpretations would be released when the lease expired. If the lease remained in effect, however, then all interpretations and all geophysical data and information would be kept confidential for 10 years after they were submitted. Geological data and analyzed information would be kept confidential for 2 years only. As in the past, the Survey could release anything to the public if the release was necessary for the proper development of the field. 41 Fed. Reg. 25893 (June 23, 1976.)²

This is the point at which the regulations stood when the 1978 Amendments were enacted. Until 1978, the Department based its authority to gather, withhold, and disclose data and information on its general authority under § 5(a). The Department's position was upheld in *Geophysical Corp. of Alaska v. Andrus*, 453 F. Supp. 361 (D. Alaska 1978), the only published decision on this issue.

B. Sec. 26 of the 1978 Amendments

The 1978 Amendments added a new sec. 26 to the original Act. As I have explained in Opinion M-36924, sec. 26 gives the Secretary

² The new rule for permittees also had new wrinkles. See 30 CFR 251.14, 41 Fed. Reg. 25897 (June 23, 1976).

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the right to see all geological and geophysical data and information gathered on the Outer Continental Shelf. It also adds a notion that was not expressed in the original Act, that of "privileged or proprietary information:"

The Secretary shall prescribe regulations to (1) assure that the confidentiality of privileged or proprietary information received by the Secretary under this section will be maintained, and (2) set forth the time periods and conditions which shall be applicable to the release of such information.

§ 26(c); 43 U.S.C. § 1352(c). The Act, *as amended*, does not define what the phrase "privileged or proprietary" means. So I must turn to the legislative history for instruction.

Early in the legislative history of the 1978 Amendments, the Congress recognized that disclosure of confidential industry information was one of the "major policy issues concerning the Outer Continental Shelf." 120 Cong. Rec. 30980 (Sept. 12, 1974) (remarks of Sen. Jackson). The early floor debate over Senate Bill 3221 revealed mild differences of opinion over what matter should be considered "proprietary:" Senator Buckley believed it meant both raw data and industry interpretation of that data; Senator Johnston believed that it meant just the interpretation. 120 Cong. Rec. 30984 (Sept. 12, 1974). But however it was to be defined; the definition of privileged or proprie-

tary information was to be the result of balancing the harms and benefits of disclosure. This was Senator Jackson's position. He stated it early in the debate, and it prevailed. See 120 Cong. Rec. 30981 (Sept. 12, 1974) (remarks of Senator Jackson) and Sen. Rpt. No. 95-284 at 46 (June 21, 1977).

Furthermore, the history of the 1978 Amendments shows Congress's intent that it is the Secretary who is to do the balancing. We can see this in the Senate's explanation of sec. 26:

Private parties using public resources for private profit should be required to make information they obtain about the resources available to the representatives of the public. At the same time, the value of this information to the individual explorer or producer is recognized. The provisions of S. 9 are designed to balance the public's interest in obtaining information about its resources and the public's interest in maintaining an active and competitive oil and gas industry. Sen. Rep. No. 95-284 at 46 (June 21, 1977).

This history is supported by other sections of the 1978 Amendments, in which the Congress has plainly left it to the Secretary to say what will be withheld and what revealed. Sec. 25(a)(3) requires the Secretary to make development and production plans public, "except for any privileged or proprietary information (as such term is defined by the Secretary)." 43 U.S.C. § 1351(a)(3). Similarly, sec. 18(g) requires the Secretary to keep confidential all privileged or proprietary data, ob-

tained for use in the oil and gas leasing program, "for such period of time as is provided for in the Act, established by regulation, or agreed to by the parties." 43 U.S.C. § 1344 (g). By not defining the meaning of "privileged or proprietary information" in sec. 26, Congress gave the Secretary the authority to define the term himself.

The Department has issued two regulations, as required by sec. 26 (c). One applies solely to permittees. See 30 CFR § 251.14, 45 Fed. Reg. 6351 (Jan. 25, 1980). The other, § 250.3, is based on the earlier § 250.97; it applies solely to lessees. See 44 Fed. Reg. 61895 (Oct. 26, 1979). The appeals by Shell and Exxon both concern information which the companies submitted as lessees.

The scope of sec. 250.3 is limited. It deals solely with disclosure of the geological and geophysical data and information which lessees have to provide to the USGS. Under this rule, all data and information will ultimately be released to the public; it is simply a question of when. The rule divides the data and information into three categories. The first is that gathered by geological or geophysical methods. The second separates information that is merely "processed" or "analyzed" from information that is "interpreted"—terms that have a relatively precise meaning to scientists. (See definitions in 30 CFR 250.2). The third category isolates certain OCS leases on which data are collected by "high resolution

systems." Depending on the category into which the data or information falls, they may be released after the lease ends, or after the specified period elapses (10 years, 2 years, 60 days), whichever is sooner. However, the rule allows the Director to release any data or information, if he finds that the release is "necessary for the proper development of the field." The effect of this section is two-fold. It bars release of the data and information for the specified time. But, once that time is up, the section requires the Survey to release the data and information.

Shell filed well logs early in 1978. Well logs are a type of analyzed geological information. 30 CFR 250.2(d). According to § 250.3(b), this information must be kept confidential for 2 years.³ The 2 years have now passed. Sec. 250.3 requires the Survey to release these logs to the public. In light of (i) the Survey's practices relating to the retention or disclosure of data of these types through the years and (ii) the statutory mandate for the Secretary to balance public and private interests, a regulation requiring disclosure after two years of data obtained by a lessee in the development of public resources appears to be well within the bounds of Secretarial discretion.

Exxon's case, does not fit into sec. 250.3 at all. Sec. 250.3 applies solely to geological and geophysical interpretations made by lessees. It does

³ Sec. 250.3 and its predecessor, § 250.97, are identical on this point.

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not apply to findings made by the Government. Just because Exxon happens to agree with the Survey's finding does not turn this finding into a confidential interpretation by Exxon. This point deserves some elaboration. To comply with OCS Order No. 4, Exxon filed several items, mostly well logs, with the Survey. These are analyzed geological information and ordinarily will not be released for 2 years. The Survey is not trying to release them now. After receiving these logs, the Survey's scientists reviewed them and made their own decision on whether each well was productive. Indeed, the Survey must make this finding on its own, because the discovery of oil and gas in paying quantities is a crucial event in the operation of the Act. It is a main element in the definition of when "exploration" ends and "development" begins. Compare 43 U.S.C. § 1331(k) with 43 U.S.C. § 1331(l). It determines whether sec. 25 of the Act applies to leases issued before the effective date of the 1978 amendments. 43 U.S.C. § 1351(a) (1). It also determines whether a lessee owes the federal government a "rental" or "minimum royalty." See OCS Lease form, §§ 4 and 5. 43 Fed. Reg. 44894 (Sept. 29, 1978). Lastly, the determination that there is a producible well on a lease is frequently a factor in the director's decision to issue a suspension of operations which keeps a lease alive past the date on which its

primary term would otherwise expire. See 30 CFR 250.12(b)(3) (iii) and (c)(1).⁴

The Secretary has balanced the interests of disclosure and confidentiality. His decision, reflected in § 250.3, is a reasonable one. Shell argues that this rule hurts its competitive position by releasing its logs prior to a lease sale in the area of its lease. The rule has taken this harm into account and has balanced it with the benefits Shell receives from the disclosure of its competitors' logs. The rule also takes into account the public benefit from disclosure: "greater and better informed competitive interest by potential producers in the oil and gas resources of the Outer Continental Shelf." S. Rep. No. 98-1140, 93rd Cong., 2d Sess. 114 (1974). Congress wants the Secretary to consider the benefit of releasing information before holding future lease sales in the area.

⁴ Exxon also argues that, by publishing its finding, the Survey reveals the criteria used to determine producibility, and thus reveals some confidential information. True, publication does reveal that Exxon has run a production test or has found at least fifteen continuous feet of producible sand. See OCS Order No. 4, § 2. But the Survey does not reveal which criterion it uses, the extent to which Exxon's evidence exceeds the minimum set by the criteria, or the depth at which the producing stratum lies. Nor does the Survey reveal whether the stratum has a high degree of natural permeability, or whether the lessee had to "fracture" it (with high pressure sand and fluid) to improve its permeability. Most importantly, the Survey makes its own reading of the logs, computes the necessary ratios, and makes its own interpretation. The independence of this finding from Exxon's own interpretation removes it from sec. 250.3.

The OCS Lands Act and the Department's regulations do not, therefore, bar the Survey from releasing well logs after 2 years or publishing its own findings.⁵ To prevail, Shell and Exxon must rely on some other law forbidding disclosure.

2. *The Trade Secrets Statute, 18 U.S.C. § 1905*

18 U.S.C. § 1905 provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. (*Italics added.*)

This statute is written in a scat-

tergun style; only two of its pellets appear to strike the issues in these appeals. Sec. 1905 prevents disclosure (unless authorized by law) of information which "concerns or relates to the trade secrets [or] operations" of anyone. This part of the statute appears to prevent the Department from releasing three types of information: trade secrets, information about operations, and information concerning or relating to trade secrets or information about operations. The wording of this part is peculiar. The term "trade secrets" is undefined, the phrase "information [about] operations" is not limited to confidential information, and the phrase "concerns or relates to" is broad enough to prevent the Department from saying that it has received a trade secret from someone. Before trying to reconcile this statute with the OCS Lands Act, we need to know more about the legislative history of sec. 1905.

A. Legislative History.

The current version of § 1905 was enacted as a part of the 1948 recodification of the Criminal Code, Title 18, United States Code. According to the House Report accompanying the recodification bill, sec. 1905 simply revised and recodified three existing nondisclosure statutes: a revenue statute, then codified at 15 U.S.C. § 216; a Commerce Department statute, then codified at 15 U.S.C. § 176(a); and a Tariff Commission statute, at 19 U.S.C. § 1335. The Congress intended that the recodification was not to change the

⁵ I note that the Department's regulations do not contain a definition of "privileged or proprietary information." Apparently, this is because §§ 250.3 and 251.14 are themselves functional definitions. Thus, for lessees, proprietary information is that which is withheld from the public under § 250.3. Therefore, now that the 2 years have passed for Shell's well logs, they are no longer "privileged or proprietary" under sec. 26.

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substance of these existing criminal provisions:

The bill makes it easy to find the criminal statutes because of the arrangement, numbering, and classification. The original intent of Congress is preserved. S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948).

Stated differently, a revision was not a substantive amendment:

Revision * * * meant the substitution of plain language for awkward terms, reconciliation of conflicting laws, omission of superseded sections, and consolidation of similar provisions. H.R. Rep. No. 304, 80th Cong., 1st Sess. 2 (1947).

The Commerce Department statute has no bearing on these appeals. The phrase barring disclosure of information about "operations" comes from an early revenue statute. See Revenue Act of 1864, ch. 173, § 38, 13 Stat. 238, reenacted in Tariff Act of 1894, ch. 349, § 34, 28 Stat. 509. As codified in 1940, this statute prevented the unauthorized disclosure of two types of information. One was information on a person's "income return." The other was information about "the operations, style of work, or apparatus of any manufacturer or producer visited by [a revenue collector] in the discharge of his official duties." 18 U.S.C. § 216 (1940). This 1940 version is much more limited than the current version. The 1940 version lacks the imprecise phrase "concerns or relates to," and it is limited to information gathered by Government agents as they

perform their duties to collect revenue.

The phrase barring disclosure of trade secrets comes from the Tariff Commission statute, enacted in 1916 and revised slightly in 1930. See Revenue Act of 1916, ch. 463, § 708, 39 Stat. 756, at 798; Tariff Act of 1930, ch. 497, § 335, 46 Stat. 590, at 701. As codified in 1940, this statute prevented any Federal employee from making an unauthorized disclosure of the "trade secrets or processes" of anyone "embraced in any examination or investigation conducted by the [Tariff] commission." 19 U.S.C. § 1335 (1940). Again, the 1940 version is much more limited than the current version. The 1940 version protects the trade secrets only of persons under investigation by the Tariff Commission (now the International Trade Commission).

B. Scope of § 1905.

Nothing in the legislative history of the 1948 recodification shows that Congress meant to expand the scope of these three predecessor statutes. For this reason, the Department of Justice has directed me to view § 1905 "as being no broader in scope than the combined scopes of the three predecessor statutes."⁶ The general rule of interpreting a recodified statute is that, whenever the language has been unintentionally changed, the

⁶ Memorandum of Assistant Attorney General Babcock, June 21, 1979, page 6.

courts should follow the intent of the original language. The Supreme Court has followed this rule of interpretation in several cases, some of them involving the 1948 recodification of the Criminal Code. For example, in *Muniz v. Hoffman*, 422 U.S. 454 (1975), the Court ignored the apparently clear language of 18 U.S.C. § 3692 and denied petitioner's claim to a jury trial in a criminal contempt proceeding. Loosely speaking, sec. 3692 provides the right to a jury trial to anyone held in violation of an injunction issued under § 10(1) of the Taft-Hartley Act; but the Court ruled it did not. The law prior to recodification, sec. 11 of the Norris-La Guardia Act, was that jury trials were not required for violations of 10(1) injunctions. "Not a word was said in connection with recodifying § 11 as § 3692 of the Criminal Code that would suggest any such important change in the settled intention of Congress * * * that there would be no jury trials in contempt proceedings arising out of labor Act injunctions." *Id.* at 467. The Court based this conclusion on its review of the Senate and House Reports accompanying the 1948 recodification bill. The court has reached similar conclusion in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 255-56 n. 29 (1975) ("well-established principle governing the interpretation of provisions altered in 1948 revision is that 'no change is to be presumed unless clearly expressed'"); *Cass v. United States*, 417 U.S. 72,

82 (1974) (1962 recodification of Title 10); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 161-62 (1972) (1948 recodification of Judicial Code, Title 28); *City of Greenwood v. Peacock*, 384 U.S. 808, 815 (1966) (1948 revision of Judicial Code); *United States v. Cook*, 384 U.S. 257, 260 (1966) (1948 recodification of Criminal Code); and *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957) (1948 recodification of Judicial Code).

Using this limited interpretation of sec. 1905, I find that well logs and producibility findings are not covered. This information is not information about operations gathered by federal employees enforcing the tax laws. Nor is it the trade secret of a firm under investigation by the International Trade Commission.

C. A Broader Interpretation of § 1905

The revision of § 1905 might be distinguishable from the statutes in the *Muniz* and *Cook* cases. The Reviser's Notes on the *Muniz* statute said nothing about the change in the right to a jury trial. See H.R. Rep. No. 304, 80th Cong., 1st Sess. A 176 (1947). The Notes for the statute in *Cook* spoke only of "changes * * * made in phraseology." *Id.* at A63. But the Notes for § 1905 are more explicit:

Words "or of any department or agency thereof" and words "such department or agency" were inserted so as to eliminate any possible ambiguity as to scope of section. (See definition of "department" and agency" in section 6 of this title.)

OIL AND GAS WELLS

November 24, 1980

Id. at A127-A128. One may argue that this statement is evidence of Congressional intent to broaden the scope of § 1905.

I think such an argument is wrong. Both houses of Congress said their work preserved the original intent of the Congress. If the Reviser's Note contradicts this, we must honor the statement of the Congress. Furthermore, I do not think the Reviser's Note does contradict the two Congressional reports on the bill. The Note says the change was to eliminate ambiguity; the Note does not say that the change was meant to expand the scope of the predecessor statutes. Eliminating ambiguity is one of the duties of the Reviser. Making a substantive change in the law is not.

In interpreting § 1905, however, I must be especially cautious. The Attorney General issued two opinions in the 1950's which assumed (without comment) that § 1905 applied generally. See 41 Op. Atty. Gen. 166 (1953). (Reconstruction Finance Corp. is authorized by law to disclose financial statements); 41 Op. Atty. Gen. 221 (1955) (FCC is authorized by law to disclose stations' financial statements to Congress). On the assumption that § 1905 applies to information gathered by all agencies, I reach four conclusions. First, the Survey's finding of producibility is not covered by § 1905 because the section is not meant to keep the Government's decisions secret. Second, assuming that off-

shore oil and gas operations are "operations" within the meaning of § 1905, that section is superseded by the OCS Lands Act. The Act is the more recent and more specific expression of the will of Congress. The release of well logs does not violate the Act, so it cannot violate § 1905. Third, neither producibility findings nor well logs are "trade secrets." We must look to the Tariff Act of 1916 for the meaning of this term. According to the most authoritative opinion on the issue,

The term "trade secrets," as ordinarily understood, means an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities.

United States, ex. rel. Norwegian Nitrogen Products Co. Inc. v. United States Tariff Commission, 6 F.2d 491, 495 (Ct. App. D.C. 1925) (information on the cost of production is not a trade secret within the meaning of § 708 of the Tariff Act).⁷ Geological informa-

⁷ *Rev'd on other grounds*, 274 U.S. 106 (1927). See also *Consumers Union of the United States v. Veterans Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

One Court has suggested that the Supreme Court has adopted as federal law the definition of trade secret in the Restatement of Torts, 1939 edition. See *Union Oil Company v. FPC*, 542 F.2d 1036, 1044 (9th Cir. 1976) ("the Supreme Court has defined 'trade secret' as it applies to the patent laws," citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974)). This suggestion is incorrect. The Court in *Kewanee* merely summarized Ohio

tion is not a plan or formula, and it is not used for making materials.

Fourth, even if I assume that my second and third conclusions are wrong, I conclude that § 1905 nevertheless permits release of well logs. Sec. 1905 itself permits disclosure of trade secrets and other privileged information. This section merely prevents disclosure "to any extent not authorized by law." Agency regulations are an appropriate form of law to authorize disclosure, provided they meet the three-part test announced in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). The USGS regulation, 30 CFR 250.3 meets this test as follows:

(i) The agency rule must be "substantive," as opposed to "interpretive:" that is, the rule must affect individual rights and obligations. 441 U.S. at 302. OCS Order No. 4,

trade secret law before deciding whether it conflicted with federal patent law.

The Restatement definition favors Shell's position. It would protect any "compilation of information" which gives the person "an advantage over competitors who do not know or use it." Restatement § 757, comment b. But this definition is inappropriate under § 1905. In discussing the meaning of "trade secret" under the Tariff Act of 1929, the Senate seemed to agree with the definition in *Norwegian Nitrogen*. See 71 Cong. Rec. 4563-67 (1929) (costs of production are confidential, but apparently not trade secrets). More significantly, Congress treated trade secrets and geological information as separate categories of exemption under the Freedom of Information Act. 5 U.S.C. § 552(b)(4) and (9). Most recently, Congress cited *Norwegian Nitrogen* as its definition of trade secret in the Government in the Sunshine Act. H. Rep. No. 94-800, Pt. I, 94th Cong. 2d Sess. 10 (1976). This Act has an exemption from the open-meeting requirement that is identical to FOIA's fourth exemption. Several courts have found § 1905 and FOIA's fourth exemption to be coextensive. See Clement, 55 Tex. L. Rev. at 605.

and 30 CFR 250.3 and 250.30 are all substantive rules. Their provisions must be obeyed; violations of them are punishable by civil and criminal penalties; (ii) the agency rule must be issued in accordance with any procedural requirement imposed by Congress. 411 U.S. at 312. The USGS non-disclosure rule was issued in strict compliance with the informal rulemaking requirements of the APA; (iii) the agency rule must be based on a Congressional grant of authority permitting the agency to disclose trade secrets and other privileged information. Congress, of course, rarely gives such authority expressly. But the Court ruled that it was enough if the authority can be reasonably inferred from the language and history of the statute. 441 U.S. at 306. See also 41 Op. Atty. Gen. 221, 228 (1955). The text and history of the OCSLA Amendments of 1978 give ample evidence that Congress wants information about OCS resources to be disclosed publicly. Sec. 26(c) is an express basis for disclosing confidential information. Accord *St. Mary's Hospital, Inc. v. Harris*, 604 F.2d 407 (5th Cir. 1979) (statute that says no disclosure "except as the Secretary of HEW * * * may by regulations prescribe" is a clear grant of authority to require disclosure of the annual cost reports of Medicare provisions.)

Thus, in my judgment nothing in the Trade Secrets Act precludes the Geological Survey from releasing well logs and producibility findings to the public.

August 5, 1981

3. *Freedom of Information Act (FOIA)*

FOIA permits agencies to withhold nine categories of information from public disclosure. Two of these categories are relevant here. The fourth category allows an agency to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b) (4). The ninth category allows an agency to withhold "geological and geophysical information and data, including maps, concerning wells." 5 U.S.C. § 552(b) (9).

Assuming, for the moment, that the information that USGS wishes to publish falls into either category, FOIA clearly does not stop the Survey from publishing it. The FOIA is exclusively a disclosure statute; its nine exemptions reflect Congress's concern with the government's need or preference for confidentiality. The act protects the submitter's interest in confidentiality only to the extent that the government endorses that interest. "Congress did not design the FOIA exemptions to be mandatory bars to disclosure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

The issue on the other side of this coin is whether the Department has the discretion to withhold well logs and producibility findings from the public. This information is not a trade secret, as I explained in Part 2C; so only the ninth FOIA exemption applies. Well logs obviously are geological information concerning wells, so

the Survey can withhold this information if it is requested under FOIA. Producibility findings, however, are different. As I noted in Part 1B, these findings are made by the Survey, not by the lessees. The publication of this finding reveals nothing certain about the information which the lessee has submitted. The lessee's information remains valuable, because the Survey keeps it confidential under 30 CFR 250.3. Furthermore, as I explained in Part 1B, the finding of producibility is a central event in the operation of the OCS Lands Act. If the public is to be able to judge whether the Department is fulfilling its duties under the Act, it has to know at the least whether individual leases are producible. FOIA requires the Survey to disclose at least this much information about producibility. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (purpose of FOIA is to open agency action to the light of public scrutiny).

CLYDE MARTZ

Solicitor

NORTHWAY NATIVES, INC.

6 ANCAR 1

Decided August 5, 1981

Appeal from the Decision of the Alaska State Director, Bureau of Land Management F-14912-A and F-14912-B.

Partial Decision; Affirmed in Part; Modified in Part.

1. Alaska Native Claims Settlement Act: Navigable Waters—Alaska: Navigable Waters: Generally

Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

Absent reasons justifying continuance of an appeal as to a particular issue, an appeal will be dismissed when the appellant before the Board withdraws its appeal of that issue.

APPEARANCES: Peter J. Aschenbrenner, Esq., Aschenbrenner and Savell, and David Wolf, Esq., Keane, Harper, Pearlman and Copeland, for appellant; Elizabeth S. Ingraham, Esq., for Doyon, Limited; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Shelley J. Higgins, Esq., and Martha T.

Mills, Esq., Department of Law, for State of Alaska.

**OPINION BY ALASKA
NATIVE CLAIMS
APPEAL BOARD**

Summary of Appeal

Appellant asserted as one of the issues appealed, the failure of the Bureau of Land Management to determine that various water bodies were navigable and to exclude the submerged lands of such respective water bodies from the Decision to Issue Conveyance.

The Board held that when the Bureau of Land Management's review of navigability shows a factual basis for redetermining the appealed water bodies to be navigable within established guidelines, the Board will decide that such water bodies are navigable.

The Board accepted appellant's withdrawal of appeal as to the remaining water bodies unaffected by Bureau of Land Management review and redetermination, and as there were not objections, dismissed the appeal as to the issues of navigability.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688 *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the fol-

lowing findings, conclusions and decision.

Procedural Background

Northway Natives, Inc. (Northway), filed village selection applications F-14912-A, *as amended*, on Oct. 22, 1974, and F-14912-B, *as amended*, on Dec. 12, 1974, for lands located near the Village of Northway. The applications were filed under the provisions of § 12(b) of the Alaska Native Claims Settlement Act (ANCSA), Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611(a) (Supp. V 1975)).

In response to these applications the Bureau of Land Management (BLM) published in 43 FR 28051 (June 28, 1978), its Decision to Issue Conveyance (DIC) of land to Northway. Northway appealed on July 28, 1978. One issue raised by Northway in Statement of Reasons was that the BLM erred in its June 26, 1978, decision requiring Northway to select the beds of certain water bodies and sua sponte approving said lands for conveyance to Northway.

On Feb. 27, 1980, BLM amended the DIC dated June 26, 1978, by its Decision entitled *Decision of June 26, 1978 Recinded [sic] in Part Additional Lands Proper for Village Selection Approved for Interim Conveyance*. In this amendment BLM published notice that the following additional water bodies were determined to be nonnavigable and therefore, the lands underlying these water bodies were public lands

available for selection pursuant to § 12(a) of ANCSA:

Fish Lake;

Unnamed lake in NW¼, Sec. 2, T. 13 N.,

R. 19 E., Copper River Meridian;

Open Creek and all lakes it flows through;

Charleskin Creek and all lakes it flows through.

A conference was held Jan. 21, 1980, to set a briefing schedule taking into account difficulties in segregation of numerous unnamed water bodies and possible impact of pending amendments to ANCSA regarding submerged lands. The Board ordered the following action and briefing schedule:

a. BLM, with assistance from Northway and Doyon shall segregate water bodies affected by RLS 77-1, RLS 78-1 and VLS 78-57 within thirty (30) days from the date of this Order.

b. BLM shall have up to sixty (60) days from the date of this Order to review RLS 77-1, RLS 78-1 and VLS 78-57 and to serve upon all parties the basis for determining the water bodies on appeal to be navigable or nonnavigable.

c. Appellants shall have sixty (60) days from the date of service of BLM's response to file on each appeal: (1) a request to suspend action on certain water bodies, as desired, pending passage of the Submerged Lands Amendment; (2) a statement of reasons pertaining to those water bodies remaining in active appeal status; and (3) any other briefs the parties may wish to file.

As directed the BLM filed its Review and Basis for Navigability Determination on Mar. 28, 1980. Upon review the following water

bodies were determined to be navigable:

Nabesna River

Mark Creek

Fish Lake

Unnamed lake in Sections 21 and 28, T. 14 N., R. 19 E., C.R.M.

Unnamed lake in Sections 14-15, 22-26, T. 14 N., R. 19 E., C.R.M.

Moose Creek to the unnamed lake in Sections 21 and 28, T. 14 N., R. 19 E., C.R.M.

Chisana River

Of the above-named water bodies, only Fish Lake had been found to be nonnavigable in BLM's amendment of Feb. 27, 1980, to the DIC. No other water bodies in the selection area were determined to be navigable.

The Board by order dated Aug. 21, 1980, approved a stipulation by the parties as follows:

On July 10, 1980, the Bureau of Land Management, State of Alaska and Northway Natives, Inc., filed a Stipulation to allow Northway Natives, Inc. to add to its appeal, concerning whether or not certain lands are under navigable waters, all lands designated by the State of Alaska on its water delineation maps of 1978 and June 25, 1979, which were not included in Northway Natives, Inc.'s original appeal in November of 1978.

The effect of the Board's order was to include in the appeal the status of those water bodies which were not included in the original appeal.

In its Response to ANCAB Order of Jan. 21, 1981, dated Apr. 8, 1981, Northway stated that it "desires to withdraw its appeal on the navigability issues." Northway provides the following basis and condition to the withdrawal.

Its withdrawal of its appeal, however, is based on the understanding that the BLM decisions concerning navigability as set forth in the decision of interim conveyance of June 26, 1978, and as modified by the BLM's decision attached to solicitor's pleading in this matter entitled Review and Basis for Navigability Determinations dated March 28, 1980, are the decisions on which Northway Natives, Inc. will receive its interim conveyance with respect to the navigability issues. Further, by dropping its appeal in this ANCAB proceeding, Northway Natives, Inc. does not waive any rights it has under Section 901 of Public Law 96-487. Northway Natives, Inc. therefore requests that ANCAB issue an order dismissing the navigability issues from this appeal based on the two foregoing understandings of Northway.

Northway's Response at 2-3.

Decision

The appeal record shows that documents upon which Interim Conveyance (IC) would be based consist of the DIC dated June 26, 1978, and the decision of the BLM entitled *Decision of June 26, 1978 Recinded [sic] in Part Additional Lands Proper for Village Selection Approved for Interim Conveyance*, dated Feb. 27, 1980. The Review & Basis for Navigability Determinations, filed Mar. 28, 1980, is not a decision of the BLM for purpose of IC. Therefore, the Board is not in a position to accept Northway's understanding regarding the effect of the review dated Mar. 28, 1980, without taking final action for the Department.

In Appeal of Bristol Bay Native Corporation, 4 ANCAB 355, 87 I.D.

341 (1980) [VLS 80-2], the Board held that:

Where the BLM has redetermined that water bodies which are the subject of an appeal pending before the Board are navigable, and where the Board finds that the facts in the record upon which BLM made its redetermination meet the essential elements of navigability enunciated in *Appeal of Doyon, Ltd.*, 4 ANCAB 50, 86 I.D. 692 (1979) [RLS 76-2], and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

87 I.D. at 346.

The Board also held that:

[F]or purposes of clarification, * * * redetermination by the BLM of navigability of water bodies while jurisdiction over such water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the BLM, and notice is not required to be published pursuant to 43 CFR 2650.7.

87 I.D. at 345.

Here, the BLM's review and resulting redetermination of navigability of certain water bodies listed herein was filed pursuant to the Board's order dated Jan. 22, 1980, while the Board retained jurisdiction over the issue of navigability and lands underlying water bodies affected by Northway's appeal with respect to the issue of navigability.

In this appeal, the Board finds that the record upon which BLM relies for its redetermination of Mar. 28, 1980, presents facts concerning use and susceptibility of use which meet the essential elements of navigability enunciated in *Appeal of Doyon, Limited*, 4 ANCAB 50, 86 I.D. 692 (1979)

[RLS 76-2]. The Board further finds that the record discloses no dispute to the facts alleged in support of a finding of navigability.

Accordingly, the Board finds Nabesna River, Mark Creek, Fish Lake, the unnamed lake in Secs. 21 and 28, T. 14 N., R. 19 E., C.R.M., the unnamed lake in Secs. 14-15, 22-26, T. 14 N., R. 19 E., C.R.M., Moose Creek to the unnamed lake in Secs. 21 and 28, T. 14 N., R. 19 E., C.R.M., and the Chisana River to be navigable. The BLM is hereby Ordered to exclude these water bodies from conveyance under ANCSA to Northway and Doyon. The Board has authority under 43 CFR 4.1(b)(5) to "consider and decide finally for the Department appeals to the head of the Department." Such finding by the Board is not a decision of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7. However, the Board's finding does govern the interim conveyance to be issued to Northway.

[1] Where the BLM has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the BLM made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

[2] Redetermination by the BLM of navigability of water bodies

while jurisdiction over the subject water bodies is in ANCAB, is not a "decision" of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

The Board's finding of the navigability of certain water bodies, based on BLM's determination, requires that the affected submerged lands of these water bodies will be excluded from the interim conveyance. The Board must now examine Northway's withdrawal of its appeal of navigability as to the remaining water bodies. The Board accepts Northway's above-referenced response filed on Apr. 10, 1981, as withdrawing from this appeal the issue of navigability of the remaining water bodies within the selected lands.

Acceptance of Northway's voluntary withdrawal of the remaining issues of navigability provides the basis for the Board to dismiss those issues from the appeal. (*See Appeal of Kenneth Arndt*, 3 ANCAB 127 (1979) [VLS 78-34]; *Appeal of Al L. Weathers*, 3 ANCAB 165 (1979) [VLS 79-1].)

The Board notes Northway's reference to provision of § 901(b) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 (1980) (ANILCA), which states:

No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act *unless a determi-*

nation by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such agency or board prior to the date of enactment of this Act. The execution of an interim conveyance or patent (whichever is executed first) by the Bureau of Land Management conveying a parcel of submerged land to a Native corporation or Native Group shall be the final agency action with respect to a decision by the Secretary of the Interior that the water covering such parcel is not navigable, *unless such decision was validly appealed prior to the date of enactment of this Act to an agency or board of the Department of the Interior other than the Bureau of Land Management.* [Italics added.]

No question has been raised as to the Board's jurisdiction over the appealed navigability issues in this appeal, or as to the fact that, without a timely appeal by Northway, BLM's DIC would become final for the Department under 43 CFR 2650.8.

This appeal predates the passage of ANILCA. Therefore, the appeal is properly within the jurisdiction of the Alaska Native Claims Appeal Board.

There are no other appellants in this appeal and no parties of record before this Board have opposed the appellant's withdrawal of its appeal as to the issues of navigability. No reasons justifying further proceedings on the navigability issues are apparent from the record.

[3] Absent reasons justifying continuance of an appeal as to a particular issue, an appeal will be dismissed when the appellant before the Board withdraws its appeal of that issue.

August 5, 1981

Based upon the above findings and conclusions, Northway's request to withdraw the remaining issues of navigability from this appeal is granted. The Board hereby dismisses this appeal from BLM's determination of navigability of water bodies within lands selected under Northway's above-referenced applications in the DIC except as modified by the Board's decision herein.

The following water bodies within Northway's selection are found to be navigable based on the BLM's decision of June 26, 1978, and the Board's findings in this decision:

1. Tanana River and all its inter-connecting sloughs.
2. Chisana River and all its inter-connecting sloughs.
3. Nabesna River.
4. Mark Creek.
5. Fish Lake.
6. Unnamed lake in Secs. 21 and 28, T. 14 N., R. 19 E., C.R.M.
7. Unnamed lake in Secs. 14-15, 22-26, T. 14 N., R. 19 E., C.R.M.
8. Moose Creek to the unnamed lake in Secs. 21 and 28, T. 14 N., R. 19 E., C.R.M.

No other water bodies in the Northway selection area are found to be navigable.

This appeal record shows that all issues raised by the appellant, other than the four mentioned below, have been resolved by Board action, stipulation or withdrawal of appealed issues by the appellant. A review of the record shows that the following have been considered and were resolved:

(1) The Native allotment NAF-027296 Parcel A is resolved as part of the broader issue of U.S. Survey No. 2630 by the Board's decision of Feb. 26, 1981, which excluded the Native allotment.

(2) The easement issues in this appeal were considered to be mooted by the BLM's Modification of the Decision of June 26, 1978, to conform easements and *Appeal of Northway Natives, Inc.*, ANCAB EC 79-1.

(3) The issue of Rejection of Selections Bordering Tanana River was withdrawn by stipulation between the BLM and Northway, filed Apr. 2, 1979. Item 6 of the Stipulation and Report on Status of Negotiations reads:

The BLM and Northway agree that the DIC under appeal did not affect the Northway selections bordering the Tanana River appealed in Section VII of the Statement of Reasons. No adjudication of these selections has been made by the BLM. Northway therefore withdraws its appeal regarding these selections.

(4) On Aug. 1, 1979, Northway identified the issue of valid existing rights as one of eight outstanding issues and stated:

8. VALID EXISTING RIGHTS.

Northway has requested that ANCAB enter an order stating that the BLM has listed all valid existing rights known to it and to include in the order the list of valid existing rights. Also, Northway asked whether or not the State considered the road from the Alaska Highway to the airport at Northway and from the airport to the village site was a valid existing rights to the State of Alaska. The State of Alaska has come forward and said that it is and Northway requests

that AN CAB order that it be listed as a valid existing rights.

The roadway identified in this appeal has been acknowledged by a stipulation approved by the Board as a valid existing right.

It appears that all issues raised in this appeal have been resolved, and the appeal should be finally dismissed. However, in recognition of the number and complexity of issues raised by this appeal, the dismissal will not be effective until thirty (30) days from the date of this decision. During that period, the parties may advise the Board of any issues raised on appeal which they believe have not been decided.

ABIGAIL F. DUNNING,
Administrative Judge.

JOSEPH A. BALDWIN,
Administrative Judge.

CLARA GOODMAN

6 AN CAB 17

Decided *August 5, 1981*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14852-A and F-14852-B.

Dismissed with order to exclude certain lands from conveyance pending adjudication of alleged allotment application.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The Board is without jurisdiction to adjudicate the validity of a Native allotment.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

The Board will order the exclusion of a disputed Native allotment from the conveyance of lands pursuant to the Alaska Native Claims Settlement Act pending adjudication of the disputed allotment.

APPEARANCES: Daniel L. Callahan, Esq., Alaska Legal Services Corp., for appellant; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The appellant requests the Board to recognize, as a valid property interest, a Native allotment which has not been adjudicated and for which the Department does not have record of an application. The appellant also requests the Board to segregate the allotment from a Native conveyance pending adjudication of the allotment. The appellant is currently attempting to establish, through the Bureau of Indian Affairs, that she timely filed an allotment application.

The portion of the appeal asking the Board to recognize a valid property interest of the appellant in the disputed lands is dismissed as untimely and not within the jurisdiction of the Board. The Board orders that the disputed lands be excluded from conveyance pending resolution of the allotment dispute, and dismisses the portion of the appeal requesting segregation.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision dismissing the appeal of Clara Goodman from the above-designated decision of the Bureau of Land Management.

Procedural Background

On Dec. 28, 1979, the Alaska State Office of the Bureau of Land Management (BLM) issued its above-designated decision approving the conveyance, pursuant to the Alaska Native Claims Settlement Act (ANCSA), of lands in the vicinity of Dot Lake.

On Feb. 4, 1980, appellant appealed the above-designated decision of the BLM on the grounds that it failed to exclude lands subject to a Native allotment for which appellant had allegedly applied prior to Dec. 18, 1971.

On Mar. 7, 1980, in response to the Board's request, appellant identified the lands in dispute in this appeal as "SW $\frac{1}{4}$ of Sec. 18. NW $\frac{1}{4}$ of Sec. 19, T23N, R5E, CRM." No allotment number was indicated and no legal description more definite than that specified above was provided. Also on Mar. 7, 1980, the appellant moved for an extension of time in which to file a statement of reasons, because the "Bureau of Land Management apparently has no available allotment file for Appellant Goodman and it will be necessary to establish before the Bureau of Land Management that a proper application was made."

On Apr. 9, 1980, responding to the Board's order requesting that BLM furnish a description of the disputed land, the BLM reported that it had no record of an allotment application filed by the appellant, and was thus unable to furnish any description of the disputed lands. Stating that the appellant cannot claim a property interest in land based upon an application for a Native allotment, BLM moved that the Board dismiss the appeal for lack of standing pursuant to 43 CFR 4.903.

On Apr. 10, 1980, the Board received appellant's Statement of Jurisdiction, Interest Affected and Reasons. Appellant therein declared that "the issue is whether appellant's interest in the allotment land applied for is protected under the Native Claims Act," and asked the Board "only to recognize the valid property interest of appellant to the land in dispute in this appeal and to segregate it pending adjudication of the allotments * * *."

Statement of Jurisdiction, Interest Affected and Reasons, p. 1. The appellant further specified, on pages 5 and 6, that she "made application for her allotment with the BIA representative Bill Mattise," and that

"if the Board wishes a more specific documentary showing of the fact of [her] allotment interest such a showing can be made within a reasonable period."

On Apr. 18, 1980, in accordance with appellant's description of lands in dispute in this appeal, the Board segregated the SW $\frac{1}{4}$ of Sec. 18 and NW $\frac{1}{4}$ of Sec. 19, T. 23 N., R. 5 E., C.R.M., from the remainder of the lands approved for conveyance in the above-designated decision of the BLM.

From May 22, through Oct. 27, 1980, the appeal was suspended while the appellant attempted, with the assistance of the Bureau of Indian Affairs (BIA), to establish that she timely filed an allotment application as alleged.

On Apr. 6, 1981, the Board ordered the appellant to submit an exact legal description of the lands affected by her alleged allotment application, or to notify the Board of the reasons why no more exact description than that previously submitted is possible. The Board declared its intention, following receipt of appellant's response, to order BLM to exclude the disputed lands from conveyance until appellant's allotment application dispute is settled.

The appellant responded on Apr. 16, 1981, with a more specific, though not exact, description of the unsurveyed lands affected by her alleged allotment application. Subsequently, on June 10, 1981, the Board segregated the N $\frac{1}{2}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ of Sec. 18, T. 23

N., R. 5 E., C.R.M., from the remainder of the lands approved for conveyance to Dot Lake Native Corp. by the above-designated decision of the BLM.

Decision

Appellant has appealed the above-designated decision of the BLM to convey lands to Dot Lake Native Corp. (Dot Lake) in order to protect her rights in her alleged allotment application. Appellant asked the Board "only to recognize the valid property interest of appellant to the land in dispute in this appeal and to segregate it pending adjudication of the allotments * * *." Statement of Jurisdiction, Interest Affected and Reasons, p. 1.

The jurisdiction of this Board is set forth in 43 CFR 4.1(b)(5):

Alaska Native Claims Appeal Board. The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act.

The Board notes that there has been no Department decision regarding the validity of appellant's alleged allotment. Rather, the Department asserts that no such application for allotment, which could be the subject of adjudication, can be found on file.

Furthermore, § 18(a) of ANCSA provides:

No Native covered by the provisions of this Act, and no descendant of his, may hereafter avail himself of an allotment

under the provisions of the Act of February 8, 1887 (24 Stat. 389), as amended and supplemented, or the Act of June 25, 1910 (36 Stat. 363). Further, the Act of May 17, 1906 (34 Stat. 197), as amended, is hereby repealed. Notwithstanding the foregoing provisions of this section, any application for an allotment that is pending before the Department of the Interior on the date of enactment of this Act may, at the option of the Native applicant, be approved and a patent issued in accordance with said 1887, 1910, or 1906 Act, as the case may be, in which event the Native shall not be eligible for a patent under subsection 14(h)(5) of this Act.

[1] Native allotments are issued pursuant to statutes other than ANCSA. While the option of the allotment applicant to proceed to patent is preserved by § 18(a) of ANCSA, decision approving or denying applications for Native allotments are not "matters relating to land selection arising under" ANCSA. Thus, even had there been a Departmental decision as to the validity of appellant's alleged allotment, the Board would not have jurisdiction to review it. This Board is without jurisdiction to adjudicate the validity of an allotment, and cannot determine the existence of a valid property interest in land based upon a disputed allotment application. If the appellant is successful in establishing before the BIA that she timely filed an allotment application, then BLM will determine whether appellant has a valid property interest in the affected land. Any appeal from that determination would be to the Interior Board of Land Appeals, and not to this Board.

The appellant requested the Board to "segregate" the disputed land pending adjudication of her allotment application.

It is the policy of the Board to segregate lands affected by an appeal from the remainder of the lands proposed for conveyance in the decision appealed, so that conveyance of the unaffected lands is not delayed pending decision of the appeal. The segregated lands remain within the jurisdiction of the Board until the appeal before the Board is dismissed.

In the instant appeal, the appellant is attempting to establish the existence of a valid property interest in the disputed lands and to protect her interest by staying their conveyance under ANCSA pending adjudication of her alleged application. The Board can stay the conveyance pending resolution of the allotment dispute but, as shown above, cannot adjudicate the validity of the appellant's allotment, and is without jurisdiction to review a Departmental adjudication of the allotment. In these circumstances, there is no need for this Board to retain jurisdiction over lands which have been segregated from lands unaffected by the appeal.

[2] An order of this Board requiring the exclusion of the alleged allotment from the conveyance pursuant to ANCSA pending adjudication of the allotment will protect the appellant's interests vis-à-vis Dot Lake regardless of the continuation of this appeal. Moreover, following issuance of the order, this

Board would be a mere intermediary not further concerned with the appellant's rights. Therefore, the Board will order exclusion of the disputed Native allotment from the conveyance of lands pursuant to ANCSA pending adjudication of the disputed allotment, and will dismiss the appeal.

Order

The Bureau of Land Management is hereby Ordered to exclude the N $\frac{1}{2}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ SW $\frac{1}{4}$ of Sec. 18, T. 23 N., R. 5 E., C.R.M., from conveyance pursuant to the Alaska Native Claims Settlement Act pending Departmental determination of whether appellant timely filed an allotment application and, if so, pending adjudication of said application.

Further, the Board hereby dismisses the above-designated appeal.

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

**APPEAL OF SINGLETON
CONTRACTING CORP.**

IBCA-1413-12-80

Decided *August 12, 1981*

Contract No. NA79RAC00076, National Oceanic and Atmospheric Administration.

Granted.

1. Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Generally

An appeal may be decided on the basis of a theory not advanced by the parties so long as the theory is consistent with the facts of record or legitimate inferences therefrom.

2. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Construction and Operation: Estimated Quantities

Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the quantity of roofing estimated by the Government and it is determined that the quantity of roofing required for performance of the contract could not have been verified by a prebid investigation, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions clause.

3. Contracts: Construction and Operation: Notices—Contracts: Disputes and Remedies: Jurisdiction

Written notice given a week after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer before the conditions are disturbed where the evidence shows that the Government had actual notice of the operative facts related to double roofing at the time the double roofing was encountered and no showing was made that any prejudice to the Government had resulted from the belated written notice.

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4. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)

A second category differing site conditions is found to exist where the Government tacitly acknowledged that double roofing encountered under a contract calling for reroofing of a building in Miami, Florida, constituted an unknown condition and the testimony offered in support of the contractor's claim shows that while double roofing is not unusual in some areas of the country, it is unusual in the southern areas where there is a lot of mildew and moisture, humidity, as would be true of the particular locale in which the instant contract was performed.

APPEARANCES: Wayne Singleton, President, Singleton Contracting Corp., Atlanta, Georgia, for Appellant; Jerry A. Walz, Government Counsel, Washington, D.C., for the Government.

*OPINION BY
CHIEF ADMINISTRATIVE
JUDGE MCGRAW
INTERIOR BOARD OF
CONTRACT APPEALS*

The contractor has timely appealed the contracting officer's denial of its claims for additional compensation totaling \$15,115¹ comprised of a claim for roofing in excess of the approximate quantities set forth in the specification (\$12,961) and a second category differing site conditions claim (\$2,154).² In a letter to the Board

under date of Jan. 22, 1981 (received in the offices of the Board on Feb. 2, 1981), the appellant confirmed that its notice of appeal of Dec. 1, 1980, was intended to serve as its complaint; that it desired an oral hearing; and, that it desired the appeal to be processed under the accelerated procedure. A hearing on the appeal was held in Atlanta, Georgia, on May 15, 1981. Briefing action on the appeal was completed on July 24, 1981, when the appellant's reply brief was received by the Board.

Findings of Fact

1. Invitation For Bids NOAA 37-80 (involving a total set-aside for small business concerns), was issued under date of Jan. 24, 1980, and provided for the opening of bids at the issuing office in Boulder, Colorado, on Feb. 15, 1980. The invitation provided for the furnishing of plant, labor, material, and equipment required to reroof the Atlantic Oceanographic and Meteorological Laboratories building located at 15 Rickenbacker Causeway, Miami, Florida. The invitation was issued by the National Oceanic and Atmospheric Administration office in Boulder, Colorado, and both the contracting officer and the administrative contracting officer were located there. Bidders were advised in the invitation that arrangements for an on-site inspection were to be made with Mr. James Barker, who was designated in the specification as the contracting officer's technical

¹ Appeal File (hereinafter AF) 5.

² The amount allocated to each claim is from the appellant's letter to the Board dated Jan. 22, 1981.

representative (COTR).³ Mr. Barker viewed his position as comparable to a project engineer of a building (AF 9; Tr. 14-15).

2. Contract No. NA79RAC00076 was awarded to the contractor by the National Oceanic and Atmospheric Administration (NOAA) on Mar. 6, 1980, in the amount of \$53,009. The contract incorporated the provisions of invitation for bid (SF 20), which included instructions to bidders (SF 22),⁴ General Provisions (Construction Contract) (SF 23-A, Apr. 1975 Edition), and Specification for reroofing Atlantic Oceanographic and Meteorological

Laboratories building. Included among the contract's specifications are the following provisions:

1.1 *Summary of Work*

The Contractor shall provide all labor, material and equipment required to re-roof the Atlantic Oceanographic and Meteorological Laboratories building located at 15 Rickenbacker Causeway, Miami, Fla.* * *

1. Existing roofing shall be taken down to insulation board and replace all damaged insulation where needed.

3rd Floor approx. 15,552 square feet

4th Floor approx. 2,352 square feet

5th Floor approx. 4,434 square feet

*The built-up roofs on the 4th and 5th floors are not as damaged as the 3rd floor. All contractors should bid on the 3rd floor roofing job—with the 4th and 5th floors as optional price bids. Depending on available finding [sic] these optional price bids may be accepted individually or severally as a part of this bid.

* * * * *

1.3 *Site Investigation*

Bidders are required to visit the site of the work and by their own investigation determine the quantities of work and existing conditions affecting the work covered by these specifications. The successful bidder shall assume all responsibility for his conclusions as to the difficulties and quantities of work to be performed.

1.4 *Pre-Construction Conference*

After the award of the contract and prior to the start of construction, the Contractor shall meet with the Contracting Officer and/or the COTR to establish work schedules and procedures.

(AF 9).

3. In response to the invitation and prior to the opening thereof the contractor submitted a bid in the amount of \$53,009 broken down as follows: For the third floor only,

³In especially pertinent part the contract specification provision read as follows:

"The COTR will be Mr. James Barker (305) 361-3361. The COTR is responsible for the technical aspects of the project and technical liaison with the Contractor. The COTR is also responsible for the inspection and acceptance of materials, services and such other specific authorized responsibilities as may be stipulated in the contract. The COTR is not authorized to make any commitments or otherwise to obligate the Government or to authorize any changes which affect the contract price, or other terms or conditions of the contract. Any such changes shall be referred to the Contracting Officer through the COTR. No such changes shall be made without the expressed prior authorization of the Contracting Officer."

(1.2 Contracting Officer's Technical Representative (COTR)) (AF 9).

⁴Among such provisions was the following:

"2. Conditions Affecting the Work.—Bidders should visit the site and take such other steps as may be reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or cost thereof. Failure to do so will not relieve bidders from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government will assume no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of the contract, unless included in the invitation for bids, the specifications, or related documents."

(AF 9, Instructions to Bidders).

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\$34,512; option #1 for fourth floor only, \$7,248; and option #2 for fifth floor only, \$11,249.

The bid was based on the contractor's estimate that the quantity of reroofing required for the job would total 22,308 square feet made up of 15,522 square feet, 2,352 square feet and 4,434 square feet.⁵ The latter figures are the same figures used in the invitation as the approximate quantities of roofing required for the third, fourth, and fifth floors, respectively of the building covered by the contract (Finding 2). The Government concedes that the appellant roofed approximately 27,720 square feet of the building which is the total quantity of roofing reflected in appellant's claim computation. The claim for excess roofing is for 5,412 square feet (27,720 square feet less 22,308 square feet), *i.e.*, approximately 24 percent greater than the total quantity reflected in the specifications (PFF 6 and 9).⁶

4. The appellant testified to having made an on-site inspection prior to submitting its bid (Tr. 25-28, 69-71). In answer to an interrogatory prepared by the Government,⁷ Mr. Singleton (the appellant's president) made the following state-

⁵ The contractor's estimate was received in evidence as Appellant's Exhibit (hereinafter AX) 1.

⁶ Accompanying the respondent's posthearing brief was Appendix A, Stipulations and Proposed Findings of Fact. PFF is the abbreviation for Proposed Findings of Fact in the brief and in this opinion.

⁷ The interrogatories and the appellant's answers thereto were received in evidence as Government's Exhibits (hereinafter GX) A and B.

ment respecting the actions the company had taken to familiarize itself with the work to be performed at the worksite: "Visual inspection of jobsite as to the nature and location of the work to be performed. Measurements taken at jobsite as to the nature, configuration, size, and quantity of work to be performed * * *. All such steps taken by either Wayne Singleton and/or Paul Webb" (GX A and B, Question and Answer 2d).

Answering another question in the same set of interrogatories as to why it was impossible to form a conclusion as to the quantities of work to be performed other than that which was given in the specifications, Mr. Singleton stated:

No plans were provided by Respondent in bidding material by which Appellant could determine correctness or even location of quantity of work to be performed. No information was given by Respondent in bidding material by which Appellant could ascertain what areas were to be reroofed, were to be roofed, were not to be reroofed, were not to be roofed, and what areas had an existing double roofing system.

GX A and B, Question and Answer 3a).

5. In its answer the respondent admits that the contract documents furnished to the appellant for the purposes of bidding and then construction consisted of a set of specifications and no plans (Respondent's Answer at 1; Tr. 7).⁸ Upon

⁸ Upon direct examination Mr. Singleton stated:

"[I]f there had been a set of plans furnished with the contract documents, which

—Continued

cross-examination, Mr. Singleton acknowledged that his answer to question 2d of respondent's interrogatories respecting measurements taken at the jobsite as to quantities may be a little ambiguous (Tr. 70-71). Elsewhere in his testimony, however, he noted the absence of any plans having been submitted with the bidding and contract documents and the fact that he had not considered it necessary to make any field measurements to determine any quantities because under sec. 1.1, paragraph 1 (Finding 2, *supra*), the Government had indicated for each floor the quantities of roofing involved in the contract work (Tr. 27).

In the claim letter of Sept. 24, 1980 (AF 5), the contractor states:

In accordance with what we have been instructed to remove and replace, we have had or will have to remove and replace 5412 S.F. more roofing than that which was specified and bid on. We have taken the time to draw a set of drawings⁽⁵⁾ showing the roof areas, which

had dimensions on it I would tend to agree that the contractor may have a responsibility for calculating, using those dimensions, and relying upon those dimensions, and making a determination as to whether or not the Specification quantities were accurate or not. But, in this instance, the Contracting Officer, or the owner, didn't even provide a set of drawings. All he did was tell you where the building was located. Nowhere in these specifications did it notify the contractor that any portion of any of the roofs would not be roofed."

(Tr. 36-37).

⁵ Commenting upon these drawings, Mr. Singleton states: "[A]ppellant's Exhibit AX 2 was prepared by appellant after the opening of bids on the subject project and at the time he submitted his claim, 24 September 1980 (Tab 5)" (Appellant's Reply to Government's Brief at 2).

The Board notes that the drawing which

have been reroofed on the above referenced project.

6. Accordingly to the testimony of Mr. James Barker (COTR) the approximate quantities of reroofing used by the Government in the invitation had been developed by a roofer whose name he did not know. Mr. Barker stated that the Government simply took the roofer's word for the quantities involved and the Government's estimated cost for performing the contract work was based on such quantities. The appellant relied on the quantities of roofing set forth in the invitation¹⁰ and based its bid upon them (Tr. 7-10, 27-32, 35-36).

7. After the award of contract, Mr. Singleton was called by Mr. Daniel Gomez (administrative contracting officer) for the purpose of arranging a preconstruction conference at the jobsite in Miami, Florida, between him and the COTR. When Mr. Singleton arrived at the jobsite from Atlanta, Georgia, how-

accompanied the contractor's claim letter of Sept. 24, 1980 (AF 5), appears to be identical to the drawing received in evidence as AX 2, except for the fact that the drawing which accompanied the Sept. 24, 1980, letter (AF 5), was apparently cut up by someone to facilitate including the drawing in the letter size appeal file.

¹⁰ After referring to the fact that there were areas on the third floor that the contractor was not required to reroof as shown on AX 2 and GX E, Mr. Singleton states:

"[O]n this particular contract, there was an area of the third floor, which we were not required to reroof. And I would assume that that area never was intended to be reroofed. Now, how a potential bidder or contractor could read these specifications, and visit the jobsite, and make a determination on that, as to whether or not that area was to be reroofed, to me, is an impossibility." (Tr. 28-29).

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ever, the COTR was not there.¹¹ Mr. Gomez was called in Colorado, and notified of these developments. He instructed Mr. Singleton to get in touch with a Mr. Parker. After a 5 minute discussion with Mr. Parker, Mr. Singleton as referred to Mr. Eddie Brille. Later Mr. Singleton learned that Mr. Brille was either a maintenance manager or simply a maintenance man at the building in question. While Mr. Brille was very helpful, he was unable to answer many pertinent questions which he stated would have to be answered by Mr. Barker (Tr. 33-35).

8. The appellant has also submitted a second category differing site condition claim as a result of having discovered a double roofing system in two different areas on the third floor of the building covered by the contract. In the decision from which the instant appeal was taken, the contracting officer interposed the defense of lack of timely notice with respect to this claim. It is undisputed that the first written notice of the claim was the contractor's letter dated Sept. 24, 1980 (AF 5), which may have been a week after the discovery of the condition. Mr. Singleton was unable to state the date upon which he was informed by telephone of the double roofing having been encountered on the job and he had not known prior to the hearing that double roofing was involved in

two different areas of the third floor roof (AF 1 and 5; Tr. 17, 51-53, 74-75).

9. In his testimony Mr. Paul Webb (roofing subcontractor) stated that the contractor's personnel was unaware of double roofing being involved until they had cut up at least half of it. The COTR (Mr. Barker) was present when this occurred and in response to a question from Mr. Webb stated that he wanted all of it off.¹² At that time, Mr. Webb was also informed by Mr. Barker that a second area involving double roofing would be encountered and that the double roofing in that area was also to be removed.¹³ The COTR was

¹² Testifying upon direct examination concerning conversations that he had had with Mr. Barker about the double roofing when first encountered, Mr. Webb stated:

"Yes, there were different occasions, when I had mentioned, I had said, 'This here is a double roof' and I believe I mentioned 'do we have to go all the way down?' And he said, 'All of it, I want it all off', and I said, 'Okay, you'll probably owe us a Pepsi or a cup of coffee for this extra work.'"

(Tr. 84).

Upon cross-examination, Mr. Webb acknowledged that at or near the end of the contract the laboratory people had invited Mr. Webb and the workers to a free picnic barbecue and that at that time they had had a chance to get a Pepsi or a cup of coffee (Tr. 83).

¹³ The following colloquy occurred upon direct examination of Mr. Webb in regard to the double roofing:

"Q. After encountering it on the first section, did anyone give you notice about you would encounter it in another location?"

"A. I believe at that time we were also informed—how shall I say it—that there was this other section. But I [sic] want it all removed, so I just went ahead under the orders to go ahead and remove it. But we weren't there only a few more days.

"Q. Did Mr. Barker ever give you any notification or have any discussions to the effect that the Government may wish to do something other than what you were getting ready to do?"

"A. No, he said he wanted it removed all the way down to the insulation."

(Tr. 85).

¹¹ Mr. Barker attributed his absence from the preconstruction conference to the fact that he was on training duty with the Navy for 2 weeks. In the course of his testimony he noted, however, that "whatever pertained to that roof, myself or Edmond Parker knew about it" (Tr. 22-23).

aware of the areas involving double roofing before they were encountered and acknowledges that he was informed of the double roofing system at the time when the contractor started tearing it up (Tr. 16-17, 84-85).

The areas of double roofing were slated to be reroofed because they had leak problems there. Once the double roofing had been removed, it was necessary to proceed with the new roofing immediately to protect the building which had been opened up and was exposed to the weather. Mr. Barker conceded that there would have been no opportunity to give the contracting officer notice with respect to the first area of double roofing encountered but noted that written notice could have been given with respect to the second area involving the same condition. Mr. Barker also conceded that it was not apparent a double roofing system would be involved until the contractor dug into the existing roof.¹⁴ It is undisputed that at no time during the performance of the contract was Mr. Baker ever notified by the contractor that it planned to submit a claim relating to the double roofing (Tr. 17, 20-21, 47-51, 75, 92).

10. Respecting the additional cost occasioned by the double roofing, Mr. Singleton testified that the removal of the double roofing required an extra amount of labor for

handling the extra material involved and that twice as much cleanup was required by reason of having twice as much debris to handle. Mr. Webb also testified to the substantial increase in cost associated with the double roofing system,¹⁵ noting that on some days the crew had had to work 9 to 12 hours (Tr. 53, 76, 86-87).

11. After referring to the elements required for the proof of a second category differing site conditions claim, Mr. Singleton testified that a second roofing system, lying underneath a first roofing system, meets the definition of unknown. Based upon his 11 years in contracting in which he could recall only one other instance of encountering a building or a project with a double roofing system on it and the fact that nowhere in the specifications did it notify the contractor that there were two roofing systems, he considered the two roofing systems to be of an unusual nature (Tr. 51-52). Testifying with respect to the unusual nature of the double roofing systems encountered in contract performance, Mr. Webb (who had had 34 years of roofing experience) stated that a double system of roofing was not unusual in some areas but that "in this particular locale, in the Southern areas, where there is a lot of mildew and moisture, humidity, it's the accepted rule that you do not apply another layer over a layer" (Tr 81-83).

¹⁴ Tr. 20-21. Later in his testimony Mr. Barker indicated that a double roofing area might have been suspected from a hump or small buildup apparent from visual inspection (Tr. 92-93).

¹⁵ In respondent's posthearing brief at page 7, Government counsel observes that there is no issue with respect to the credibility of Mr. Webb who appeared to be very concerned with testifying truthfully.

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12. The change order request for claimed extra work submitted with the contractor's letter of Sept. 24, 1980, was in the amount of \$15,115 (AF 5). In support of the requested change order, the contractor asserted: (i) that the bidding and contract documents furnished to the contractor for bidding and construction consisted of a set of specifications, estimated quantities of work to be performed and no plans; (ii) that the bidding and contracting documents called for replacing a total of 22,308 square feet of roofing on the third, fourth, and fifth floors of the building covered by the contract; (iii) that performance of the contract had involved replacing 27,720 feet of roofing or 5,412 square feet more roofing than that which was specified and bid on; (iv) that the contractor had also been required to remove 5,692 square feet of double roofing from the third floor, although its bid had been based on the assumption that only one roofing system would have to be removed: and (v) that the total amount requested for performing the extra work (including overhead and profit) was in the sum of \$15,115.

13. In denying the contractor's claims in a letter dated Oct. 28, 1980 (AF 1), the contracting officer stated:

[Y]our claim is herewith denied. Your contract in the total amount of \$53,009.00, in accordance with IFB NOAA 37-80, is "For the entire job (including both options)" to furnish plant, labor, material, and equipment to reroof the 3rd, 4th and 5th floors of the Atlantic Oceanographic

and Meteorological Laboratories (AOML) building.

In regards to those portions of your letter dated September 24, 1980 concerning estimated quantities, the specifications Section 1.3 Site Investigation specifically delineates bidder and successful bidder requirements and responsibilities i.e. "The successful bidder shall assume all responsibility for his conclusions as to the difficulties and quantities of work to be performed." (emphasis added). Should your claim be in reference to a differing site condition, i.e., double roofing etc., a written request describing such must be submitted in writing to the Contracting Officer *before* such conditions are disturbed (Reference Standard Form 23-A Clause 4).

14. The parties have stipulated that the quantum of the excess roofing claim is \$12,368 and that the quantum of the double roofing claim is \$850 (Respondent's Post-hearing Brief and Appendix A, Stipulations and Proposed Findings of Fact). Assuming that liability is found to exist for both claims, the stipulated amount for quantum totals \$13,218.

Claim for Roofing in Excess of Quantities Estimated by Government—\$12,368

Discussion

[1] The appellant's claim for excess roofing is being asserted under Clause 3 (Changes) of the General Provisions on the ground that the specifications were defective. Defending against the claim, the Government relies principally upon the fact that the appellant has failed to show it is entitled to any relief under Clause 4 (Differing Site Condi-

tions) of the General Provisions. The Board considers that the claim as presented may properly be considered as a first category differing site conditions claim and will so treat it in this decision.¹⁶

[2] In the Government's view the question presented is whether, in the circumstances of this case, the appellant can rely on the estimate contained in the contract specifications as the basis for a claim for work done in excess of the estimate. Addressing this question, Government Counsel states:

Pulling aside for the moment the question of whether the square footage in the Government's estimate was erroneous¹⁷ and the legal effect of the term

¹⁶ The Board is not necessarily precluded from deciding a claim on the basis of a theory not advanced by the parties so long as the theory is consistent with the facts of record or legitimate inferences from such facts. *Paul C. Helmich Co.*, IBCA-39 (Oct. 31, 1956), 63 I.D. 363, 365-66, 56-2 BCA par. 1096 at 2777-78. *Cf. American Cement Corp.*, IBCA-496-5-65 and IBCA-578-7-66 (Jan. 10, 1967), 74 I.D. 15, 23-27, 66-2 BCA par. 6065 at 28,069-72 (no party should be compelled to try its cause under legal theories and allegations advanced on its behalf by the opposing party).

¹⁷ See *Womack v. United States*, 182 Ct. Cl. 399 (1968), for a case in which in the circumstances there present the Court of Claims found that the Government's erroneous estimate was the result of negligence.

In this case there was at least one instance involving a serious maladministration of the contract. We refer to the situation where the Administrative Contracting Officer in Boulder, Colorado, scheduled a preconstruction conference between Mr. Singleton and the COTR in Miami, Florida. Departing from Atlanta, Georgia, for Miami, Florida, Mr. Singleton discovered when he arrived at the time and place scheduled for the preconstruction conference (i) that Mr. Barker (COTR) was not there by reason of being on training duty with the Navy; (ii) that Mr. Barker (who was reported to be knowledgeable with respect to whatever pertained to the roof) devoted only approximately 5 minutes of time to discussions with Mr. Singleton; and (iii) that Mr. Eddie Brille

approx. (approximately), the crux of this case is that Appellant has admitted that it made a pre-bid site investigation and took measurements as to the quantity of work to be performed¹⁸

After quoting from the answer given by the appellant to question 2d of the Government's interrogatories (Finding 4), Government counsel offers the following comment: "The above interrogatories and testimony at trial (Tr. 70) clearly show that this site visit was prior to the time that Appellant submitted its final bid and that Appellant therefore either had or should have had actual knowledge as to the amount of roofing required" (Respondent's Posthearing Brief at 3, 4).

In answer to one of the Government's interrogatories the appellant did state that it had taken measurements at the jobsite as to the quantity of work to be performed (Finding 4). If we were to attach the same significance to appellant's answer to that interrogatory as the Government apparently does, that answer might well preclude recovery in this case on the ground that the appellant had not relied on the Government's estimate for the bid submitted. The Board considers ap-

(either maintenance manager for the building or a maintenance man) was very helpful in areas with which he was conversant but he was not in a position to answer questions normally raised by a contractor at a preconstruction conference (Finding 7).

¹⁸ Although no portion of the record is cited, Government counsel has suggested that the drawing introduced into evidence as AX 2 may reflect the measurements taken by the appellant during the prebid site visit. The appellant states that AX 2 was prepared after the opening of bids on the project and at the time it submitted its claim (n.9, *supra*).

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pellant's answer to Government interrogatory 2d has little probative value, however, even though neither at the hearing nor in its post-hearing briefs has the appellant given any satisfactory explanation as to why the particular question was answered the way it was.

At the outset we note the unqualified assertion by the appellant in the same set of interrogatories that it was not possible to form a conclusion as to the quantity of work to be performed except on the basis of the estimates given by the Government in the specifications. Also noted is the fact that the 22,308 square feet of roofing reflected in the contractor's estimate corresponds exactly with the total figures for roofing derived from the addition of the approximate quantities of roofing given for the third, fourth, and fifth floors in the invitation for bids (Findings 2 and 3).

Entirely aside from the above considerations, however, is the fact that the Government has not only failed to prove but has not even undertaken to show how it would have been possible for the appellant or anyone bidding on the job to verify by means of a site investigation the quantity of roofing that would be required for the project. In this case, the specification failed to indicate the areas in which the roofing was to be performed; neither plans nor drawings were furnished; and the areas to be roofed were apparently determined on the basis of directions received from the COTR or someone authorized to act for him

(Finding 9 nn.8, 10 & 13, *supra*). Based upon the foregoing analysis, the Board finds that it would have been impossible for the contractor to verify from an on-site inspection either the quantity of roofing required or where it would be required. In such circumstances, the appellant clearly had no alternative but to base its bid upon the estimated quantities of roofing set forth in the invitation. This is what it did as shown by its testimony and its bid estimate (Finding 3). So finding, the Board considers that, insofar as the claim for excess roofing is concerned, this case is very similar to that involved in *Lee R. Smith-Contract Builder*, ASBCA No. 11135 (Sept. 23, 1966), 66-2 BCA par. 5857.

The *Lee R. Smith* case, *supra*, involved a reroofing contract where there was a substantial difference between the approximate quantity of reroofing estimated in the invitation (610 squares) and the quantity of reroofing required to complete the contract work (691 squares), i.e., an overrun of approximately 13.28 percent. Commenting upon the effect of the contractor's failure to make a site inspection in that case, the Armed Services Board states:

There is no contention that appellant could have detected the error in the Government's statement of quantity in any way except by a site examination. The fact that appellant made no prebid site inspection makes no difference, as he is chargeable with knowledge of what he could have discovered by a reasonable prebid site inspection, but is not charge-

able with knowledge of what would not have been disclosed by such an inspection. The crucial issue in this appeal is whether appellant could have discovered the error in Government's quantity statement by a proper site inspection.

(66-2 BCA par. 5857 at 27,181). In its posthearing brief at page 4, the respondent attempts to distinguish the *Lee R. Smith* case, on the ground that in that case the contractor did not make a prebid site investigation which included measurements as to the quantity of work to be performed. If, as we have found, however, the contractor could not and therefore did not verify the accuracy of the estimated quantity of roofing set forth in the invitation by means of its site investigation, the distinctions made by the Government between the two cases are not considered to be of any real significance.

Apparently, with a view to establishing that the term approx. (approximately) does not necessarily imply a certain precision in the respondent's figures, Government counsel cites the decision of this Board in *Swauger Contractor*, IBCA-609-12-66 (July 11, 1967), 67-2 BCA par. 6430. In that case we recognized that although the term approximately is not synonymous with the term estimated, it is often used in such a context. The Board found that to be the case in *Swauger* where, however, the overrun was only approximately 3 percent of the total estimate and the contract clearly used the two terms interchangeably. Here the overrun quantities were in excess of

24 percent above the estimate and there is no language in the contract indicating the two terms were being used interchangeably.

Remaining for consideration is the effect to be given to the site investigation provision of the specifications under which the successful bidder was required to assume all responsibility for the conclusions reached as to the difficulties and quantities of work to be performed (Finding 2). Addressing this question Government counsel calls attention to case of *Archie and Allan Spiers, Inc. v. United States*, 155 Ct. Cl. 614 (1961) in which the Court of Claims noted that *Hollerbach v. United States*, 233 U.S. 165 (1914) and other cited cases did not stand for the proposition that all warning and exculpatory clauses are without effect.

Construing clauses generally comparable to those included in the instant contract, this Board stated in *Swauger*, *supra* at 29818: "Provisions such as the 'Conditions Affecting the Work' clause, *supra*, relied upon exclusively by the Contracting Officer in deciding this claim, or the 'Examination of Project Site' clause, do not operate to eliminate the 'Changed Conditions' clause" (footnotes omitted). Since the Board has found that it would not have been possible to ascertain the quality of reroofing work from a site examination in the instant case,¹⁹ there is no need to determine

¹⁹ Cf. *Benson Tree Co.*, IBCA-812-11-69 (Nov. 10, 1970), 70-2 BCA par. 8549 at 39,754 ("[W]e do not think that a reasonable prebid

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the effect to be given to exculpatory clauses in other circumstances.

Decision

For the reasons stated and on the basis of the authorities cited, the Board finds that the appellant is entitled to an equitable adjustment under the Differing Site Conditions clause in the amount of \$12,368 for 5,412 square feet of roofing in excess of the aggregate quantity of roofing represented by the Government in the specifications as required for the performance of the contract work (Finding 3, 14).

Claim for Double Roofing (Second Category Differing Site Conditions)—\$850

Discussion

[3] In the course of performing the instant contract the contractor encountered double roofing in two different areas of the third floor roof. It is undisputed that no written notice was given to the contracting officer prior to the time the conditions were disturbed. Appellant offered testimony to show that the double roofing encountered was both unknown and unusual. The Government's position is that the contractor's failure to give written notice to the contracting officer before the conditions were disturbed precludes the allowance of the

double roofing claim. The Government also states that the appellant has not shown that the double roofing was a condition of an unusual nature differing materially from conditions ordinarily encountered in performing the type of work covered by the contract.

Citing *Carson Linebaugh, Inc.*, ASBCA No. 11384 (Oct. 5, 1967), 67-2 BCA par. 6640 as authority, the Government asserts that appellant's failure to give the notice required by the Differing Site Conditions clause is fatal to its claim, at least insofar as the second area of double roofing encountered is concerned. In *Carson Linebaugh, supra*, however, the Armed Services Board recognized that written notice may be waived by the Government or may become supererogatory where the Government has in fact knowledge of the condition and of the difficulties encountered by the contractor.

A review of Board decisions in the area of notice under different clauses²⁰ discloses that ever since the Court of Claims decision in *Hoel-Steffen Construction Co. v. United States*, 197 Ct. Cl. 561 (1972), involving consideration of timeliness of notice under a Suspension of Work clauses,²¹ the

site examination, admittedly omitted by appellant, would necessarily have revealed the condition, in view of the sampling method employed by the Government to establish the approximation, and the even more elaborate and sophisticated methods used to verify it").

²⁰ None of the cases discussed in the text involve a contractor's failure to file a timely notice of appeal. For a case in which a contractor's failure to take an appeal within the time specified in the contract was fatal to its claim, see *Harry Claterbos Co., JV*, IBCA-1153-5-77 (Dec. 6, 1977), 84 LD. 969, 78-1 BCA par. 12,888.

²¹ See our discussion of *Hoel-Steffen*, text *supra*, in *Hartford Accident and Indemnity Co., IBCA-1139-1-77* (June 23, 1977), 84 LD. 296, 301-03, 77-2 BCA par. 12,604 at 61,075-76.

Boards have been loath to deny a claim on the basis of a contractor's failure to comply with the notice provisions of various clauses (*e.g.*, Changes, Differing Site Conditions), where the Government was found to have actual knowledge of the operative facts and no prejudice was shown to have resulted from a belated written notice. *See*, for example, *Mutual Construction Co., Inc.*, DOT CAB No. 1075 (Aug. 18, 1980), 80-2 BCA par. 14,630 at 72,157-58; *Smith & Pittman Construction Co.*, AGBCA No. 76-131 (Mar. 2, 1977), 77-1 BCA par. 12,381 at 59,929; and *A. Belanger & Sons, Inc.*, ASBCA No. 19187 (Jan. 29, 1975), 75-1 BCA par. 11,073 at 52,714. *Cf. Phillips Construction Co.*, IBCA-1295-8-79 and IBCA-1296-8-79 (July 31, 1981), 88 I.D. 689, 81-2 BCA par. — (appellant not foreclosed from asserting the defense of an excusable cause for delay under Clause 5 of the General Provisions of Standard Form 23-A construction contract simply because of the alleged technical inadequacy of the written notice).

Turning to the facts having a bearing on the question of notice in this case, we note that if the type of preconstruction conference apparently arranged for by the administrative contracting officer had been held as planned by him, it is entirely possible that Mr. Singleton would have been informed at that time that he would encounter areas involving double roofing. He would then clearly have had an opportunity to file a timely protest predicated upon the fact that the bid sub-

mitted had included no allowance for the additional expenses involved in the removal and disposal of the excess material necessarily encompassed in double roofing. As we have noted, however, the COTR did not attend the scheduled preconstruction conference as the administrative contracting officer had apparently contemplated. Mr. Parker was apparently preoccupied with other matters and Mr. Eddie Brille was not knowledgeable of the conditions which might be expected to obtain in performing the contract work. The conditions under which the preconstruction conference scheduled by the administrative contracting officer went forward raises a serious question as to whether the Government's own conduct may have contributed to the contractor's delay in giving notice that additional compensation would be expected for the double roofing work. *Cf. J. A. LaPorte, Inc.*, IBCA-1014-12-73 (Sept. 29, 1975), 82 I.D. 459, 483, 75-2 BCA par. 11,486 at 54,780 ("[T]he Government's actions contributed to and may even have been the principal cause of the delay in giving notice of the claim" (footnote omitted)).

In this case it is undisputed that the COTR knew of the double roofing being present in two different areas of the third floor prior to the issuance of the invitation; that the invitation contained no reference to double roofing; that prior to the time the double roofing was encountered neither the contractor nor the roofing subcontractor had been informed that it would be; that the

COTR was present when the double roofing was first encountered by the roofing subcontractor; that in response to a question received from the roofing subcontractor the COTR directed him to take all of the double roofing off; and at that time the COTR informed the roofing subcontractor that double roofing would be encountered in another area and that all of that should be removed also down to the insulation (Findings 8 and 9).

From the record made in these proceedings it is clear that the Government in the person of the COTR was aware of the operative facts pertaining to the double roofing claim. The Government has failed to offer any evidence to show that the contractor's delay in giving the written notice impeded its investigation of the claim or that if an earlier written notice had been given it would have proceeded differently. Absent such showing, the Board is persuaded and so finds that the Government was not prejudiced²² by the contractor's delay in giving written notice of the claim for double roofing²³ and that the

claim should be considered on the merits.

[4] With respect to the merits of the double roofing claim, Government Counsel has raised a number of defenses, among which are; (i) under the terms of the contract the COTR had no authority to authorize a change or to obligate the Government in any way which could affect the contract price; (ii) when the double roofing was first encountered the roofing subcontractor had indicated that a Pepsi or a cup of coffee would be sufficient compensation for any additional work involved; and (iii) that the evidence offered at the hearing had failed to show that encountering the double roofing in either area of the third floor roof was an unusual condition within the meaning of the Differing Site Conditions clause.

As to the first point the Board notes that the fact the COTR was without authority to contract on behalf of the Government does not mean that he had no duty to report matters to the contracting officer which were brought to his attention regarding the performance of the contract work (*Mutual Construction Co., Inc., supra*), or that the knowledge that he possessed of a potential claim could not be imputed to the contracting officer. *Environment Consultants, Inc., IBCA—1192-5-78* (June 29, 1979), 86 I.D. 349, 357-58, 79-2 BCA par. 13,937 at 68,396. It is clear that directions received from a person without authority to contract can in certain circumstances form a predicate for the allowance of a

²² See *Parcoa, Inc.*, AGBCA No. 76-130 (July 19, 1977), 77-2 BCA par. 12,658 at 61,361-62 ("In connection with allegations of prejudice resulting from lack of timely written notice of changes or differing site conditions, it is the Government's burden to prove prejudice since there is no presumption that prejudice resulted").

²³ Since our decision is grounded on the Government having actual knowledge of the operative facts and on the lack of a showing of any prejudice to the Government as a result of the belated written notice and since that rationale encompasses both areas in which the double roofing was encountered, we have not considered that there is any need to distinguish between them.

claim for additional compensation. *Barton & Sons Co.*, ASBCA Nos. 9477 and 9764 (May 21, 1965), 65-2 BCA par. 4874.

The weight that Government counsel attaches to a remark made by the roofing subcontractor when the double roofing was first encountered does not appear to be warranted by the record made in this case. Considering the additional work involved in handling the double roofing according to the undisputed testimony offered by Mr. Singleton and Mr. Webb, it appears to the Board that Mr. Webb's remark about accepting a Pepsi or a cup of coffee for such work must have been made in a jocular vein. In any event, it is clear that Mr. Webb's remark was made at a time before he could have been fully aware of the possible dimensions of the problem and prior to the time he had communicated information about double roofing having been encountered to Mr. Singleton, who was clearly the one that would decide whether a claim for the double roofing would be submitted. Moreover, both Mr. Singleton and Mr. Webb testified that the contractor's cost were substantially increased by reason of encountering the double roofing. Based upon this uncontradicted testimony, the Board finds this to be the case.

Remaining for consideration is the Government's assertion that the double roofing did not constitute an unusual condition. Appellant's witnesses Singleton and Webb both testified that encountering the

double roofing in the performance of the contract work was unusual. Mr. Webb's testimony was subject to the qualification that double roofing could only be said to be unusual if encountered in southern areas of the country (Finding 11). The Board takes administrative notice of the fact that Miami, Florida, is located in a southern area of the country. The Board therefore finds that the double roofing encountered in performing the instant contract constituted an unusual condition within the meaning of Clause 4, Differing Site Conditions of the contract (AF 9).

Decision

For the reasons stated and on the basis of the authorities cited, the Board finds that the appellant is entitled to an equitable adjustment under the Differing Site Conditions clause in the amount of \$850 by reason of having encountered double roofing in two different areas on the third floor of the building involved in the instant contract which double roofing constituted an unknown physical condition at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

Summary

The appeal is granted in the amount of \$13,218 (Finding 14), plus interest thereon computed in accordance with the Contract Dis-

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putes Act of 1978 (41 U.S.C. §§ 605, 611 (Supp. II 1978)), from Sept. 24, 1980, until payment thereof.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

OLD HOME MANOR, INC.

3 IBSMA 241

Decided August 13, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement for review of the Dec. 8, 1980, decision of Administrative Law Judge Sheldon L. Shepherd, Docket No. CH 1-55-R, granting Old Home Manor, Inc., temporary relief from a cessation order issued pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(3) (Supp. II 1978).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally

Backfilling and grading requirements of 30 CFR 715.14 are to be satisfied as contemporaneously as possible with surface coal mining operations to accomplish timely reclamation of disturbed areas.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally

Whether particular backfilling and grading activity is timely must be determined taking into account the overall circum-

stances of a surface coal mining and reclamation operation.

3. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Generally

Where OSM provides the maximum time allowable under 30 CFR 722.12(d) for the abatement of a violation, an Administrative Law Judge may not effectively extend this time by granting temporary relief from the abatement requirement.

4. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally

A permittee's noncompliance with an order by OSM to abate an alleged violation of the backfilling and grading requirements of 30 CFR 715.14 cannot serve to excuse the permittee's noncompliance with an order by OSM to abate an alleged violation of the revegetation requirements of 30 CFR 715.20.

APPEARANCES: William F. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Marcus P. McGraw, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, Division of Surface Mining, and John Pendergrass, Esq., Division of Surface Mining, for the Office of Surface Mining Reclamation and Enforcement; Gregg M. Rosen, Esq., Pittsburgh, Pennsylvania, for Old Home Manor, Inc.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by the Office of Surface Mining Reclamation and Enforcement (OSM) for review of the Dec. 8, 1980, decision

of Administrative Law Judge Sheldon L. Shepherd granting Old Home Manor, Inc. (Manor), temporary relief from Cessation Order (CO) No. 80-I-59-10. OSM issued this cessation order pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act),¹ as implemented in 30 CFR 722.13, on the basis of Manor's alleged failure to abate two violations of the Department's regulations charged in Notice of Violation (NOV) No. 80-I-59-18. We reverse the decision granting temporary relief and reinstate the CO pending its final review.

Factual and Procedural Background

On Aug. 18, 1980, OSM inspected the Hamil surface coal mine permitted to Manor (permit 615-35) in Westmoreland County, Pennsylvania, in response to a citizen's complaint (Tr. 16; Exh. A). At the conclusion of this inspection OSM issued Notice of Violation No. 81-I-59-18, charging the company with

violations of 30 CFR 715.14, 715.17, and 715.20. Two of the alleged violations are involved in this appeal: (1) Failure to transport, backfill, compact, and grade all spoil material to achieve the approximate original contour, with all highwalls, spoil piles, and depressions eliminated, in violation of 30 CFR 715.14; and (2) failure to establish on disturbed land a diverse, effective, and permanent vegetative cover, in violation of 30 CFR 715.20. The remedial actions prescribed by OSM to abate these alleged violations were for Manor to backfill and grade the disturbed land to achieve the approximate original contour, and to seed and mulch the topsoil storage piles.² These actions were to be taken within 90 days of the issuance of the NOV.³

The circumstance that prompted issuance of the NOV was that reclamation activity at the Hamil minesite appeared to be at a stand-

¹ Act of Aug. 3, 1977, 91 Stat. 445-532, 30 U.S.C. §§ 1201-1328 (Supp. II 1978). Sec. 521(a)(3), 30 U.S.C. § 1271(a)(3), provides in pertinent part:

"If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. * * * In the order of cessation issued by the Secretary under this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order." 30 CFR 722.13 contains language to the same effect as that quoted above.

² The NOV (Exh. A) as originally issued required Manor to abate the violation of 30 CFR 715.20 (violation 5 in the NOV) by seeding and mulching the disturbed area upon the completion of backfilling and grading. During a minesite meeting between representatives of OSM and Manor, on Oct. 22, 1980, OSM informed Manor that it would terminate violation 5 of the NOV when the stockpiles of topsoil on the permit area were seeded and mulched (Tr. 35).

As a general rule modifications of a NOV must be written. *Drumond Coal Co.*, 3 IBAMA 100, 106 n.6, 88 I.D. 474, 477 n.6 (1980). Because there is no disagreement between the parties in this case on the fact and terms of the oral modification, however, we are willing to recognize it.

³ OSM first specified that these actions be completed by Sept. 19 and 20, 1980, respectively. On Oct. 15, 1980, OSM issued a written modification of the NOV (Exh. F) extending the abatement deadlines for both alleged violations to Nov. 16, 1980.

still, even though spoil and topsoil piles, depressions, a portion of the highwall created during mining, and areas of limited or no vegetation remained (Tr. 17, 23-27; Exhs. S1-S10). Mining activity had ended at the site in October 1979 (Tr. 100). Backfilling operations begun at that time were discontinued in June 1980 "due to management's decision" (Tr. 101). At that time seven persons were employed on the site in reclamation activity (Tr. 103).

Reclamation operations were recommenced at the Hamil site in September 1980. Between then and OSM's issuance of the CO to Manor on Nov. 24, 1980, two men and two pieces of earthmoving equipment were employed in one-shift 5-day work weeks, to accomplish abatement of the violations charged in the NOV (Tr. 114, 119-20, 140).⁴ When OSM reinspected the minesite on November 24, the backfilling and grading operations remained incomplete and none of the topsoil stockpiles had been seeded and mulched (Tr. 37, 41-43).⁵

Manor applied for temporary relief from the CO and a review hearing was held on Dec. 5, 1980. The Administrative Law Judge's

decision, issued Dec. 8, 1980, granted Manor "[t]emporary relief * * * to vacate the cessation order and [to toll] the \$750 per day civil penalty as to [Manor's alleged failure to return the disturbed area to its approximate original contour and to seed and mulch the topsoil stockpiles] until [Manor's] application for review [of the CO] is disposed of" (Decision at 4-5). In accordance with 43 CFR 4.1267, OSM appealed this decision. Both parties filed briefs.

Discussion and Conclusions

As a preliminary matter we address OSM's argument that the decision below improperly granted Manor permanent relief. We agree with OSM's contention that before permanent relief may be granted from its enforcement action the parties must have notice of the intention of an Administrative Law Judge to render a final decision on the merits of a case, in accordance with the provisions of 43 CFR 4.1123 and 4.1167. *See Cravat Coal Co.*, 2 IBSMA 136, 87 I.D. 308 (1980).⁶ We do not believe, however, that it was the Administrative Law Judge's intention in the instant case to grant permanent relief. The order states in pertinent part: "Temporary relief shall be granted to vacate the cessation order * * *

⁴ This effort to accomplish reclamation contrasts with Manor's use of seven men (and, presumably, more than two pieces of equipment) for reclamation work before abandoning this work in June 1980 (Tr. 103).

⁵ The OSM inspector testified that he did not take precise measurements but that he would guess that, between the dates of the issuances of the NOV and CO in August and November respectively, the highwall was reduced from 50 to 30 feet in height (Tr. 75-76, 83, 90).

⁶ *Cf. Grafton Coal Co., Inc.*, 2 IBSMA 316, 319 n.2, 87 I.D. 521, 523 n.2 (1980) (in which the Board indicated that it is incumbent upon the potentially disadvantaged party to object to permanent relief granted in the context of a proceeding for temporary relief).

until the application for review is disposed of" (Decision at 4-5). We consider this language to grant temporary relief only.⁷

A party seeking temporary relief from enforcement action by OSM must show (1) "a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant" and (2) "that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources." 43 CFR 4.1263; *see* 43 CFR 4.1191. The Administrative Law Judge concluded that the record supports a decision in favor of Manor under both these criteria. We disagree with the determination that there is a substantial likelihood that Manor ultimately will prevail on the merits of its case. In view of this disagreement with the decision below, we need not address the Administrative Law Judge's determination that a grant of temporary relief to Manor would not adversely affect the health or safety of the public or cause significant environmental harm to land, air, or water resources. We note, however, that his determination is not supported by reference in the decision to evidence

supporting it, as is required by 43 CFR 4.1127(a).⁸

[1] The first issue is whether OSM can require a permittee to satisfy the performance standards of 30 CFR 715.14 within a particular time. As Manor correctly points out, the provisions of sec. 715.14 do not contain a time schedule for completion of backfilling and grading operations. These provisions, however, must be read in conjunction with the Act and other regulations. Specifically, 30 CFR 715.13(a) provides that "[a]ll disturbed areas shall be restored in a timely manner." This requirement, in turn, correlates with sec. 102(e) of the Act, 30 U.S.C. § 1202(e) (Supp. II 1978), in which one purpose of the surface mining legislation is specified to be "[to] assure that adequate procedures are undertaken to reclaim surface areas *as contemporaneously as possible with the surface*

⁸ Indeed, the Administrative Law Judge's recitation of the evidence of a "50-foot unreclaimed highwall * * * severe erosion on spoil piles * * * caused by the lack of vegetation * * * as well as due to lack of protection of the spoil piles and topsoil piles" (Decision at 2), indicates otherwise. Looking beyond the decision to the record as a whole, the only support we find for the Administrative Law Judge's determination is Manor's argument that OSM's issuance of an NOV rather than a CO in August "constitutes a tacit admission by OSM that Old Home Manor has met its burden of establishing the absence of an adverse, environmental impact" (Manor's Brief at 11). For Manor's proposition to be acceptable, an assumption must be made either that conditions at the minesite are static (which is clearly not the case) or that Manor's reclamation activity would hold constant or reduce the likelihood of harm to the public or environment resulting from conditions at the minesite. The latter assumption, while not patently unreasonable, is insufficient to support the conclusion urged by Manor.

⁷ Because the Administrative Law Judge used the term "vacate" rather than "stay" in describing the relief granted Manor, OSM's interpretation of the intended relief is plausible. We decline to adopt this interpretation, however, on the basis of our reading of the order as a whole.

coal mining operations." (Italics added.) These provisions demonstrate that timing is an important factor in OSM's evaluation of a permittee's compliance with the performance standards in 30 CFR 715.14.⁹

[2] Whether particular reclamation work is "timely" must be determined taking into account the overall circumstances of a surface coal mining and reclamation operation. The record here informs us that Manor did not begin its backfilling activity until its mining was completed; that the company discontinued that activity, for unexplained reasons, before its completion; and that it did not show any disposition to recommence reclamation until after it was charged with a violation of 30 CFR 715.14, some 9 months after the conclusion of mining. Moreover, we are informed that in response to OSM's enforcement action Manor devoted significantly fewer resources to reclamation than it had used prior to OSM's action.¹⁰ These circumstances certainly do not suggest timely performance of backfilling and grading. Thus, at this stage in the review process there does not appear to be a substantial likelihood that the alleged violation of

30 CFR 715.14 will be vacated upon final review.¹¹

[3] Manor further contends that OSM exceeded its authority in requiring the company to complete backfilling and grading operations within 90 days of the issuance of the NOV. OSM is directed by sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. II 1978), and 30 CFR 722.12(d), however, the able time for abatement of any violation alleged in a NOV. Under 30 CFR 722.12(d), however, the time set cannot exceed 90 days. *Universal Coal Co.*, 3 IBSMA 218, 88 I.D. 672 (1981).¹² OSM's requirement that Manor complete backfilling and grading was certainly consonant with the violation of 30 CFR

¹¹ The Administrative Law Judge apparently failed to consider the background of 30 CFR 715.14 in arriving at the conclusion that Manor's performance was consistent with that regulation. He stated in this regard the following:

"Specifically, I feel that, as to the requirement that the applicant regrade and reclaim the spoil and return it to the approximate original contour, this is being done in a reasonably diligent manner to the extent the resources of the applicant have been applied to the reclamation process. The regulations and the Act do not, as the applicant's attorney pointed out, provide timetables nor do they provide equipment requirements. Obviously of course, one old man with a wheelbarrow and a shovel could hardly be construed to be a diligent reclamation effort. On the other hand I do not feel that the regulations or the Act authorize the respondent to order the applicant to devote 100 percent of its efforts on one reclamation project to the exclusion of all other activity."

(Decision at 4).

¹² Under present regulations a permittee's inability to comply with a proper abatement requirement cannot be the basis for extending the abatement period beyond 90 days. See 30 CFR 722.17.

⁹ While it would have been useful for OSM to refer to 30 CFR 715.13(a) in the NOV, the lack of reference to this provision does not render the NOV defective in terms of the requirements of 30 U.S.C. § 1271(a)(5) (Supp. II 1978). See *Renfro Construction Co., Inc.*, 2 IBSMA 372, 87 I.D. 584 (1980); cf. *Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980).

¹⁰ See n.4 and accompanying text.

715.14 alleged, and OSM provided Manor with the full 90 days allowable under 30 CFR 722.12(d) to abate this violation. It was, therefore, improper for the Administrative Law Judge to grant Manor temporary relief effectively extending the time for abatement beyond 90 days. Accordingly, we reverse the decision granting temporary relief from violation 1 of the CO.

The other element of the CO (violation 3) which is at issue is the allegation that Manor failed to seed and mulch its topsoil storage piles to abate the violation of 30 CFR 715.20 charged in the NOV. The Administrative Law Judge granted temporary relief from this element of the CO despite his conclusion "that the applicant is required to protect the topsoil and spoil piles to preserve the stockpiles and to prevent erosion" (Decision at 4). Without attempting to resolve this apparent inconsistency in the decision below we hold that temporary relief was improperly granted as to violation 3.

[4] Manor argues that it was continuing to add topsoil to existing stockpiles during the course of backfilling and grading operations and that, therefore, it "would have been futile to mulch the topsoil pile" (Manor's Brief at 9). This argument is not persuasive. Although the record is ambiguous concerning how many stockpiles existed when the CO was issued, it appears that Manor was adding topsoil to

only one stockpile.¹³ More importantly, had the company completed backfilling and grading operations as required by OSM it would have salvaged all remaining topsoil in time to seed and mulch the stockpiles in accordance with the terms of the NOV. We do not accept Manor's noncompliance with 30 CFR 715.14 as an excuse for its noncompliance with 30 CFR 715.20(d).

For the above-stated reasons the decision on appeal granting Manor temporary relief from violations 1 and 3 of Cessation Order No. 80-I-59-10 is reversed.¹⁴ No civil penalty shall be assessed for these alleged violations for the period beginning with the issuance of the CO and terminating with Manor's receipt of this decision.¹⁵

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

DELTA MINING CORP.

3 IBSMA 252

Decided August 13, 1981

Appeal by Delta Mining Corp., from an Apr. 17, 1981, decision by Administra-

¹³ OSM's evidence indicates that there was more than one topsoil stockpile on the permit area noted during the Aug. 18, 1980, inspection (Tr. 25-27; Exhs. S-5, S-9, S-10). Manor's evidence indicates that topsoil was added to only one stockpile during the abatement period (Tr. 104-07; Applicant's Exh. 1).

¹⁴ Manor's motion for the Board to vacate its order of June 30, 1981, is granted. The Board has not considered materials filed by OSM in response to that order in arriving at its decision in this case.

¹⁵ See 43 CFR 4.1116.

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tive Law Judge Frederick A. Miller in Docket Nos. IN 0-10-P and IN 0-17-P, denying its petition for an award of costs and expenses, including attorneys' fees, filed pursuant to 43 CFR 4.1290 through 4.1296.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Bad Faith/Harassment

The fact that a permittee prevailed before the Hearings Division does not establish that OSM's enforcement action was undertaken in bad faith and for the purpose of harassing or embarrassing the permittee.

APPEARANCES: David R. Joest, Esq., Bowers, Harrison & Kent, Evansville, Indiana, for Delta Mining Corporation; Myra Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Delta Mining Corp. (Delta) has sought review of an Apr. 17, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket Nos. IN 0-10-P and IN 0-17-P denying its petition for an award of costs and expenses, in-

cluding attorneys' fees. The award was sought under the provisions of the Surface Mining Control and Reclamation Act of 1977 (Act)¹ and its implementing regulations in 43 CFR 4.1290 through 4.1296. For the reasons set forth below, we affirm that decision.

Background

Delta filed its petition in order to recover costs associated with administrative review of Notice of Violation No. 79-III-6-40, issued by the Office of Surface Mining Reclamation and Enforcement (OSM) on July 25, 1979, and of Cessation Order No. 79-3-6-14, issued on Oct. 1, 1979, for failure to abate the violation listed in the notice. The notice alleged that Delta had violated 30 CFR 715.14 (h) (3) and (4) at its Sendelwick Pit in Dubois County, Indiana, by failing properly to transport, backfill, and grade the entire disturbed area. The notice had required Delta to return equipment to the site, on which mining had been completed, and to finish reclamation by Aug. 15, 1979.

Delta sought review of these enforcement actions and on Jan. 22, 1981, received a decision from the Hearings Division vacating the notice and order. The basis of that decision was that 30 CFR 715.13(a), which requires that "[a]ll disturbed areas shall be restored in a timely

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

manner" after mining is completed, did not, in the Administrative Law Judge's view, grant authority to OSM to establish schedules for the completion of reclamation. OSM did not appeal this decision.

On Mar. 5, 1981, Delta filed its petition for costs with the Administrative Law Judge. OSM filed a memorandum in opposition to the petition on Apr. 9, 1981. On Apr. 17, 1981, the Administrative Law Judge denied the petition. Delta appealed this decision to the Board on May 1, 1981, and both parties filed briefs.

Discussion and Conclusions

43 CFR 4.1294(c) provides that costs and expenses, including attorneys' fees, may be awarded "[t]o a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee." In *Dennis R. Patrick*, 1 IBSMA 248, 86 I.D. 450 (1979), we held that a petitioner must prove the elements listed in 43 CFR 4.1294(c) and that such proof must consist of more than assertions of personal belief.

Delta's only argument to show bad faith and harassment is that OSM has evidenced an "attitude of bureaucratic arrogance" in pursuing its case. This argument is based on the fact that the Jan. 22, 1981, decision for Delta was the second decision from the Hearings Divi-

sion vacating enforcement action taken by OSM on the ground that OSM could not impose schedules for the completion of reclamation after mining had been concluded.² See *Old Home Manor*, Docket No. CH I-55-R (Dec. 8, 1980).

In *Miami Springs Properties*, 2 IBSMA 399, 404, 87 I.D. 645, 647 (1980), the Board noted that a decision of the Hearings Division is the law of that case only and is not precedential authority for future cases. Although the Administrative Law Judge here characterized that statement as "an invitation * * * to be inconsistent in the application and interpretation of the terms of the Act and the regulations" (Jan. 22, 1981, Decision at 3),³ it is more appropriately considered an acknowledgement that the Secretary deserves the best effort of each Administrative Law Judge and Board member in attempting to implement the statutes entrusted to the Department. Those best efforts may at times lead to different approaches or results. Such diversity is a constructive way to help the Board and the Secretary to discover problem areas and to choose between alternative approaches to resolving those problems.

² But see *Cape Coal Corp.*, Docket No. NX 9-105-R (Mar. 12, 1981).

³ This and similar hyperbole in the decision may well have encouraged the filing of this petition.

Such statements can also have a chilling effect on the parties' development of their own theories of the case and of the law involved. The parties should be free to present any arguments not inappropriate to the issues in a case. The Department, the industry, and the public are all better served by such exposition.

Therefore, OSM is not required to change its policies on the basis of an adverse decision from the Hearings Division.⁴ Indeed, OSM had appealed *Old Home Manor, supra*. The Board today reversed the Hearings Division's decision in that case and held that OSM may establish schedules for reclamation after the completion of mining. *Old Home Manor*, 3 IBSMA 241, 88 I.D. 737 (1981).

[1] Delta's claim for costs and expenses, therefore, rests only on the ground that it prevailed in the original litigation. This is not sufficient to show bad faith by OSM or an intent to harass or embarrass Delta.

The Apr. 17, 1981, decision of the Hearings Division is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

REITZ COAL CO.

3 IBSMA 260

Decided August 20, 1981

Petition by Reitz Coal Co. for review of the Oct. 15, 1980, decision of Admin-

istrative Law Judge Sheldon L. Shepherd, Docket No. CH 9-35-P, upholding Notice of Violation No. 79-I-21-3, against petitioner's assertion that the coal preparation facility where the alleged violation occurred is not subject to the regulatory authority of the Office of Surface Mining Reclamation and Enforcement, and reducing the associated civil penalty assessment.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface Coal Mining Operations." Mere evidence that a coal processing facility receives some undisclosed percentage of the coal production of two mines operated in connection with the facility, and located distances of 8 and 11 miles from the facility, is not sufficient to establish that the facility is "at or near" either of the mines, within the meaning of the definition of "surface coal mining operations" at 30 CFR 700.5.

APPEARANCES: John J. Dirienzo, Jr., Esq., Fike, Cascio & Boose, P.C., Somerset, Pennsylvania, for Reitz Coal Co.; William F. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Marcus P. McGraw, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, and Glenda R. Hudson, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

⁴ Continued adverse decisions from different Administrative Law Judges may strongly suggest, however, that OSM should change its policy or appeal one or more of those decisions to the Board.

*OPINION BY THE INTERIOR
BOARD OF SURFACE
MINING AND
RECLAMATION APPEALS*

Reitz Coal Co., (Reitz) has petitioned the Board to review the Oct. 15, 1980, decision of the Hearings Division upholding Notice of Violation No. 79-I-21-3 and assessing a civil penalty against Reitz. The notice was issued to Reitz for its alleged discharges of surface runoff containing suspended solids in excess of those permitted under 30 CFR 717.17(a). Reitz has challenged this enforcement action, on the ground that the Office of Surface Mining Reclamation and Enforcement (OSM) lacks authority to regulate operations at the subject coal preparation and loading facility, as well as the civil penalty assessment.

*Factual and Procedural
Background*

Reitz operates a coal preparation facility in Central City, Pennsylvania, pursuant to a permit from the State Bureau of Water Quality Management. The facility occupies approximately 15 to 20 acres. Coal is received there from various mines in Somerset County. The coal is stockpiled, blended, and passed through a cleaning plant; transferred by conveyor belts to storage silos; and, ultimately, loaded into rail cars.

In February and March 1979, 33,857 tons of coal were delivered

to Reitz's preparation facility from mines 2 to 11 miles from it. Of this amount 16.6 percent came from two mines operated by Reitz and located 8 and 11 miles from the preparation facility.¹

On Mar. 5, 1979, OSM inspected Reitz's coal preparation facility and issued Notice of Violation No. 79-I-21-3, charging Reitz with discharging surface runoff containing suspended solids in excess of 70 mg/l, in violation of 30 CFR 717.17(a). To abate this alleged violation,

¹ Petitioner's Exhibit E discloses the identity of companies operating mines from which coal was supplied to Reitz's preparation facility in Feb. and Mar. 1979; the amount of coal delivered from each mine; the proportion of the total deliveries that each amount represents; and the distance between each mine and Reitz's facility. The exhibit is reproduced in essential part, below.

February, 1979

Mine	Tons delivered	Percent	Haulage
Potochar.....	151	1	8
Trent Coal Co.....	194	1	10
J & D Mining.....	10,208	76	2
Reitz #22.....	2,901	22	8
Subtotal.....	13,454		

March, 1979

J & D Mining.....	7,811	38	2
Cairnbrook Coal.....	3,496	17	5
J & P Mining.....	6,392	32	3
Reitz #24.....	427	2	11
Reitz #22.....	2,277	11	8
Subtotal.....	20,403		
Total.....	38,857		

The information contained in this exhibit was augmented by related testimony at the review hearing: Berwind Corp. owns Reitz Coal Co. and Wilmore Coal Co. (Tr. 118-19); Wilmore Coal Co. owns the coal indicated to have been supplied to Reitz's preparation facility by J & D Mining, Cairnbrook Coal Co. (Tr. 119), and the Reitz's Nos. 22 and 24 mines (Tr. 124); and Anthony T. Sossong is the president of both Reitz and Wilmore (Tr. 122).

Reitz was required to construct a sedimentation control structure for treatment of the surface runoff. The original abatement period set by OSM was 60 days. This was extended to 90 days after Reitz had substantially complied with OSM's remedial requirement. The notice of violation was terminated on May 21, 1979.

OSM first proposed a civil penalty of \$2,500. At the assessment conference conducted pursuant to 30 CFR 723.17, OSM reduced this amount to \$1,700.

A hearing on the notice and proposed assessment was held by the Hearings Division on June 6, 1980. The Administrative Law Judge upheld OSM's assertion of authority over Reitz's preparation facility and the violation of 30 CFR 717.17(a) charged by OSM, but reduced the civil penalty assessment from \$1,700 to \$1,000. Reitz's petition to the Board followed and was granted on Jan. 26, 1981.² Both parties filed briefs.

Discussion

The Administrative Law Judge held that Reitz is engaged in surface coal mining operations subject to OSM's regulatory authority. In support of its petition for review, Reitz contends that its coal processing facility is not located "at or near" a minesite and, thus, that the

facility is not embraced by the definition of "surface coal mining operations" set forth in 30 CFR 700.5.

The controlling definition is as follows:

Surface coal mining operations means—

(a) Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. *Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or reorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine-site.* [Italics added.] *Provided,* These activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16% per centum of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration subject to Section 512 of the Act; and *Provided further,* that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(b) Areas upon which the activities described in paragraph (a) above occur or where those activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments,

² On Nov. 26, 1980, the Board denied Reitz's petition on the basis of its apparent untimeliness. *Reitz Coal Co.*, 2 IBSMA 381 (1980). Upon Reitz's motion for reconsideration of this order, the Board granted the petition. Order of Jan. 26, 1981.

dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

The Board has previously determined that, during the initial regulatory program, the activities enumerated in the first part of this definition qualify as surface coal mining operations only if they are conducted "in connection with" and "at or near" a mine. *See, e.g., Falcon Coal Co., Inc.*, 2 IBSMA 406, 87 I.D. 669 (1980). Because Reitz has not questioned the determination that its coal processing facility is conducted "in connection with" a mine, the Board need only address whether the facility is located "at or near" a mine. I conclude that it is not so located.

This conclusion is based upon my view that the only mines that Reitz's processing facility may be said to be operated "in connection with" are the two mines, Reitz Nos. 22 and 24, which the company owns and operates.³ These are located 8 and 11 miles from the processing facility, respectively. Obviously the facility is not "at" either of these mines; therefore, the issue becomes whether it is "near" either mine.

³ The record discloses (n.1, *supra*) that the coal supplied by J & D Mining and Cairnbrook Coal Co. to Reitz's processing facility is owned, ultimately, by Berwind Corp., which owns Reitz Coal Co. This does not establish, however, that Reitz's processing facility is operated "in connection with" the mines producing that coal.

In the Board's previous decisions concerning coal processing facilities the term "near" has been characterized as a relative term, depending on the context of its use for its precise meaning. *See, e.g., Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980), *rev'd, Drummond Coal Co. v. Andrus*, CV 80-M-0829 (N.D. Ala. Apr. 20, 1981). The context provided by the definition of "surface coal mining operations," quoted *supra*, is that of a broad and comprehensive statement of the many activities and areas of land that Congress and the Department consider to be subject to OSM's regulatory authority.⁴ This statement convinces me that the significance of "near" is not meant to be formulated in terms of a precise, linear measurement applicable under all circumstances.⁵ Thus, I have previously joined the other members of the Board in considering the nature and extent of activities conducted at a particular coal processing facility, as well as the geographical relationship between the facility and the associated mine or mines, in determining whether the facility is located "near" the mine(s).

While I remain convinced that this circumstantial approach to

⁴ The definitions of "surface coal mining operations" in the Act and regulations are identical except for the additional proviso in the regulations that "excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles." Compare 30 CFR 700.5 with 30 U.S.C. § 1291(28) (Supp. II 1978).

⁵ Indeed, the lack of a prescribed distance or even a general definition of the term "near," in both the Act and regulations, further supports a functional consideration of the term.

identifying nearness is that indicated by the definition of surface coal mining operations and other interpretive aids, the decision of the district court in *Drummond Coal Co., supra*, has persuaded me that the Board must proceed cautiously in cases concerning OSM's regulatory authority over processing facilities, to avoid giving the impression that so long as there are ownership and functional connections between a processing facility and a mine the Board's determination that the facility is "at or near" the mine will follow automatically.⁶

[1] From the record in this case we know that the Reitz Nos. 22 and 24 mines supply some undetermined amount of their coal production to the Reitz processing facility. We know also that these mines are located 8 and 11 miles, respectively, from the facility. We do not know more precisely the geographical relationship between the mines and processing facility; nor do we know more about the functional relationship between them.⁷ Under these circumstances I am not prepared to hold that the facility is "near" the mines, for the functional and geographical relationships disclosed lack even the indicia of nearness which the Board found in the

Drummond processing facility/mine configuration.⁸

For the foregoing reasons I would reverse the decision below.

MELVIN J. MIRKIN

Administrative Judge.

ADMINISTRATIVE JUDGE FRISHBERG CONCURRING:

I agree with the conclusion of Administrative Judge Mirkin that Reitz's coal preparation facility is not located at or near a mine. The basis of my agreement, however, represents a more radical departure from the Board's prior decisions on this point than that suggested in his decision; therefore, I write separately.

⁸ The concurring and dissenting opinions deserve some comment. The concurrence says it is abandoning a functional definition in favor of a solely geographical one. It then defines a geographic relationship in terms of physical integration. How this simplifies or aids us in determining "near," geographically, evades me.

The dissent questions the advisability of our generating opinions on coal processing facilities that only "produce results but no consistent rationale" (Dissenting Opinion at 757). I voiced a similar sentiment in *Drummond Coal Co.*, 2 IBSMA at 103, 87 I.D. at 199. The dissent now suggests that we leave the matter to the Secretary to clarify by appropriate regulations. I do not disagree. My only amplification is that while we are awaiting such clarification we should resolve all doubts against, not in favor of, regulability. See *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979).

As for the dissent's consideration of the preamble materials, at 44 FR 14915 (Mar. 13, 1979), concerning the meaning of "at or near" as reflected in regulatory provisions of the permanent program, I note that we considered those materials in *Western Engineering, supra*, and did not then find it necessary to sound the dissent's alarm about their import in enforcement action taken during the initial program after their publication. Although we should remain open to argument in this regard, I cannot now agree with the speculation of the dissent regarding our future behavior.

⁶ Such an impression might readily follow from two of our decisions which antedated the district court's decision in *Drummond: Falcon Coal Co., Inc.*, 2 IBSMA 406, 87 I.D. 669 (1980); *Wolverine Coal Corp.*, 2 IBSMA 325, 87 I.D. 554 (1980).

⁷ For example, we do not know whether all coal from these mines is processed at Reitz's facility or whether some is processed at a competing, possibly closer, facility.

In *Drummond Coal Co. v. Andrus* the Chief Judge for the Northern District of Alabama opined that this Board's decision in that case rendered the term "near" a redundant element of the definition of "surface coal mining operations." CV 80-M-0829 at 5-6. I am inclined to agree. See *Drummond Coal Co.*, 2 IBSMA at 105-07, 87 I.D. at 200-01 (dissenting opinion). In *Drummond* and subsequent cases the Board's opinions have placed almost exclusive emphasis on the elements of functional and economic integration between a coal processing facility and mine, to the exclusion of the geographic relationship. See, e.g., *Falcon Coal Co., Inc.*, *supra* n.6; *Wolverine Coal Corp.*, *supra* n.6. In view of the district court's *Drummond* decision and the increasing sense of arbitrariness conveyed in the Board's pronouncements about the meaning of "at or near," I believe the Board should retreat to an interpretation that better informs those conducting processing activities of their exposure to OSM's regulatory authority.¹

The starting point for the approach we should adopt is an unequivocal acknowledgement that the phrase "at or near" connotes a geographical, not functional relationship.² Further, our inquiry into

whether the requisite geographical relationship between a processing facility and mine exists should be the primary element of our determination whether the processing activities are conducted "in connection with" a coal mine.³ Only if there is a sufficient geographical relationship should we examine other indicia of a connection, such as functional and economic ties.

As for the question of what constitutes the requisite geographical relationship, I answer that only when a processing or similar facility is so physically integrated with the situs of coal extraction activi-

than its functional relationship to a mine." *Drummond Coal Co. v. Andrus*, CV 80-M-0829 at 6 (emphasis in original)

¹ I place primary emphasis on the geographical relationship because the qualifying phrase "at or near" appears in the definition of surface coal mining operations" as part of an enumeration of "[a]ctivities conducted * * * in connection with a surface coal mine." 30 CFR 700.5. The geographical relationship may ultimately be a product of functional considerations, but it is a processing facility's physical proximity to a mine, not the considerations giving rise to that proximity, that should be the focus of our attention. This represents a departure from preceding Board decisions, for under my formulation the consideration of nearness is not a test separate from that of connection; rather, it is the primary element of connection.

In this regard I do not accept the dissent's reading of subsec. (b) of the definition of surface coal mining operations at 30 CFR 700.5. This subsection includes within the meaning of surface coal mining operations the "[a]reas upon which the activities described in paragraph (a) * * * occur or where those activities disturb the natural land surface." The dissent suggests that this provision somehow has significance independent of the provisions of subsec. (a). Clearly to the contrary, however, the areas of land referenced in subsec. (b) are only those affected by the activities described in subsec. (a). Thus, the restriction imposed by the term "at or near" in subsec. (a) is not erased by the language of subsec. (b).

¹ My previous acquiescence in the Board's approach to this issue was based on the plurality decision in *Drummond*. The district court's reversal of that decision has obviated any necessity for my further acquiescence.

² As the district court observed in *Drummond*, "it is plain that the Act and regulations intended 'near' to describe the location of a processor with respect to a mine rather

ties that regulation by OSM of the latter cannot occur effectively without regard to the former is the facility "at or near" the mine.⁴ Under this formulation, of course, processing and similar activities conducted pursuant to the same permit as coal extraction activities, and thus part of the same permit area, are "at or near" the mine.

Reitz's processing facility has not been shown to be either within the permit area of any of the mines which supply coal to it or so physically integrated with any of these mines as to require its regulation by OSM in order to render effective OSM's regulation of the mines. Accordingly, I do not consider the facility to be "at or near" any of the mines.

⁴ A consequence of this view is that the regulation of the environmental or health and safety effects of many coal preparation or processing activities may be left to authorities other than OSM. I do not believe, however, that we should risk denial of due process to various elements of the coal industry to avoid this consequence. See *Western Engineering, Inc.*, 2 IBSMA at 213-14 n.12, 86 I.D. at 341-42 n.12 (1979).

That the location of coal processing plants and their support facilities is not a determinant of OSM's regulatory authority over them under the permanent program regulations does not alter my view of OSM's authority under the initial program. In the permanent program regulations the Department has clearly specified performance standards applicable to "coal processing plants and their support facilities not located within the permit area for a mine." 30 CFR Part 827. There is no such provision in the initial program regulations. See generally *Western Engineering, Inc.*, 2 IBSMA at 211-12 n.9, 86 I.D. at 340-41 n.9. Thus, I share Administrative Judge Mirkin's reservation about the potential relevance of the permanent program interpretation of the definition of "surface coal mining operations" (*supra* n.8) to enforcement action under the initial program.

For the foregoing reasons I agree that the decision of the Hearings Division should be reversed.

NEWTON FRISHBERG
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN DISSENTING:

Since my colleagues give the recent decision of the U.S. District Court for the Northern District of Alabama in the *Drummond Coal Co.* case¹ as the reason they wish respectively to "proceed cautiously" and "retreat" in interpreting the application of the definition of "surface coal mining operations" to coal processing facilities, perhaps it would be helpful to set forth the relevant portions of that decision.

In his memorandum opinion Chief Judge McFadden first addressed the question whether Drummond's coal processing activities were conducted in connection with a surface coal mine:

The first question is whether plaintiff's cleaning or processing of coal occurs "in connection with" the mining conducted at its seven mines. Plaintiff owns both the mines and the processing plant. The two make up an integrated mining and processing operation in which plaintiff first extracts the coal from the mine and then prepares it at the plant for shipment to consumers. There is an economic integration between the mines and the plant and the court is of the opinion that the plant is operated in connection with the surface mines.^[2]

¹ *Drummond Coal Co. v. Andrus*, CV 80-M-0829 (N.D. Ala. Apr. 20, 1981).

² *Id.* at 5.

Next, Judge McFadden dealt with the question whether the processing activity occurred "at or near" a minesite:

The second issue is whether the processing occurs "at or near" the mine site. The nearest supply mine is nine miles away, and some of the mines are as distant as 30 miles. The seven mines are spread through three counties. Despite these facts, the Secretary held that the plant was "near" all the mines by construing "near" a mine to mean essentially the same as "in connection with" a mine. Speaking through the Board, he said:

"In this case, Drummond's coal processing activities are *functionally and economically integrated* with the operation of several neighboring mines. It is true that *distances of 9-30 miles separate the coal processing facility from these mines, but that circumstance alone should not be decisive in light of the context in which the activities at the facility are conducted.* The fact of the facility's location in relation to Drummond's mines and the fact that these mines all use that facility outweigh the almost coincidental fact that the closest mine is nine miles away. Under these circumstances Drummond's coal processing activities are conducted 'near' its mines."

2 IB SMA at 102 (italics supplied).

The Secretary, thus, made "near" a term connoting functional and economic integration rather than geographical proximity. In context, however, it is plain that the Act and regulations intended "near" to describe the *location* of a processor with respect to a mine rather than its functional relationship to a mine. If "near" means "in connection with," as the Secretary suggests, then its inclusion in the Act and regulations would be unnecessary and redundant, for the phrase "in connection with" is already a part of the Act and regulations.

The court is of the opinion, therefore, that the Secretary erred in holding the term "near" to denote something other than geographical proximity. The court

further concludes that under the most generous and deferential reading of the regulation, a processor nine to thirty miles from the mines is not "near" them. While the court would not go so far as to hold that "at or near" means "adjacent to," the court holds on the facts of this case that the Secretary was unreasonable to exert jurisdiction over the Sayre Processing plant.³ [Italics in original.]

On this second issue Judge McFadden mischaracterized the Board's decision in *Drummond*, when he stated that it "made 'near' a term connoting functional and economic integration rather than geographical proximity." This misunderstanding can be made clear by a more focused emphasis on the Board language he quoted: "It is true that *distances of 9-30 miles separate the coal processing facility from these mines, but that circumstance alone should not be decisive in light of the context in which the activities at the facility are conducted.*" (Italics supplied.)

That is, "geographical proximity," although of course important, is not the only factor that determines whether a facility is "near" a mine or group of mines. Expressed otherwise, a distance that is not "near" in one context may be "near" under other factual circumstances. "Near" is a word without abstract or absolute meaning; rather, it derives its meaning from the subject matter involved and the relationship of the particular objects.⁴ For

³ *Id.* at 5-6.

⁴ Judge McFadden did not consider this approach or any of the several cases offered him in support of it. See, e.g., *Kirkbride v. Lafayette County*, 108 U.S. 208, 211 (1883); *City of Nashville v. Vaughan*, 159 Tenn. 498, —Continued

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example, in our solar system, our moon is near Earth; in an atom an electron is not near a neutron.

In *Drummond*, the facility was located among seven mines also owned by Drummond. Administrative Judge Mirkin's opinion in this case emphasizes the absence of this "configuration" and the absence of knowledge about how much of the coal from Reitz mines Nos. 22 and 24 goes to the facility in question as reasons for finding the distances of 8 and 11 miles not close enough to be "near." Since *Drummond*, however, we have frequently held a facility that was not surrounded by a constellation of mines subject to OSM authority.⁵ It does not well serve the Board's efforts to develop a consistent rationale, predictable both for the industry and the regulatory authority, to abandon those holdings at this stage. As for the information Administrative Judge Mirkin believes fatally lacking, in my view it is virtually inconsequential for two reasons. First, the functional inquiry concerning the

relationship between a processing facility and a mine or mines asks not only how much a mine depends on a facility but also how much a facility's activities depend on the mine(s).⁶ Focusing on the percentage of the mine's production that goes to the facility views the matter from only one end.

But second, and more importantly, given all other facts known about the functional and economic relationships in this case, how much of the production of the Reitz Nos. 22 and 24 mines is sent to the facility is, of itself, relatively unimportant.

I appreciate that Administrative Judge Mirkin believes that it is only the relationships between the processing facility and the Reitz Nos. 22 and 24 mines that are relevant in this case. I believe this is too narrow a perspective to take. Our cases on this subject subsequent to the *Drummond* decision have shown that there are a myriad of legal arrangements, in addition to common ownership, in which these relationships are manifested. If one looks only at the information concerning the Reitz processing facility and the mines named Reitz Nos. 22 and 24, it shows that in February and March 1979 these mines, respectively, supplied 22 percent and 13 percent of the coal processed by the facility.

14 S.W. 2d 716, 717 (1929); *Fall River Iron Works v. Old Colony and Fall River R.R. Co.*, 87 Mass. 221, 227 (1862). See generally 65 C.J.S. *Navigable Waters* at 378-380 (1966) (definition of "near").

Nor did Judge McFadden offer any suggestions, beyond saying it did not have to be "adjacent," for determining how geographically close a facility should be to be considered "near" a mine.

⁵ *Falcon Coal Co., Inc.*, *supra* n.6 (two mines, 11 and 13 miles distant); *Wolverine Coal Corp.*, *supra* n.6 (two mines, 7 and 13 miles distant); *Bethlehem Mines Corp.*, 2 IBSMA 215, 87 I.D. 380 (1980) (one mine, 2 miles distant); *Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980) (three pits, perhaps all part of one mine, 8, 10, and 15 miles distant).

⁶ See *Wolverine Coal Corp.*, *supra* n.6, at 328 (69 percent of the facility's processed coal came from the two Wolverine mines); *Bethlehem Mines Corp.*, *supra* at 218 (95 percent of the facility's processed coal came from the Bethlehem mine and the tippie closed when the mine was closed).

But if one views the context as a whole, the facility's role becomes much more central. At the top of the legal structure is the Berwind Corporation; its president is Andrew T. Sossong. Berwind has two wholly owned subsidiary corporations, Reitz Coal Co. and Wilmore Coal Co.; Sossong is president of both. Wilmore owns coal mined by J & D Mining. J & D Mining delivered 76 percent of the coal processed by the Reitz facility for February 1979 and 38 percent for March 1979 under a contract with Reitz that gives Reitz right of first refusal on coal J & D Mining mines (Tr. 117). Wilmore also owns the coal mined by Cairnbrook Coal Co.; in March 1979 Cairnbrook delivered 17 percent of the coal processed by the Reitz facility. Wilmore also owns the coal mined in the Reitz Nos. 22 and 24 mines (Tr. 124). Reitz has direct control over Wilmore (Tr. 122). The J & D Mining deep mine is located 2 miles from the facility; the Cairnbrook deep mine is located 5 miles away.

I analyze whether a facility is "near" one or more of these mines (and it need only be one) by weighing physical (or geographical) proximity and legal, economic, and functional integration. It is not simply a matter of saying the more integration there is the less physical proximity is necessary between a facility and a mine. The nature of the legal arrangements is a factor; the degree of functional dependence and the strength of the economic ties are factors, as well. Where, af-

ter considering these factors independently and together, a facility seems, on balance, essential to a neighboring mine or mines, then it seems to me reasonable to regard it as "near" even though several miles separate it geographically. Where the relationships are more tenuous the distances must be shorter. I am aware this is not an easy formula; in my view the interdependencies involved in this definition do not lend themselves to ready formulation—or resolution.

In this case, although the mines that supply coal to the facility are not all owned by the company that owns the facility, that company controls where their production goes either by corporate direction or contract. How much of their production is directed to the facility depends on what the market is for certain qualities and quantities of coal (Tr. 123, 125). Thus, the facility is both legally related to and economically and functionally integrated with these mines. It is 2, 5, 8, and 11 miles distant from them. In this context I believe it is "near" the mines. It is also operated "in connection with" them.

Administrative Judge Frishberg's opinion is not merely inconsistent with previous Board decisions; it is based on a distorted reading of the definition of "surface coal mining operations." As I understand it, his position is that one asks first "Is an activity conducted at or near a mine?" and then, if the answer is "yes," asks "Is it also conducted in connection with a mine?"

If the second answer is also "yes," the activity is a surface coal mining operation. He takes this position "because the qualifying phrase 'at or near' appears in the definition of 'surface coal mining operations' as part of an enumeration of '[a]ctivities conducted * * * in connection with a surface coal mine.'" But this confuses example with principle. "At or near" modifies only a few of several examples of the kinds of activities included (*not* enumerated) among those conducted in connection with a surface coal mine that are to be regarded as surface coal mining operations. Activities conducted in connection with a surface coal mine are only one part (subsec. (a)) of what "surface coal mining operations" are defined to mean. Areas where these activities occur or disturb the natural land surface are also "surface coal mining operations" in accordance with subsec. (b) of the definition. This subsection alone would be adequate to cover Reitz's coal processing plant, at least under my interpretation of subsec. (a), but, even without resorting to it for that purpose, the subsection demonstrates that determining whether an activity is a surface coal mining operation does not begin with answering the question "Is it near a surface coal mine?" The definition is a general, two-part statement of activities and areas that constitute surface mining, with illustrations of both activities and areas included within its scope. The question to begin with under subsec. (a) is "Is this activity

conducted on the surface of lands in connection with a surface coal mine?"⁷

Administrative Judge Frishberg acknowledges that a consequence of his approach is "that the regulation of the environmental or health and safety effects of many coal preparation or processing activities may be left to authorities other than OSM." This directly contravenes Congressional intent to implement a national system of coal mining regulation by covering all coal surface mining and the surface impacts of underground mines *and* coal processing.⁸ Coal processing was specifically covered because Congress intended the Act to prevent, among other environmental or health and safety effects of coal preparation activities, future events such as occurred when a dam retaining coal processing wastes failed at Buffalo Creek in West Virginia.⁹

The Congress specifically addressed the relationship between the Department under the Act and other agencies under other environmental laws. In order to avoid inconsistent standard-setting activities, the Secretary is required to obtain the concurrence of the Environmental Protection Agency (EPA) before promulgating performance standards concerning air and water pollu-

⁷ This assumes, of course, that what is involved is not a surface operation or impact incident to an underground coal mine that affects interstate commerce—the other category included in subsec. (a).

⁸ H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 57 (1977).

⁹ *Id.* at 125; H.R. Rep. 94-1445, 94th Cong., 2d Sess. 19 (1976).

tion, for example.¹⁰ So far as other regulatory activities are concerned, the Congress directed that "maximum coordination [is] required and that any risk of duplication or conflict be minimized."¹¹ Although EPA has general pollution control responsibilities under the Clean Water Act, the Resource Conservation and Recovery Act, and the Clean Air Act, OSM has more experience regulating the special water, waste and air pollution problems occasioned by surface coal mining. It seems to me there is a far better chance for achieving "maximum coordination" and minimizing the "risk of duplication or conflict" if OSM is responsible for regulating coal processing facilities as well as surface coal mines, rather than leaving the former to EPA and the latter to OSM.

Administrative Judge Frishberg also remarks: "That the location of coal processing plants and their support facilities is not a determinant of OSM's regulatory authority over them under the permanent program regulations does not alter my view of OSM's authority under the initial program." At best I find this a misleading statement. The definition of "surface coal mining operations," as revised and interpreted on Mar. 13, 1979, became applicable to both the initial and the permanent regulatory programs on

Apr. 12, 1979.¹² Under this interpretation the phrase "at or near the minesite" applies only to facilities that are engaged in the loading of coal. Cleaning, concentrating, or other processing or preparation of coal are subject to OSM regulation if they are operated "in connection with" a surface coal mine.¹³ This interpretation has not been applied by the Board in previous cases—or in this case—because the enforcement actions involved took place before its effective date. Presumably this interpretation will govern in future cases that might arise from enforcement actions taken subsequent to its promulgation. The absence of performance standards specifically applicable under the initial regulatory program to coal processing facilities separated from the mine permit areas does not undermine the expressed intention that this interpretation apply during the initial program.

Whatever else might be said about the opinions of my colleagues in this case, they indicate that the efforts of the Board to maintain a consensus on behalf of the Secretary concerning OSM's authority to regulate coal processing facilities

¹² 44 FR 14902 (Mar. 13, 1979); 44 FR 15485 (Mar. 14, 1979). See *Farmington Coal Corp.*, 3 IBSMA 182, 88 I.D. 616 (1981).

¹³ "Changes have been made in the permit and performance standard provisions of the rules to reflect the Office's interpretation that the phrase 'at or near the minesite,' used in the statutory definition of 'surface coal mining operations,' modifies only 'loading of coal.' The Office interprets the Act as setting no territorial limitation on its jurisdiction over other facilities identified in the statutory definition preceding 'loading of coal.'" 44 FR 14915 (Mar. 13, 1979).

¹⁰ Sec. 501(a)(B), 30 U.S.C. § 1251(a)(B) (Supp. II 1978).

¹¹ H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 142 (1977).

under the initial program have reached at least a temporary impasse. Further Board decisions on this question apparently will produce results but no consistent rationale. Under these circumstances it seems appropriate that the Secretary himself clarify the intended coverage of the definition of surface coal mining operations during the initial regulatory program, either by amending the language of the regulation or by revising the comments that accompany it, if he deems it worth the time and effort to do so given the relatively short life expectancy of this program.

WILL A. IRWIN,
Chief Administrative Judge

**U.S. FISH AND WILDLIFE
SERVICE**

6 ANCAB 37

Decided August 21, 1981

**Appeal from the Decision of the
Alaska State Office, Bureau of Land
Management AA-6697-A through
AA-6697-E.**

Dismissed.

**1. Alaska Native Claims Settlement
Act: Alaska Native Claims Appeal
Board: Appeals: Dismissal**

An appeal to the Secretary of the Interior will be dismissed when enactment of legislation renders moot the questions raised on appeal.

APPEARANCES: David Fisher, Esq.,
for U.S. Fish and Wildlife Service;
Robert Spitzfaden, Esq. and John A.

Smith, Esq., Smith & Gruening, Inc.,
for Tanadgusix Corp.; Russell L. Win-
ner, Esq., Office of the Regional So-
licitor, for the Bureau of Land Man-
agement.

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD**

Summary of Appeal

The sole issue raised by Appellant U.S. Fish and Wildlife Service in this appeal is whether the Bureau of Land Management erred in failing to determine in the issued Decision to Issue Conveyance that Walrus Island and Otter Island are part of the National Wildlife Refuge System and therefore subject to the provisions of §§ 22(e) and (g) of ANCSA. The Bureau of Land Management denied that either of these two islands were part of the National Wildlife Refuge System and subject to the referenced provisions of ANCSA.

The Secretary of the Interior was authorized and directed to acquire lands including Walrus and Otter Islands for inclusion in the Alaska Maritime National Wildlife Refuge, pursuant to provisions of Title XIV, § 1417 of the Alaska National Interest Lands Conservation Act.

Based upon this Congressional act directing acquisition by the Federal Government of the lands involved in the sole appealed issue, the appeal itself is mooted and will be dismissed.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

The Bureau of Land Management (BLM) published in 43 FR 35116 (1978), its Decision to Issue Conveyance (DIC) of land to Tanadgusix Corp. (Tanadgusix) in response to village selection applications AA-6697-A through AA-6697-E, *as amended*. The DIC was issued pursuant to § 12 of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611 (Supp. V 1975)), for the surface estate of certain lands in the Pribilof-Aleutian Island area, including Walrus and Otter Islands.

On Sept. 8, 1978, the U.S. Fish and Wildlife Service (FWS), Department of the Interior, filed its Notice of Appeal from the above-referenced DIC. The FWS, in Statement of Facts and Reasons, contends that Walrus and Otter Islands comprise a unit of the National Wildlife Refuge System and, therefore, any conveyance of these islands must be subject to §§ 22(e)

and (g) of ANCSA. Tanadgusix and BLM assert in their respective Answers that Walrus and Otter Islands were probably never a part of the refuge system and therefore the restrictive language of § 22 has no bearing on the conveyance.

The FWS, on Feb. 14, 1979, filed an additional statement of facts and reasons. Subsequently, the Board ordered the parties to submit information on specific questions raised by the Board and listed in its Order Requesting Further Information, dated June 6, 1979. The FWS filed its response on July 16, 1979.

Thereafter, the parties were granted numerous extensions of time in which to file responses. Proceedings were then suspended at the request of the parties, pending settlement negotiations and passage of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371 (1980) (ANILCA), which contained amendments to ANCSA.

On Nov. 25, 1980, Tanadgusix reported that (1) the D-2 Bill (Alaska National Interest Lands Conservation Act) had passed Congress; (2) once the Bill was enacted into law, the parties would file a motion for dismissal to ANCAB; and (3) the Bill completely settled the dispute between the parties. Tanadgusix expressed its understanding that FWS concurs with this report.

ANILCA, in § 1417, authorizes and directs the Secretary of the Interior to acquire certain lands in-

August 21, 1981

cluding Walrus and Otter Islands.

Tanadgusix, on June 3, 1981, moved for dismissal of this appeal, without prejudice. In the Affidavit of Counsel, Tanadgusix informs the Board, *inter alia*, that counsel for FWS concurs.

Decision

Title XIV of ANILCA amends the Alaska Native Claims Settlement Act. Sec. 1417, authorizes and directs the Secretary of the Interior to acquire certain lands on the Pribilof Islands, as follows:

(a) Congress finds and declares that—

(1) certain cliff areas on Saint Paul Island and Saint George Island of the Pribilof Islands group in the Bering Sea and the entirety of Otter Island, and Walrus Island, are used by numerous species of migratory birds, several of them unique, as rookeries;

(2) these areas are of singular high values for such birds;

(3) these cliff areas, from the line of mean high tide to and including the bluff and areas inland from them, and the entirety of Otter Island, and Walrus Island, aggregating approximately eight thousand acres, properly ought to be made and be managed as a part or parts of the Alaska Maritime National Wildlife Refuge free of any claims of Native Corporation ownership; and

(4) this can best be accomplished through purchase by the United States

(b) The Secretary is authorized and directed to acquire the lands described in subsection (a)(3) of this section on the terms of and conditions set forth in the Agreement known as the "Pribilof Terms and Conditions", between Tanadgusix, Incorporated, Tanaq, Incorporated, the Aleut Corporation, and the Department of the Interior, incorporated as an Attachment of the letter of the Direc-

tor, Fish and Wildlife Service, Department of the Interior, dated August 4, 1980, file reference FWS 1366, addressed to the Aleut, Tanadgusix, and Tanaq Corporations. The "Pribilof Terms and Conditions," as referenced in this subsection, are hereby ratified as to the duties and obligations of the United States and its agencies, Tanadgusix, Incorporated, Tanaq, Incorporated, and the Aleut Corporation: *Provided*, That the "Pribilof Terms and Conditions" may be modified or amended, upon the written agreement of all parties thereto and appropriate notification in writing to the appropriate committees of the Congress, without further action by the Congress. Upon acquisition by the United States, the lands described in such subsection (a)(3) shall be incorporated within, and made a subunit of, the Alaska Maritime National Wildlife Refuge and administered accordingly.

(c) There are hereby authorized to be appropriated for the purposes of this section, out of any money in the Treasury not otherwise appropriated, for the acquisition of such lands, not to exceed \$7,500,000, to remain available until expended, and without regard to fiscal year limitation.

(d) The land or money exchanged under this section shall be deemed to be property exchanged within the meaning of section 21(c) of the Alaska Native Claims Settlement Act.

The lands in dispute in this appeal are included in lands to be acquired by the Secretary of the Interior for the United States to be incorporated as a subunit of the Alaska Maritime National Wildlife Refuge. ANILCA moots the issues on appeal before ANCAB.

[1] An appeal to the Secretary of the Interior will be dismissed where enactment of legislation renders moot the questions raised on

appeal. *See Gibbonsville Townsite*, 30 IBLA 74 (1977). Accordingly, the appeal of FWS must be dismissed. Counsel for Tanadgusix, in affidavit filed with motion for dismissal, states that "[w]hile Mr. Fisher [counsel for FWS] and I do not foresee any problems in obtaining the appropriation and effectuating the exchange, the remote possibility of a problem dictates that the appeal be dismissed without prejudice."

The *Appeal of U.S. Fish and Wildlife Service*, ANCAB VLS 78-61, is hereby dismissed.

The dismissal of this appeal has no effect on any right of appeal which may accrue under terms of the above-referenced legislation.

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

OREGON PORTLAND CEMENT CO.

6 ANCAB 65

Decided August 25, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-14015.

Decision affirmed.

1. Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Allocations—Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: Generally

Sec. 14(h)(8)(B) of ANCSA, which governs withdrawal and allocation of lands for selection by the Native regional corporation for southeastern Alaska, constitutes an exception to the requirement that lands withdrawn and allocated by the Secretary under § 14(h)(8) must be from unreserved and unappropriated lands outside areas withdrawn by §§ 11 and 16.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Regulations: Generally

The Board is bound by duly-promulgated Departmental regulations as well as by Departmental policy expressed in Secretarial Orders published in the *Federal Register* or set forth in the Departmental Manual.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Mining Claims: Determination of Validity

Pursuant to the Departmental Manual 601 DM 2, requirements in Secretary's Order No. 3029, as to adjudication of Federally-created interests, do not apply to unpatented mining claims and the Bureau of Land Management is not required to adjudicate mining claims before conveyance. Pursuant to ANCSA and Secretary's Order No. 3029, *as amended*, lands selected by a Native corporation must be conveyed by the Bureau of Land Management notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws.

4. Alaska Native Claims Settlement Act: Conveyances: Generally

When lands have been selected by a Native corporation and approved by the

Bureau of Land Management for conveyance under ANCSA, such lands may be excluded from conveyance only pursuant to provisions of ANCSA or implementing regulations which constitute an exception to the requirements of Secretary's Order No. 3029, *as amended*.

5. Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

Regulations in 43 CFR 2651.4(e) cannot be applied to permit a selecting Native corporation to exclude lands within unpatented mining claims after the selection period has terminated.

6. Alaska Native Claims Settlement Act: Conveyances: Generally

Exclusion of the disputed mining claims from conveyance, pending their adjudication, is not permitted under any provision of ANCSA or implementing regulations.

7. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Mining Claims: Possessory Right

When an unpatented mining claim is situated within lands selected and approved for conveyance under ANCSA, the possessory interest of the mining claimant is protected under provisions of § 22(c) and 43 CFR 2650.3-2 as a valid existing right notwithstanding that the Bureau of Land Management has not adjudicated such unpatented mining claim prior to conveyance.

APPEARANCES: Frank E. Nash, Esq., Miller, Anderson, Nash, Yerke & Wiener, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Richmond F. Allan, Esq. and Dan A. Hensley, Esq., Duncan,

Weinberg & Miller, P.C., for Sealaska Corp.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

The appellant challenges conveyance to a southeastern Alaskan Native regional corporation under § 14(h)(8)(B) of ANCSA, of lands on which appellant has unpatented mining claims. Issues decided include whether the appropriate effect of the mining claims prevented withdrawal of the land for selection under § 14(h)(8)(B), on the grounds that such withdrawals were required to be from unre-served and unappropriated lands; whether the Bureau of Land Management is required to adjudicate the validity of mining claims before conveyance under ANCSA of the land upon which they are located; whether, if adjudication is not a prerequisite to conveyance, such lands may be excluded from conveyance, without prejudice to the grantee Native corporation's selection rights, until adjudication is completed; and whether unpatented mining claims are protected as valid existing rights under ANCSA.

The Board finds that withdrawals under § 14(h)(8)(B) of ANCSA are not required to be from unappropriated lands; that the Bureau of Land Management is not required to adjudicate unpatented mining claims as a prerequisite to

conveyance under ANCSA of land on which they are located; that lands on which unpatented mining claims are located may not be excluded from conveyance in the manner advocated by parties to this appeal; and that possessory interests created by unpatented mining claims are protected pursuant to § 22(c) of ANCSA.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

Sealaska Corp. (Sealaska), on Dec. 12, 1974, filed selection application AA-14015, *as amended*, under the provisions of § 14(h)(8) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 705; 43 U.S.C. §§ 1601, 1613(h)(8) (1976)), for surface and subsurface estate of certain lands withdrawn pursuant to § 16(a) (43 CFR 1615(a)) for Native villages in southeast Alaska.

On May 3, 1979, the Bureau of Land Management (BLM) published in 44 FR 25940, a Decision to Issue Conveyance (DIC) to Sealaska pursuant to § 14(h)(8) of

ANCSA including certain lands in question located in T. 78 S., R. 82 E., Copper River meridian.

On May 23, 1979, the Appellant, Oregon Portland Cement Co. (OPC), filed its notice of appeal and statement of reasons asserting that BLM erred by failing to exclude from the DIC lands which had been appropriated in 1965 by the location of 40 limestone placer mining claims. The appellant asserts that lands appropriated under the mining laws are not available under § 14(h)(8) of ANCSA, and further that § 14(g) of the Act protects the inchoate right of a mineral locator as a valid existing right.

Sealaska responded on June 20, 1979, that no appropriation of disputed lands can be claimed until the validity of the unpatented mining claims has been adjudicated. Sealaska states that: (1) selection under § 14(h)(8) is not subject to land availability pursuant to § 14(h)(8)(B), but is made from public lands pursuant to § 16(a) and § 3(e) of ANCSA; (2) the validity of appellant's mining claims, and their resulting status as valid existing rights, can only be determined by adjudication under the mining laws; (3) Secretary's Order No. 3029, 43 FR 55287 (1978) (S.O. 3029) does not apply to mining claims; (4) § 22(c) of ANCSA requires conveyance of lands to Native corporations subject to mining claims; and (5) BLM is required to determine validity of mining claims and jurisdiction over segregated lands should be remanded.

BLM asserts that the primary issue is whether § 14(h), requiring selections to be from "unreserved and unappropriated" lands, applies to Sealaska's selection under § 14(h)(8)(B). BLM contends that selection under subsection (B) is an exception to § 14(h).

Further briefing filed by parties reflects consideration of the Secretary of the Interior's Order of Nov. 20, 1979, amending S.O. 3029, and also findings of the U.S. District Court in *Alaska Miners v. Andrus*, A-76-263 (D. Alaska), Memorandum and Order dated Oct. 19, 1979.

BLM contends that if § 14(h)(8)(B) is an exception to the criteria for determining land availability in § 14(h), then the decision in *Alaska Miners, supra*, is applicable. The Secretary's amendment of S.O. 3029 in Departmental Manual Release No. 2246 (601 DM 2), does not require BLM to adjudicate the validity of OPC mining claims before conveyance to Sealaska. BLM also states that conveyance may be made in absence of application made pursuant to 43 CFR 2650.3-2(b).

After giving consideration to the Secretary's amendment of S.O. 3029 and of decision in *Alaska Miners, supra*, Sealaska has proposed termination of this appeal. While continuing to assert BLM's obligation to determine the validity of appellant's mining claims, Sealaska concedes that such a determination is not a dispositive issue in this appeal.

Sealaska proposes that the Board remand to BLM with directions to: (1) define lands in dispute with more specificity; and (2) exclude the land area of the disputed mining claims from the DIC while leaving the same land, alternatively, subject to Sealaska's selection and available for later conveyance to Sealaska, or available for later patent to the appellant under the mining laws, upon final adjudication.

On Jan. 15, 1980, BLM agreed to this proposal except that further definition of lands in dispute was not possible due to insufficient data. BLM suggests vacation of presently segregated lands from the DIC by order of the Board; Sealaska agrees. It is asserted that the proposed alternatives would enable Sealaska to:

1. relinquish selection of disputed lands;
2. contest the validity of the mining claims;
3. request conveyance of lands subject to unpatented mining claims while allowing appellant to:
 - a. pursue mining claims to patent;
 - b. continue possession of claims; or
 - c. give up the mining claims.

OPC has moved to exclude the land subject to this appeal and terminate the appeal without prejudice to any party.

Sealaska cites 43 CFR 2650.0-8 as Secretarial authority to waive agency regulations. Sealaska submits that 43 CFR 2651.4(e) poses no ban to the disposition of this appeal in the manner sought by all of the parties and the Board ought

now proceed to effect such disposition.

Initial briefs of all parties in this appeal identified lands in dispute as within the withdrawal area of Klukwan Native village. This was in error and the parties now agree that all lands in dispute are located within the withdrawal area of Hydaburg Native village which is listed in § 16(a) of ANCSA. The Board accepts that all disputed lands in this appeal are withdrawn in the vicinity of Hydaburg Native village pursuant to § 16(a).

Decision

The first issue raised by OPC is that BLM erred in failing to exclude their mining claims from lands approved for conveyance in the DIC, because § 14(h) of ANCSA limits selections to "unreserved and unappropriated public lands," withdrawn for this purpose; since the unpatented mining claims constituted an appropriation of land affected, they are not available under ANCSA for selection by Sealaska.

In application AA-14015 Sealaska selected entirely from lands withdrawn by the Secretary for selection under provision of § 14(h)(8) of ANCSA. Withdrawals under terms of § 14(h) are required to be from "unreserved and unappropriated public lands" located outside areas withdrawn by §§ 11 and 16 of ANCSA. This scheme was unworkable in southeastern Alaska and corrective measures were attempted by amendment to

ANCSA, as explained in the legislative history and purpose of P.L. 94-204, 1976, U.S. Code Cong. & Adm. News, p. 2396:

The Native region created by the Settlement Act for southeastern Alaska was precluded, generally, by the Congress from sharing in the land benefits of the Act. This area encompasses the Tlingit-Haida Indians. Prior to enactment of the Settlement Act, this tribe recovered an award of several million dollars against the United States for extinguishment of their aboriginal land claims in the southeastern area.

In consideration of this fact, the southeast region (Sealaska, Inc.) does not generally share in the land benefits accorded to other regional corporations. However, Sealaska, Inc., does receive certain land entitlements under section 14(h)(8) of the Act. The estimate is that Sealaska's share will approximate 200,000 acres.

Practically the entire area of southeastern Alaska is encompassed by the Tongass National Forest. What remains is either State or privately-owned lands, national monuments, village selected lands, mountain tops or glaciers, or otherwise valueless lands. If Sealaska's entitlement under section 14(h)(8) is not to be meaningless, it must be allowed to select lands within the Tongass National Forest.

This section [section 10] provides that Sealaska, Inc., may select its approximately 200,000 acre entitlement from lands which were withdrawn in the National Forest for selection by village corporation of the southeastern region, but which were not so selected. This section provides that Sealaska, Inc., may not select any lands an [sic] Admiralty Island in the withdrawal for the village of Angoon. In addition, no selections can be made in the withdrawal for the villages of Yakutat and Saxman, unless the Governor of the State of Alaska or his delegate consents to such selection.

The initial pertinent amendment to ANCSA was by P.L. 94-204, Sec. 10, 89 Stat. 1146 (1976), referred to as "this section" in the legislative history just quoted. This amendment was deleted as part of § 16(b) and added to § 14(h) (8) as (B) by P.L. 95-178, Sec. 2, 91 Stat. 1369 (1977).

For reasons stated in the above legislative history, the acreage allocation to Sealaska under § 14(h) (8) could not be met under the criteria for availability of land for selection under § 14(h). As withdrawals for southeastern villages under terms of § 16(a) were with few exceptions, "reserved and appropriated" lands within the Tongass National Forest, they were unavailable for selection under § 14(h). Thus Sealaska's allocation of acreage must either have come from additional portions of the National Forest outside the area of § 16(a) withdrawal,¹ or from lands already withdrawn for village selection which remained unselected after the village entitlement was satisfied. The latter alternative was chosen in the amendment with the result that lands available for selection would include all public lands as defined in § 3(e) of ANCSA located within § 16(a) withdrawal area and not selected by the village corporation. Public lands are defined in § 3(e) as follows:

¹ The regional Native corporation for southeastern Alaska would have no selection rights to lands outside of the areas withdrawn by § 11 of ANCSA.

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6 (g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

Thus under § 14(h) (8) (B) Sealaska was permitted to select its allocated acreage from lands withdrawn in areas withdrawn pursuant to § 16(a) of ANCSA, which were reserved and appropriated. This moots as an issue whether a valid perfected unpatented mining claim is such an appropriation of public land as to prevent withdrawal of lands under § 14(h) of ANCSA.

[1] Sec. 14(h) (8) (B) of ANCSA, which governs withdrawal and allocation of lands for selection by the Native regional corporation for southeastern Alaska, constitutes an exception to the requirement that lands withdrawn and allocated under § 14(h) (8) can only be unreserved and unappropriated lands outside areas withdrawn by §§ 11 and 16.

The next issue is whether the BLM is required to adjudicate the validity of unpatented mining claims located within the lands selected prior to conveyance pursuant to ANCSA. Both appellant and Sealaska initially urged the Board to remand for adjudication by BLM the issue of validity of ap-

pellant's unpatented mining claims before conveyance. However, a decision in the case of *Alaska Miners, supra*, and the Secretary's amendment to S.O. 3029 on Nov. 20, 1979, are controlling on this issue.

In *Alaska Miners, supra*, three Alaska miners filed suit before the District Court of Alaska seeking to have certain portions of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, and implementing regulations, declared to be void as an unconstitutional taking of their property interests in located and perfected but unpatented mining claims. The Court decided only on the question of "whether the United States may transfer whatever legal interest it retains in perfected unpatented mining claims to a third party * * *." The Court declared that:

The fate of mining claims was expressly addressed in Section 22(c) of the Settlement Act: * * * The clear thrust of these provisions [22(c)] is to permit conveyance to a Native corporation of lands on which a perfected mining claim has been located. The regulations implementing this section further lend support to this reading. 43 C.F.R. 2650.3-2. It is not argued here that conveyance will work to divest plaintiffs of their possessory right in their unpatented mining claims. The government does not urge this nor do I find this to be so. * * *

* * * * *

The parties are in apparent agreement that a claimant who perfects a mining claim, without seeking patent, acquires the substantial property right of possession. This right of possession is exclusive and remains with the claimant so long as the claim remains perfected,

30 U.S.C. 26, 28; *Wilbur v. Krushnic*, 280 U.S. 306, 316-17 (1930). * * *

Alaska Miners, supra, at 2-3.

S.O. 3029 establishes the Department's position regarding valid existing rights under ANCSA.

In addressing the issue of adjudication of third-party interests, S.O. 3029 states:

Another issue for resolution is to what extent the law and regulations require the Department to identify and determine the validity of (adjudicate) third party valid existing rights.

Clearly the administrative act of listing an interest as a valid existing right or of failing to list it does not create or extinguish the right. Because of this the ultimate validity of all interests may require court litigation.

*Nevertheless it is appropriate for BLM to determine in the first instance the validity of those interests which are created by federal law since BLM is in most cases the agency charged with the administration of those laws. * * ** [Italics added.]

43 FR 55291.

The underlined sentence above would lead one to understand that mining claims must be adjudicated before conveyance.

Subsequently, on Nov. 20, 1979, the Secretary in the amendment to S.O. 3029, after alluding to some confusion caused by S.O. 3029, stated in pertinent part:

The sentence [in S.O. 3029] concerned the adjudication by the Bureau of Land Management (BLM) of certain potential third party interests in land being conveyed to Natives. It reads:

"Nevertheless it is appropriate for BLM to determine in the first instance the validity of those interests which are created by Federal law since BLM is in

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most cases the agency charged with the administration of those laws."

This sentence was not intended to require the adjudication of unpatented mining claims located under the Mining Law of 1872, 17 Stat. 92, 30 U.S.C. § 22 *et seq.* Congress, in section 22(c) of ANCSA, specifically treated unpatented mining claims differently from other types of possible pre-existing rights. Section 22(c) and the regulations implementing it provide that the land on which an unpatented mining claim is located, if selected by a Native corporation, will be conveyed unless prior to conveyance the claimant files an application for mineral patent or mineral survey. 43 CFR 2650.3-2. * * *

* * * * *

For the foregoing reasons, the sentence should be revised to read:

"Nevertheless, it is appropriate for BLM to determine in the first instance the validity of those interests created by federal laws, which are administered by BLM, other than unpatented mining claims under the Mining Law of 1872, 30 U.S.C. § 22 *et seq.*, * * *."

Appendix 2 to 601 DM 2.

Thus the Department policy is that determination by BLM of the validity of unpatented mining claims is not a prerequisite to conveyance to a Native corporation and land on which an unpatented mining claim is located will be conveyed to the selecting Native corporation.

The Board has previously held that it is bound by statements of Secretarial policy contained in a Secretarial Order published in the *Federal Register*. *Appeal of Ouzinkie Native Corp.*, 4 ANCAB 3, 86 I.D. 618 (1979) [VLS 78-7]. The Board is also bound by statements

of policy made by the Secretary and contained in a published Departmental Manual Release.

[2] The Board is bound by duly-promulgated Departmental regulations as well as by Departmental policy expressed in Secretarial Orders published in the *Federal Register* or set forth in Departmental Manuals.

[3] Thus pursuant to 601 DM 2, requirements in S.O. 3029, as to adjudication of Federally created interest, do not apply to unpatented mining claims and BLM is not required to adjudicate mining claims before conveyance. Pursuant to ANCSA and S.O. 3029, *as amended*, lands selected by a Native corporation must be conveyed by BLM notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws.

In the absence of a requirement for adjudication before conveyance, the parties request that conveyance to Sealaska of lands affected by the mining claims be delayed pending an ultimate adjudication of the mining claims and urged termination of the appeal without prejudice to Sealaska's selection rights or to the validity of the claims. Having found that S.O. 3029, *as amended*, mandates conveyance, the Board cannot grant this request.

[4] When lands have been selected by a Native corporation and approved by BLM for conveyance under ANCSA, such lands may be excluded from conveyance

only pursuant to provisions of ANCSA or implementing regulations which constitute an exception to the requirements of S.O. 3029, *as amended*.

In addressing the question whether any provision of ANCSA or regulations in 43 CFR can enable the Board to terminate this appeal in the manner proposed, all parties briefed the possible effect of provisions in § 2651.4(e) on this issue. Sec. 2651.4(e) states:

Village or regional corporations are not required to select lands within an unpatented mining claim or millsite. Unpatented mining claims and millsites shall be deemed to be selected, unless they are excluded from the selection by metes and bounds or other suitable description and there is attached to the selection application a copy of the notice of location and any amendments thereto. If the village or regional corporation selection omits lands within an unpatented mining claim or millsite, this will not be construed as violating the requirements for compactness and contiguity. If, during the selection period, the excepted mining claims or millsites are declared invalid, or under the State of Alaska mining laws are determined to be abandoned, the selection will no longer be considered as compact and contiguous. The corporation shall be required to amend its selection, upon notice from the authorized officer of the Bureau of Land Management, to include the lands formerly included in the mining claim or millsite. If the corporation fails to amend its selection to include such lands, the selection may be rejected.

Thus under § 2651.4(e) the selecting Native corporation has an initial choice: to omit from its selection lands situated within an unpatented mining claim or to select lands upon which the mining claims are situated. Among the effects of

such an omission are elimination of any concern with the mining claimant's possessory interest as an encumbrance, and entitlement to selection from excess selected lands to replace those in the omitted mining claims. The usual requirement of compactness in selection is excused to permit such omissions.

If, however, during the remainder of the selection period the mining claim is either found invalid or abandoned, this finding would eliminate the basis for omission of the claim and would again make applicable the requirement for compactness. In that case, failure of the Native corporation to amend the selection application and select the previously omitted mining claim may cause their selection to be rejected under § 2651.4(e).

43 CFR 2652.3(e) provides: "Regional corporations are not required to select lands within unpatented mining claims or millsites, as provided in § 2651.4(e) of this chapter."

The selecting Native corporation is authorized to omit unpatented mining claims *only* until termination of the selection period designated in § 2653.4(c): "As to all recipients under section 14(h) (8) of the Act * * * September 18, 1978." The terms of § 2651.4(e) are not applicable to the issues raised in this appeal because Sealaska did not choose to omit OPC's unpatented mining claims from lands selected during their selection period, nor do they wish to do so at this time.

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[5] The Board concludes that regulations in 43 CFR 2651.4(e) cannot be applied to permit a selecting Native corporation to exclude lands within unpatented mining claims after the selection period has terminated.

OPC contends that § 2653.9(b) does support the requested action by permitting selection of acreage in excess of actual land entitlement in event of any conflicts. The Board disagrees.

Sec. 2653.9(b) provides in pertinent part: "A regional corporation may select a total area in excess of its entitlement * * * in the event of any conflicts."

The purpose of this provision is to assume full selection entitlement despite any selection conflicts. In any case, the selection scheme of this provision calls for the prioritizing of alternate selections during the selection period. Pursuant to the DIC issued by BLM the disputed lands in this appeal were properly selected and were approved for conveyance to Sealaska notwithstanding the existence of OPC's unpatented mining claims.

Because there is no conflict with Sealaska's selection of lands upon which OPC's unpatented mining claims are situated, this provision is not applicable to any issue in this appeal.

Regulations which govern selection applications by a Native regional corporation for lands allocated under terms of § 14(h)(8) are found in 43 CFR 2653.9(c) which states in pertinent part:

Selections need not be contiguous but must be made along section lines in reasonably compact tracts * * * not including any unavailable land contained therein. * * * Each tract selected shall not be considered to be reasonably compact if (1) it excludes other lands for selection within its exterior boundaries * * *.

This regulation defines the requirement for compactness in regional § 14(h)(8) selections which prohibits exclusion of lands otherwise available within a selected tract. An exception to this compactness requirement is found in § 2651.4(e) which specifically authorizes a Native corporation to omit lands within an unpatented mining claim from selection during the selection period.

Sec. 14(h)(8)(B) of ANCSA provides in part: "Such allocation as the Regional Corporation for southeastern Alaska shall receive under this paragraph shall be selected and conveyed * * *" and regulations in 43 CFR 2652.0-3 provides in part: "[S]elections 14 * * * (8), provide for the conveyance to regional corporations of the selected surface and subsurface estates, as appropriate."

From the above regulations and from S.O. 3029, *as amended*, the Board has found it to be axiomatic that all lands which are available as public lands under § 3(e) of ANCSA, and have been properly selected by a Native corporation, must be conveyed by BLM unless there is lawful authority not to convey.

The parties have further con-

tended that such authority is found in various provisions of ANCSA and regulations in 43 CFR which fall into two general categories.

First, the Board should make an analogy to regulations under which the selection of lands may be amended by the selecting Native corporation or lands are excluded after selection.

BLM asserts that the exclusion of mining claims may be based upon the similarity with provisions of 43 CFR 2650.2(d)(1) and (f). These regulations provide for additional and amendatory filings of applications or how land selection adjustments are made after the initial selections either by the applicant or with their consent. They do not purport to allow any action on land selections after the filing period has expired.

BLM refers to 43 CFR 2651.4(e) as an example of regulations permitting exclusion of mining claims from conveyance. The Board has ruled herein that these regulations do not apply in the circumstances of this appeal because the selection period is over.

Furthermore, Sealaska has consistently adhered to its right to conveyance of the disputed lands and is not even now seeking to omit those lands from its selection. To the contrary, Sealaska and OPC insist that conveyance rights to the disputed lands under ANCSA must be retained after conveyance of the unaffected lands. Sealaska does not now seek to omit OPC's unpatented mining claims from selection but

seeks to retain its selection rights after the lands are excluded from the initial conveyance.

Regulations in 43 CFR 2650.3-2, as referred to in S.O. 3029, *as amended*, allow a mining claim for which mineral patent application has been made, to be excluded from conveyance. This regulation has no application to the present appeal because OPC has not applied for mineral patent to the mining claims in question.

The Board finds that the analogies made in reference to these regulations are not applicable to the issue presented in this appeal.

Secondly, the Board is referred to regulations which provide for the use of Secretarial discretion in waiving regulatory requirements.

OPC refers to use of discretion as illustrated in § 22(f) (authorizing land exchange) and § 17(b)(3) (authorizing public easements) of ANCSA.

Sealaska urges use of a discretionary waiver of requirements as in 43 CFR 2650.0-8, which reads:

The Secretary may, in his discretion, waive any nonstatutory requirement of these regulations. When the rights of third parties will not be impaired, and when rapid, certain settlement of the claims of Natives will be assisted, minor procedural and technical errors should be waived.

BLM contends that termination of the appeal as requested requires utilization only of policy and raises no legal issue.

None of the provisions for use of discretion or waiver have been delegated to this Board, and in any case,

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the issues now on appeal have nothing to do with the specific subject matter upon which the Secretary's discretion is to be exercised.

Land selections made under terms of § 14(h)(8)(B) may be viewed as exceptional procedures which required a different selection schedule for Sealaska than for the other Native regional corporations. However, no such selection schedule has been set forth and therefore the provisions of current regulations must govern.

[6] Accordingly, the Board finds that exclusion of the disputed mining claims from conveyance, pending their adjudication, is not permitted by any provision of ANCSA or implementing regulations.

As an additional basis for appeal OPC asserts that BLM failed to recognize in the DIC that their unpatented mining claims are valid existing rights under § 14(g) of ANCSA.

Sealaska states its position insofar as OPC's unpatented mining claims within their selected lands as follows:

The ultimate issue between appellant, and Sealaska, on the other, is whether appellant's claims are valid. If they prove to be, they constitute valid existing rights under the Settlement Act (and generally) and entitle appellant to remain in undisturbed possession (so long as they remain valid) and, if appellant elects, to enter the claims for patenting. * * *

Sealaska's Brief in Response to Order of July 3, 1979, at 3.

It is undisputed that if OPC's unpatented mining claims within lands approved for conveyance to Sealaska are valid under the general mining laws, their possessory interest constitutes a valid existing right which is recognized under ANCSA.

As a result of the Secretary's amendment of S.O. 3029, 601 DM 2.3, the Board concludes that the possessory interest of an unpatented mining claimant is protected by § 22(c) of ANCSA and regulations in 43 CFR 2650.3-2.

[7] When an unpatented mining claim is situated within lands selected and approved for conveyance under ANCSA, the possessory interest of the mining claimant is protected under provisions of § 22(c) and 43 CFR 2650.3-2 as a valid existing right notwithstanding that the BLM has not adjudicated such unpatented mining claim prior to conveyance.

Based upon the discussion and findings herein, the Board concludes that the parties' agreement regarding termination of the appeal and exclusion of the mining claims from conveyance is not consistent with provisions of ANCSA and regulations. BLM's decision to convey the selected lands including the unpatented mining claims is affirmed.

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

UNITED STATES
v.
ONEIDA PERLITE CORP.

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Decided August 27, 1981

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Appeal by the Forest Service, Department of Agriculture, from the decision of Administrative Law Judge Michael L. Morehouse holding that 580 acres were embraced in valid mining claims held by Oneida Perlite Corp. Motion by the corporation for rehearing.

Set aside and remanded.

1. Administrative Practice—Administrative Procedure: Administrative Review—Appeals—Mining Claims: Contests—Mining Claims: Excess Reserves—Rules of Practice: Appeals: Generally

Where, following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, Department of Agriculture, Ogden, Utah, for appellant; William J. Critchlow III, Esq., Ogden, Utah, and Louis F. Racine, Jr., Esq., Pocatello, Idaho, for Oneida Perlite Corp.

Oneida Perlite Corp., (Oneida) applied to the Bureau of Land Management (BLM), Department of the Interior, for patent of 15 association placer mining claims.¹ The claims, which are located for the mineral substance perlite, are situated in Oneida and Bannock Counties, Idaho, and embrace an area of 2,000 acres within Caribou National Forest, which is administered by the Forest Service (FS), Department of Agriculture.²

Disposition of federally owned minerals under the general mining law is a function of the Secretary of the Interior, notwithstanding that the land in which such minerals occur may be withdrawn for the use of another Federal agency and be administered by that agency for its own purposes. However, under the provisions of a memorandum of understanding between BLM and FS in effect since 1957, FS is authorized to conduct mineral examinations of claims on national forest lands, render reports, make recommendations concerning patent applications, or request initiation of

¹ The subject claims are the Wright Creek Nos. 1 through 9, Wright Creek Nos. 13, 14, and 16, and placer claims P-17 through P-19, more particularly described in the patent application (Exh. G-3), the contest complaint, and exhibit "U."

² A 40-acre tract, (the Wright Creek No. 14 claim) apparently reserved by the United States as an administrative site, was withdrawn from the patent application by the company, leaving an area of 1,960 acres.

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contests of the validity of claims. Should FS recommend contest, BLM, upon its determination that the elements of a contest are present, prepares and serves an appropriate contest complaint. Upon receipt of a timely and responsive answer, the case is referred to the Hearings Division, Office of Hearings and Appeals, Department of the Interior. At the hearing, the memorandum of understanding provides that the Government will be represented by an attorney of the Office of the General Counsel, Department of Agriculture. The initial decision is made by the presiding Administrative Law Judge, an Interior employee, and either party may appeal from his decision to this Board. Thus, in the administrative process, all decisionmaking authority is reposed in officials who exercise the delegated authority of the Secretary of the Interior.

That procedure was followed faithfully in this case. Following their location by associations of individuals who conveyed the claims to Oneida, they were examined by FS minerals personnel. The first report of such examination allegedly found that all of the claims were supported by a qualifying discovery of valuable mineral deposits. A second examination was conducted by FS following Oneida's submission to BLM of its patent application. An effort at negotiation between FS and Oneida, whereby FS would recommend part of the area for patent and Oneida would withdraw the remaining area

from its patent application without prejudice to reapply in the future, failed to achieve agreement. Thereafter, FS recommended to BLM that 100 acres be approved for patent (comprised of portions of three claims), and that contest proceedings be initiated against the remaining claims and portions of claims. BLM issued and served the contest complaint; Oneida filed its timely answer; and BLM referred the case for hearing.

The case was assigned to Administrative Law Judge Morehouse, who presided over the hearing which was held in Pocatello, Idaho, on Feb. 17 and 18, 1978. By his decision dated Feb. 12, 1979, Judge Morehouse held that portions of six claims, aggregating 580 acres, were valid and should be patented, and that the remaining claims and portions of claims were invalid.³

³ In calculating the acreage for patent in his decision the Administrative Law Judge included 100 acres which were not part of the contest, but were, in fact, the same 100 acres which were recommended for patent by FS. Therefore, of the 1,860 acres contested the Administrative Law Judge validated 480 acres and invalidated 1,380 acres. The proper acreage figures are:

	Contested	Validated by ALJ	Invalidated by ALJ	FS Recommendation
Claim No. 1.....	130	90	40	30
Claim No. 2.....	160	120	40	-----
Claim No. 3.....	110	50	60	50
Claim No. 4.....	140	60	80	20
Claim No. 5.....	160	80	80	-----
Claim No. 6.....	160	80	80	-----
Claim No. 7.....	160	-----	160	-----
Claim No. 8.....	160	-----	160	-----
Claim No. 9.....	160	-----	160	-----
Claim No. 13.....	160	-----	160	-----
Claim No. 16.....	120	-----	120	-----
P-17.....	40	-----	40	-----
P-18.....	80	-----	80	-----
P-19.....	120	-----	120	-----
Total.....	1,860	480	1,380	100

FS appealed to this Board from Judge Morehouse's decision. Oneida did not appeal, but contended itself with filing an answer to the statement of reasons for appeal filed by FS.

The contest had proceeded on the basis of a complaint which embodied the following three charges:

a. There are not presently disclosed within the boundaries of the mining claims or portions of mining claims, minerals of a variety subject to the mining laws sufficient in quality, quantity, and value to constitute a discovery.

b. In the alternative, the minerals or mineral materials on the subject claims constitute excessive reserves.

c. The land is nonmineral in character.

In commenting on these charges at the outset of his decision, Judge Morehouse made the following observation: "The only material allegations of the complaint are set out in paragraphs a and b above, since if the claims are not supported by a proper discovery or constitute excess reserves they are invalid and it is immaterial whether the land is mineral or nonmineral in character" (Decision at 2).

At the time Judge Morehouse authored the foregoing, we would have regarded it as a generally correct statement, although charges a. and b. are conceptually redundant. However, subsequent decisions by the Court of Appeals for the Ninth Circuit have made the reference to "excess reserves" an anathema, while lending enhanced significance to the term "nonmineral in character," as will be discussed, *infra*.

At the hearing the Government

had devoted considerable effort toward establishing its contention that Oneida had located claims for far more perlite mineral than could be extracted, processed, and absorbed by the market for as far into the future as one might reasonably see.⁴ As the hearing progressed and evidence was adduced, Judge Morehouse commented, "However, the issue in this case, I think it's clear to everyone, is one of excess reserves" (Tr. 246). Both sides repeatedly referred to the perlite deposits on the claims as "massive," and evidence was admitted to show the extent of reserves based upon various measures such as total annual United States consumption, the current rate of production by the contestee, maximum plant capacity, etc. The FS mineral examiner testified that on the 100-acre area he recommended for patent there is in excess of 5,300,000 tons of commercial perlite which, based on the contestee's annual production, would provide a reserve for 1,000 to 1,200 years (Tr. 68). Contestee had arranged to have the claims examined by an expert in perlite who enjoys a worldwide reputation as such, Herbert A. Stein, whose report is appended to the patent application. Stein estimated the total reserves on the subject claims at 200,000,000 to 300,000,000 tons. The FS mineral

⁴ For example, at the opening of the hearing, counsel for contestant declared: "We believe that on a hundred acres a valuable discovery had occurred, and also that on that hundred acres there is at present rate of production about—anywhere from fifty thousands to a million years reserve supply for the company" (Tr. 8). This may have been an indulgence in hyperbole.

examiner estimated that this is enough to supply the entire needs of the United States at current levels of consumption for "more than two or three hundred years." The national rate of production was given as 602,000 tons per annum.⁵ In 1977, the latest year for which figures were available at the time of the hearing, 80 percent of the national output was produced in New Mexico, the remainder being produced in Arizona, California, Colorado, Idaho, and Nevada. Twelve mines were producing in those six States (Exh. G-8). The United States is an exporter to the extent of 18,000 tons per annum (Exh. G-9).

The Administrative Law Judge and FS were familiar with and guided by a decision of this Department which also was a case in which there had been multiple claims (covering 2,165 acres of land in the Santa Fe National Forest, New Mexico, and 200 acres of BLM land for vast deposits of perlite estimated at more than 25,000,000 tons). In that case, *United States v. Anderson*, 74 I.D. 292 (1967), the Department found that although a market exists for a certain amount of perlite, so that the claimants might mine some of it at a profit, the limitations of the market were such that it could not all be absorbed, and thus huge quantities were not marketable. In locating multiple claims for reserve deposits

which were far more than needed as a reasonable reserve supply, the claimants had laid claim to "excess reserves" which had no economic worth as mineral. The mining law requires that each claim be supported by the "valuable" mineral deposit within its boundaries. 30 U.S.C. § 22 (1976). Noting that, "What must be shown is that at the present time there is an existing market and that there is a reasonable justification for believing that the product of each claim can be disposed of in that market at a profit," the *Anderson* decision held that patent could be approved only for sufficient reserves necessary to sustain a mining operation of the size contemplated for a reasonable period of time. The remaining claims were held to be invalid on the ground that there was no discovery thereon of a mineral deposit which was "valuable" in terms of present marketability at a profit.

There is such a remarkable resemblance between the circumstances which characterized *United States v. Anderson*, *supra*, and those which obtain in the case at bar that the two cases are virtually indistinguishable in any relevant particular.⁶ It seemed apparent that the

⁵ Our calculations show that on this basis there is sufficient perlite on the claims to equal the entire United States production for from 332 years to 498 years, including the total domestic consumption and total exports.

⁶ In his decision Judge Morehouse noted that the *Anderson* case was "considerably different" than the instant case because the *Anderson* claimants had not then built a mill or expanding plant or constructed roads, whereas Oneida had done so, and had sold approximately 2,500 tons of expanded perlite per year for the years 1976 and 1977. However, this distinction would have no bearing on the extent of the market, the economics of exploitation, the nature of the deposit, the quality of the mineral or the applicable law.

law of the case in *Anderson* would apply to and control the result here.

The contestee, however, argued that its reasonable reserve requirements should not be gauged solely on the tonnage of perlite within the claims, but consideration should also be given to the fact that there are 14 different varieties of perlite with different uses and potential markets, and that the various types are not closely concentrated on any one claim but are distributed on several claims over an extensive area. Therefore, contestee said, it must have more than the area recommended for patent by FS (which contains only three types of perlite), in order to supply "any known and future use for the mineral" and impart value to the mining venture which will attract additional investment capital. For this reason, contestee argued, type—not tonnage—is the critical consideration in calculating reasonable reserves.

Contestant countered this argument with the assertion that the evidence presented showed that only 2 or 3 of the 14 types of perlite are currently being marketed.⁷ It was contended that the mining law does not provide for the patenting of large acreages and vast quantities on the hope or speculation that

some day a market for the other perlite varieties might be developed.

Nevertheless, Judge Morehouse was persuaded that it was appropriate to validate a sufficient area of the claimed lands to encompass all the varieties which the company said it required for an existing market and potential future markets. In doing so he expressly recognized that if all of the estimated reserves on claims 1, 3, and 4 were mineable, there would be enough to operate to the total maximum capacity of the company's mill for 35 years. (The mill has a present capacity of 70,000 tons per year, but can be converted to handle 140,000 tons per year, although annual sales for the 2 preceeding years (1976-77) were only 2,500 tons per annum.) However, he found that not all types of perlite were present on claims 1, 3, and 4, but that other required types were present on claims 2, 5, and 6. Accordingly, Judge Morehouse held that 580 acres, comprised of portions of six claims containing all varieties of perlite, should be patented without regard for the volume of perlite within that area.⁸ Also included in the 580 acres ordered to patent by Judge Morehouse were the areas occupied by contestee's mill and an improved spring which contestee's president

⁷ On appeal, FS asserts that "only one or two types of perlite are presently being marketed," other than "the possible exception of the pumicite." In its answer, Oneida says, "Currently there are approximately six to seven different types of perlite being sold, but there are fourteen different types of perlite found on the 580 acres which impart to these claims the unique characteristics of being able to meet every known demand for perlite." The record does not resolve the disparity.

⁸ Actually, there is no way of knowing or estimating the quantity of perlite within that particular 580 acres, as evidence was not presented concerning the volume on each claim and each portion thereof. We can only speculate that it must exceed by several times the 5,000,000 tons included in the portion recommended for patent by FS.

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testified was desired "in case we need wet scrubbers in the mill for environmentalists" (Tr. 184-85).

The 1,380 acres occupied by the remaining claims and portions of claims which were held invalid by Judge Morehouse were eliminated for various reasons. He found that there was insufficient evidence adduced by the contestee to show that valuable deposits are present on claims 7, 8, 13, 16, P-17, P-18, and P-19, and he held that these claims are invalid for lack of discovery. Applying the "10-acre rule," under which aliquot 10-acre increments which contain no commercial mineral can be excluded from a placer claim, Judge Morehouse eliminated the SE $\frac{1}{4}$ of claim 1, the SW $\frac{1}{4}$ of claim 2, the SE $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ of claim 3, and the E $\frac{1}{2}$ of claim 4. Then, applying the rule relating to "excess reserves" as articulated in *United States v. Anderson, supra*, Judge Morehouse concluded that 540 acres comprised of portions of claims 1, 2, 3, 4, 5, and 6, and all of claim 9 constituted locations of "excessive reserves" of perlite for which there is no existing or potential market.

In its appeal to this Board from the decision of Judge Morehouse, FS maintained, *inter alia*, "[t]hat the reserves allowed by the Judge

are greatly in excess of reasonable needs"; that his validation of claims for perlite varieties for which there is no present market was violative of the requirement that the value of a deposit be determined by whether it is presently marketable at a profit; that in awarding Oneida a portion of Wright Creek No. 2 claim for "pumicious perlite," which is used as an abrasive, the Judge erred in granting patent for a mineral which has been barred from location under the Act of July 23, 1955 (30 U.S.C. § 611 (1976)); that the patenting of a mining claim, or portion thereof, where there is no mineral in order to make provision for the site of Oneida's mill is violative of the mill-site statutes, 30 U.S.C. § 42 (1976); that the allowance of a portion of Wright Creek No. 3 claim, not shown to contain commercial perlite, to accommodate Oneida's desire to have a spring, was contrary to the holding of the Supreme Court in *Andrus v. Charleston Stone Products Co., Inc.*, 436 U.S. 604 (1978); and that portions of claims ordered to patent by Judge Morehouse were not shown to contain commercial perlite. However, appellant's principal point of contention concerned Judge Morehouse's award to Oneida of what it asserted were excess reserves, and it relied heavily on *United States v. Anderson, supra*, to support its contention.

Oneida did not appeal, but responded to the appeal of FS urging the propriety of the decision of the Administrative Law Judge.

⁹ Reference to "the E $\frac{1}{4}$ of Claim No. 4" on page 12 of Judge Morehouse's decision is an apparent typographical error. On page 15 of the decision it becomes evident that he excluded the E $\frac{1}{2}$ of the claim.

The Baker Decision

While this appeal was pending, indeed, after it had been reached for adjudication on the docket of this Board and was actually under review, the Court of Appeals for the Ninth Circuit issued its decision in *Baker v. United States*, 613 F.2d 224 (9th Cir. 1980). In that decision the Court held that this Board's application of the excess reserves rule, yclept the "*too much test*," exceeded the Board's discretionary and statutory powers, and amounted to a legislative enactment by an executive tribunal, was arbitrary, capricious, and an abuse of discretion. The Court held, in effect, that there can be no such thing as an "excess reserves test" or a "*too much test*." (Italics by the Court.) In so doing the Court of Appeals declared that *United States v. Anderson, supra*, and other Departmental decisions which referred to "excess reserves" or "reasonable reserves" were based upon a faulty premise. The Board's decision in that case, *United States v. Baker*, 23 IBLA 319 (1976), noted that the claimant had, prior to July 23, 1955, located the Wildcat Hill Nos. 1 through 5 placer claims for common cinders, and had made application for patent. At the request of FS, contest proceedings had been initiated to determine their validity and that of a sixth claim, known as the "Cinder." Subsequently, the contest proceedings against the Wildcat Hill No. 5 and the Cinder claims were dismissed, leaving only the Wildcat Hill Nos. 1 through 4 at issue. The hearing established

that marketable cinders were exposed in vast quantities on all four claims, and that a profitable market for such cinders had existed since prior to July 23, 1955. Accordingly, the Administrative Law Judge held that all four claims were valid. FS then appealed to this Board. Upon review of the record, we noted that Baker had located claims covering 15,000,000 tons of cinders by his own estimate; that his sales over the preceding 18 years amounted to from 700,000 to 1 million tons; that a substantial volume of these sales were for fill or other nonmineral purposes which could not be recognized under the holding in *United States v. Barrows*, 76 I.D. 299 (1969), *aff'd*, *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971); that at 10 cents per ton for the material, the maximum gross income from his operation was \$100,000 over the preceding 18 years, or an average of \$5,555 per annum; that the supply of cinders in the area significantly exceeded the demand; and that there were numerous competitive producers in the vicinity. Depending on the figures used for the projection, Baker's location of four claims containing 15,000,000 tons of cinders gave him a reserve supply which could not be consumed in less than 270 years and most probably would last more than 400 years. Accordingly, we held that Baker had located extra claims for "excess reserves," *i.e.*, reserves which could not be marketed, which had no value, which no prudent man would produce, and which were therefore invalid for lack of a discovery of a

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valuable deposit of mineral. We held that two of his claims were valid instead of one because his main pit and principal improvements extended into both claims and we did not wish to disrupt his operation. Assuming that the 15,000,000 tons were uniformly distributed on the four claims at issue, the two claims cleared for patent by the Board's decision provided him with sufficient reserves to supply his market from 100 to 200 years, *not* including his other sources.

We therefore found "that although Baker was justified in the reasonable and prudent anticipation that a valuable mine could be developed on this deposit, and in proceeding with the expenditure of his labor and means to that end, he located claims for far more land and mineral than reason and prudence would allow." *United States v. Baker, supra* at 335. This statement was the Board's expression and application of the time-honored "prudent man rule," first articulated in *Castle v. Womble*, 19 L.D. 455 (1894), which has since been repeatedly approved by the Supreme Court. *Andrus v. Charlesstone Stone Products Co., Inc., supra* at 607 n.4; *United States v. Coleman*, 390 U.S. 599 (1968); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Cameron v. United States*, 252 U.S. 450, 460 (1920); *Chrisman v. Miller*, 197 U.S. 313, 322 (1905). Statute provides that "valuable" mineral deposits are open to exploration and purchase. 30 U.S.C. § 22 (1976).

Whether a deposit has economic value is determined by whether there exists a profitable market which will receive the material, as "[m]inerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable." *United States v. Coleman, supra* at 602. Moreover, this test of whether claims are supported by a qualifying discovery of an economically valuable deposit of mineral must be applied to *each claim individually*. *United States v. Melluzzo (Supp. On Judicial Remand)*, 32 IBLA 46 (1977), *aff'd*, *Melluzzo v. Andrus*, No. CIV-79-282-PHX CAM (D. Ariz. May 20, 1980), and cases cited. An assumption that a qualifying discovery on one claim can inure to the benefit of another is a mistake of law. *Henrikson v. Udall*, 229 F. Supp. 510, 512 (N.D. Calif. 1964), *aff'd*, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966). Where *multiple* claimants have located multiple claims for an infinite amount of mineral which is widespread and abundant for which there is only a limited market demand, the Court of Appeals for the Ninth Circuit has held that claims which are not already developed and producing profitably to supply that market must be held invalid where it cannot be proven that they are presently capable of such profitable participation. *Melluzzo v. Morton*, 534 F.2d 860 (9th Cir. 1976). Of course, where, for exam-

ple, 50 different claimants locate 50 separate claims for a superabundance of the same mineral with a limited market, the question of "excess reserves" does not arise. Each claim is regarded individually and a determination made that the mineral deposit is or is not "valuable" according to the test applied by the Supreme Court in *United States v. Coleman*, *supra*, and interpreted by the Ninth Circuit in *Melluzzo v. Morton*, *supra*. Those claims determined to be not qualified according to these criteria are properly held to be invalid for want of discovery of a valuable deposit of mineral.

Where a single claimant or association of claimants locates multiple claims for far more mineral than the market can absorb the test of the validity of each claim is *precisely the same*. No "legislative enactment by an executive tribunal," violative of "our system of separation of powers" is required in order for the Department to discharge its historic responsibility in this regard.¹⁰ The only distinction between the situation involving *multiple* parties locating multiple claims involving a superabundant mineral with a limited market, and the situation where a single locator or association does so, is in the terminology employed to describe what has happened. Assuming that the single locator does have, at present, a profitable market for a limited amount of material which

can easily be supplied from one claim, the question of the value of the deposits of the same mineral on the rest of the claims necessarily arises. Usually, the claimant asserts that the additional claims are needed as a *reserve* supply in order to continue his operation when the supply on the first claim is exhausted or severely depleted. This Board has recognized repeatedly the right of a mining claimant to locate claims containing *valuable* deposits of mineral and to hold them, without development, as "*reasonable reserves*." See, e.g., *United States v. Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972); *United States v. Harenberg*, 9 IBLA 77, 80 (1973).¹¹ In *United States v. Gibbs*, 13 IBLA 382, 396 (1973), we discussed the concept of "reasonable reserves" and application of a test of the validity of a claim allegedly located for that purpose, as follows:

The Judge further found that the absence of sales was attributable to the fact that the operator chose to put his plant on the adjacent claim and hold the material from the contested claim in reserve. He concluded that the holding of a claim without development as a reasonable reserve supply is a permissible procedure under the rules announced in the case of *United States v. Anderson*, 74 I.D. 292, 303 (1967), noting that the reserves afforded by the Sorefoot No. 10

¹¹ This case, *United States v. Harenberg*, *supra*, is not the same one referred to by the Ninth Circuit in the *Baker* decision, which found a later decision, *United States v. Harenberg*, 11 IBLA 153 (1973), to be unhelpful on the issue of locating claims for reserve supplies. The second *Harenberg* decision alluded to the discussion of "reserves" contained in the first *Harenberg* decision.

¹⁰ The role and authority of the Department in the determination of the validity of mining claims is discussed, *infra*.

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were clearly not in excess of the 30-year supply held to be a reasonable amount in the *Anderson* case. Again, we agree.

The question of the propriety of holding mining claims as reserve sources of supply has been considered in other cases. It is well established that the holding of a mining claim as a reserve of sand and gravel for future development *without present marketability* does not impart validity to the claim. *United States v. O'Callaghan*, 8 IBLA 324 (1972); *United States v. Stewart*, (1972), *supra*; *United States v. McCall*, 1 IBLA 115 (1970); *United States v. Hinde*, A-30634 (July 9, 1968); *United States v. Schelden*, A-29078 (April 26, 1963); *United States v. Fischer Contracting Co.*, A-28779 (August 21, 1962). But where the marketability of the deposit has been established for the critical dates by a demonstration that the claimant could then have mined and sold the material at a profit, his election to retain that deposit intact as a reasonable reserve for future use will not operate to invalidate an otherwise valid claim. *United States v. Harenberg*, *supra*. The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the United States mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including [where the mineral is a "common variety"] a showing of marketability on or before July 23, 1955. *United States v. Stewart*, (1972) *supra*, at p. 56. [Italics in original.]

But where a claimant has located multiple claims embracing deposits of mineral so vast that the limited market for that mineral, reasonably projected for growth, could not be expected to absorb it over the course of hundreds or even thousands of years, we have held that such an appropriation of public land cannot be justified under the mining laws as necessary "reasonable re-

serves." Instead we have characterized such locations as "excess reserves," a term which the Ninth Circuit has disdained in favor of its own descriptive phrase "the *too much* test" (always italicized by the Court). The reserves are in excess of the ability of the market to absorb them and, correspondingly, in excess of the claimant's need of them for any legitimate purpose under the mining law. The claims located for such additional amounts are invalid for lack of a discovery of a valuable mineral deposit on each of them, since no prudent man would spend his labor and means in an effort to produce mineral in such quantity that the market could not accept even a small percentage of it.

Theoretically, mineral from all the claims blanketing an homogeneous, massive, and extensive deposit could be marketed profitably to supply a limited demand by the simple expedient of taking a little material from each claim as the opportunities for sales presented themselves. But this would be deliberately inefficient mining, not bona fide development but a clear subterfuge to control the land, either to preclude its acquisition by competitors, or for other purposes. *United States v. Osborne (Supp. on Judicial Remand)*, 28 IBLA 13, 29 (1976). "Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes." *United States v. Coleman*, *supra* at 602. Moreover, the Court of Appeals for the Ninth

Circuit, prior to its decision in *Baker*, had considered and rejected the notion that simply because a limited market exists for a mineral which is the subject of a great many claims, we must consider that each claim, viewed in isolation from all the rest, is capable of being developed as a profitable source of supply for that market. In *Melluzzo v. Morton*, *supra*, at 864 n. 4, the Court said:

A hypothetical market in which the claimant's material is the only unmarketed material taken into account is hardly a useful supposition. If claimant's material can be marketed, then so can that from all potentially competitive sources. To exclude all unmarketed material save that of the claimant *could result in the unrealistic conclusion that all such material, considered claim by claim, is marketable at a profit notwithstanding the fact that if the claims had all been actively operated none could have done so profitably.* [Italics added.]

The same theory (that since a limited market existed locally in an area of superabundant supply, material could be taken from *any* claim and sold at a profit into that market) was addressed in *Osborne v. Hammitt*, 377 F. Supp. 977, 985 (D. Nev. 1964), where the Court said:

We think the Secretary was right in holding the proofs insufficient here to establish present marketability under the quoted standards. If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary* * *. But the record discloses a situation where, if

the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres * * * of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

In *Melluzzo v. Morton*, *supra* (as in *Osborne v. Hammitt*, *supra*), the Court was dealing with a superabundant supply from many sources held by diverse owners and claimants, and the Court was in full agreement with the Department that claims for surplus mineral which simply overwhelm the available market are invalid for want of discovery. The same factors were operative in the *Baker* case, but it was unnecessary to deal with them at length because Baker's own claims constituted such a surplusage on the basis of his own experience after 18 years of operation. Thus, in *Baker*, it was unnecessary to develop evidence concerning the total available supply from all the sources in the area in order to ascertain whether Baker had located far more than his market could absorb or whether he had merely provided himself with "reasonable reserves." In making this determination, the Board could not even consider increases in the market since July 23, 1955, as the cinders on Baker's claims were a common variety. Therefore, the validity of each claim had to be tested on the basis of whether the deposits on each claim were marketable at a profit

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as of that date. *Barrows v. Hickel*, 447 F.2d 80 (9th Cir. 1971).

Nevertheless, although Baker's principal workings and improvements were on his Wildcat Hill Nos. 2 and 3 claims, where he had a sufficient supply of cinders for 100 to 200 years, the Court of Appeals noted that, "Baker had, in fact, developed and marketed the cinders from claims one and four," and that "he had actually extracted and marketed cinders from the contested claims at a profit." *Baker v. United States*, *supra* at 228.

The Court of Appeals for the Ninth Circuit has previously considered a classic case wherein a claimant acquired multiple claims for common, abundant mineral, some of which could be then profitably disposed in the market while the balance could not be, because the claimant's own production from one of its claims was sufficient to satisfy the existing market. In that case, *Clear Gravel Enterprises, Inc. v. Keil*, 505 F.2d 180 (9th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975), the Court noted that appellant had held 16 association placer claims of 160 acres each located for common sand and gravel in the Las Vegas Valley, and had leased all 16 claims to the second largest producer of sand and gravel in the area. The lessee company had opened a mine on only one of these claims. The validity of 14 of the claims had previously been litigated, as the result of which 7 were ordered to patent and 7 claims were declared in-

valid.¹² Before the Court was the question of the validity of the remaining two claims, neither of which was the claim being mined by the lessee. The Court noted and held as follows:

Other evidence produced at the time of the hearing before the Hearings Examiner further demonstrated that the one mine being operated provided sufficient sand and gravel to meet the needs of the market and that it could yield a sufficient quantity of sand and gravel to provide for any increased share of the market to its producer.

* * * * *

Of particular significance is the obvious fact appearing from the record that the quantity of Appellant's other sand and gravel holdings in the area, when combined with the state of the market, were such as to deter the Appellant from expending money and effort to extract and market the sand and gravel from the claims in question from the time of location in 1946 until approximately 1963. [Italics added.]

Id. at 505 F.2d 181. Although the Court did not use the terms "too much" or "excess reserves," either phrase would have served to characterize its findings. The Court had, from the outset, identified the issue in the case as being whether there had been a discovery of valuable

¹² *Palmer v. Dredge Corp.*, 398 F.2d 791 (9th Cir. 1968), *cert. denied*, 39 U.S. 1066 (1969). This case presents the first discussion by the Ninth Circuit of the application of the marketability test to determine whether a deposit is "valuable" following the Supreme Court's decision in *United States v. Coleman*, *supra*. There it is also reported that the Dredge Corp. actually held 36 sand and gravel claims in the area at the time the various proceedings were initiated.

minerals deposits on the claims within the definition of "the prudent man rule" as tested by an ability to market the material at a profit during the critical period. Upon finding "that the *quantity* of Appellant's *other * * * holdings * * ** were such as to deter the Appellant" (*italics added*) from attempting to mine the subject claims, they were held to be invalid. However, as the material on all the claims was homogenous, it must be presumed that profitable sales of material from each of the claims could have been made to some limited extent, just as was done in the *Baker* case. Nevertheless, in deciding *Baker*, the Court said, "However, *Clear Gravel* cannot be read as establishing or even supporting a *too much* test." *Baker v. United States*, *supra* at 227.

In *Hallenbeck v. Kleppe*, 590 F.2d 852, 859 (10th Cir. 1979), the Court of Appeals quoted with approval from the decision of the district court in that case saying:

We feel the court correctly followed the test of present marketability. See, *e.g.*, *Coleman*, *supra*, 390 U.S. at 602-03, 88 S.Ct. 1327; *Barrows v. Hickel*, 447 F.2d 80, 83 (9th Cir.). The court's findings in the instant case stated that: "A private litigant cannot locate claims upon public lands and then simply wait until the minerals are in sufficient demand to be marketed at a profit," and also that: "... plaintiffs cannot hoard common sand and gravel on public lands until it becomes profitable to market such deposits." The court also quoted the following statement from the opinion in *Foster v. Seaton*, 106 U.S.App. D.C. 253, 255, 271 F.2d 836, 838: "To allow such land to be removed from the public domain because unforeseeable

development might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development."

In reversing the Board's decision in the *Baker* case insofar as it held that two claims were invalid by reason of being located "for far more land and mineral than reason and prudence would allow" (the "prudent man test"), the Court of Appeals asked a number of rhetorical questions. In view of the fact that we are remanding the instant case for rehearing, we will supply responses to some of the Court's rhetorical questions for the edification and guidance of the parties and the Administrative Law Judge who will hear and decide the contest on remand.

Stating that, "Under the [*too much*] rule, Interior reserves to itself the decision as to how slowly or rapidly a claim can be worked," the Court asked, "Will the large well-endowed corporation * * * with extensive and valuable open-pit or subsurface claims, be subject to the same standards as the sole 'pack-string' prospector?" *Baker v. United States*, *supra* at 229.

The Department has never indicated, even by implication, that it reserves to itself the decision as to how slowly or rapidly a claim can be worked. Moreover, this Board has held repeatedly that the test of whether there has been a discovery of a valuable mineral deposit on any claim is an objective test, not a subjective one, and that the financial abilities of the claimants are irrelevant to this inquiry. See, *e.g.*,

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United States v. Reynders, 26 IBLA 131, 136 (1976), wherein we said, "The prudent man test is objective, and subjective considerations, such as willingness to work for little or no return, simply have no place in the calculus of prudence." (Citations omitted.) The inquiry is limited to whether the mineral on the claim can be extracted, beneficiated, transported, and disposed in the market at a profit to the claimant which is sufficiently attractive to warrant a person of ordinary prudence, not necessarily a skilled miner, to expend his labor and means, with a reasonable prospect of success, in developing a paying mine. *Castle v. Womble*, *supra*. Unpatented mining claims are property in the fullest sense, and may be sold, leased, transferred, mortgaged, inherited, sold on execution, or acquired by condemnation. Accordingly, the relative size or wealth of a particular claimant is not, and never has been, a factor in the Department's consideration of the validity of a claim. Only the claim itself is at issue, and that is the reason that a Government contest of mining claim has historically been regarded as an action *quasi in rem*, rather than *in personum*.

The Court of Appeals in the *Baker* decision asks, "To what locality or geographic region will [the *too much* test] apply? To what classification of mineral deposits will it apply? To what geologic structures will it apply?" *Baker v. United States*, *supra* at 229. The

answer, of course, is that it applies to multiple locations of claims to land containing vast amounts of minerals of a type which can be marketed at a profit only in limited quantities from a few claims. For example, *United States v. Duval*, 1 IBLA 103 (1970), the claimants had located 24 association placer claims on 3,080 acres in what became the Oregon Dunes Recreation Area. The claims were located for silica quartz sand suitable for glass making. Not only was the market so limited that no sand from these claims had been sold, the evidence established "that other sands found in numerous deposits along the Oregon coastal regions and in the entire Pacific Northwest might also be used in glass making with varying needs for beneficiation, sizing and screening and these deposits are in the millions, if not billions, of tons." *Id.* at 107. Our decision holding these claims invalid was affirmed in *Duval v. Morton*, 347 F. Supp. 501 (D. Ore. 1972), which was affirmed in turn by the Ninth Circuit's memorandum opinion of Dec. 19, 1973, No. 72-2839.

In *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364 (9th Cir. 1976), appellant had located and applied for patent 45 claims in a national forest in Alaska. These claims were located for limestone which the claimant could presently use in its own plants in the manufacture and sale of cement at a profit. Nevertheless, because that limestone could only be utilized at a cost of \$1.94 per ton at plants where

ample supplies of limestone from other sources were available at \$1.48 per ton, the Court perceived that even though the company could still make a profit through the sale of cement made from the stone from the subject claims, it could only do so "by sacrificing profits properly attributable to manufacturing or selling." *Id.* at 1369-70. The Court affirmed the authority of this Department to pursue its inquiry through hearing procedures to determine whether the company would be prudent to sacrifice profits which could be made by utilizing the limestone which was available at significantly lower cost, and whether the limestone on the claims was truly presently marketable at a profit under these circumstances. (Trask, J., dissenting).

In *Multiple Use, Inc. v. Morton*, 504 F.2d 448, 450 (9th Cir. 1974), the Court noted that, "There was no evidence that the sand and gravel were used *in quantity* prior to July 23, 1955, hence they are not locatable deposits. The stone 'and similar deposits are along the creek bed for miles and appear as common as drops of water in San Francisco Bay.'" (Italics by the Court.)

In *Dredge Corp. v. Penny*, 362 F.2d 889 (9th Cir. 1966), the Court encountered a situation where the plaintiff had located sand and gravel claims covering 16 quarter-sections of land (2,560 acres) in the Las Vegas Valley, Nevada. (The case was decided on the basis of the status of the land rather than

on the discovery issue.) Another example of superabundant supplies of sand and gravel situated on numerous claims in the Las Vegas Valley was *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959), where the Court noted:

With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, *existence of present demand*, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." *Layman v. Ellis*, 54 I.D. 294, 296 (1933), emphasis supplied. See also *Estate of Victor E. Hanny*, 63 I.D. 369, 370-72 (1956). Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development. [Italic by the Court.]

Thus, the Department's concern for the location of claims for excess reserves is *geologically* limited to those types of minerals which occur in such abundance that only a small portion of the known deposits can be absorbed by the market at a profit. Minerals for which there is virtually unlimited demand, such as

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precious metals, and which can be extracted and sold at a profit, of course would not be the subject of such concern. The distinction between the two categories was noted by the Supreme Court in *United States v. Coleman, supra*. With respect to the other questions raised by the Court in *Baker*, the only concern of the Department for *locality* or *geographic region* in the context of excess reserves would relate to local or geographic influences on the marketability of the mineral, e.g., market areas, hauling distances and costs, etc. We can think of no way in which the nature of a particular *geologic structure* might influence the concept of excess reserves.

In *Baker, supra* at 229, the Court of Appeals also asked:

Will claimants of all variety now be forced to locate and claim only mediocre discoveries, exploitable within 1, 5 or 10 years? Will claimants be forced to overlook those claims with extremely rich and extensive deposits which may require many more years to develop and exploit, but which are by all present day statutes and relevant decisions legally exploitable claims?

As explained above, claims "which are by all present day statutes and relevant decisions legally exploitable" would never be considered excess reserves by this Department. And, as also related above, *reasonable* reserves, liberally projected for many years into the future, have been consistently approved by this Department as legitimately within the scope and purpose of the general mining law.

United States v. Anderson, supra; United States v. Harenberg, supra; United States v. Gibbs, supra; United States v. Baker, supra. See also United States v. McElwaine, 26 IBLA 20 (1976). What amount of reserves is "reasonable" is a determination to be decided on the basis of the evidence in each case. The nature of the mineral, its unit value, the extent of the market, and whether it is expanding or diminishing, the amount of similar mineral which can supply that market from other sources (*Melluzzo v. Morton, supra*), might all bear on the question of whether the location of additional claims for the same mineral was justified as the act of a prudent man in the reasonable belief that by the expenditure of his labor and means a valuable mine might be developed on each such claim.

The Court of Appeals in the *Baker* case stated at 229:

The *too much* rule is, in our view, a wholly unreliable subjective analysis, resting too much in the eye of the administrative beholder.

The IBLA exceeded its discretionary and statutory powers when it adopted its *too much* or excess reserves rule. Although Congress may see fit to deal with the issue, it has never done so. The IBLA decision amounts to a legislative enactment by an executive tribunal. The IBLA possesses no such authority under our system of separation of powers.

As hereinbefore indicated, a reference to "excess reserves" does not describe a new rule of law invented by this Department, or a super imposition of a new test of a

claim's validity on the existing law. It is nothing more or less than a descriptive phrase applicable to a particular set of circumstances. It describes the location of claims for far more land and mineral than reason and prudence would allow because there is such a superabundance of the material that the market simply cannot accept all of it at a profit. Therefore, some of the deposits must be regarded as not valuable in an economic sense. This concern for excess reserves is rooted in the basic statute, 30 U.S.C. § 22 (1976), and controlled by the "prudent man" test of discovery as complemented by the requirement that the economic value of the deposit be measured by a determination of whether it is presently marketable at a profit. *United States v. Coleman, supra*. In the making of this determination, it is appropriate to consider the quantity of the claimant's other holdings of this same mineral, and the limitations of the market, and the claimant's share of that market. *Clear Gravel Enterprises v. Keil, supra*. It is also appropriate to consider the magnitude and sources of other supplies of that mineral to the same market. *Melluzzo v. Morton, supra*.

The authority of the Department of the Interior to make such determinations has been reiterated frequently. See, e.g., *Ideal Basic Industries v. Morton, supra* at 1367.

The Supreme Court of the United States has repeatedly acknowledged and defined the judicial role of the Secretary.

Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and quasi-judicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands. [Italics in original.]

Plested v. Abbey, 228 U.S. 42, 52 (1913). *Accord, United States ex rel. Ness v. Fisher*, 223 U.S. 683, 693, (1912); *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324 (1903).

[T]he Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. * * * "The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department * * * by direct orders or by review on appeals."

Knight v. United States Land Association, 142 U.S. 161, 178 (1891). *Accord, Cameron v. United States*, 252 U.S. 450 (1920); *United States v. Fisher, supra*; *Stoneroad v. Stoneroad*, 158 U.S. 240 (1895); *Orchard v. Alexander*, 157 U.S. 372 (1895); *McDaid v. Oklahoma Territory*, 150 U.S. 209 (1893); *Hastings & Dakota R.R. Co. v. Whitney*, 132 U.S. 357 (1889).

The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395. Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them. *Cameron v.*

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United States, supra—an opinion written by Mr. Justice Van Devanter, who, as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and distinction to the administration of the public lands—illustrates the special role of the Department of the Interior in that field. [Footnotes omitted.]

Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-37 (1963).

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.

Cameron v. United States, 252 U.S. 450, 459-60 (1920).

The Interior Board of Land Appeals "is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 43 CFR 4.1. If, as was said by the Court of Appeals in the *Baker* case, "Interior Board of Land Appeals' 'too much rule,' prohibiting the mining claimant from locating claims in excess of reasonably anticipated market need, was abuse of discretion."¹³ Contrary to

existing mining law" (Syllabus), then there is no entity within the Federal establishment with the requisite jurisdiction, authority, and responsibility to challenge and determine the validity of "extra" claims containing deposits of mineral which are without value because of the limitations of the market and superabundant existing supply. Land located for such claims would pass from Federal ownership by default simply because of an absence of any governmental authority to administer the law. We cannot believe that was the intended consequence of the holding in *Baker*, although the dissenting Justices of the United States Supreme Court perceived that it might have that effect.

The Department of the Interior recommended to the Department of Justice that application be made to the Supreme Court for a writ of Certiorari in the *Baker* case. The Solicitor General concurring, this was done, but the Supreme Court denied the petition on Oct. 20, 1980. *Andrus v. Baker*, 101 S. Ct. 332 (1980). Mr. Justice Blackmun authored a dissenting opinion, in which he was joined by Mr. Justice Marshall and Mr. Justice Powell. The dissent noted that this Board had nullified two of Baker's four contested Wildcat Hill claims, "rea-

¹³ Since the *Baker* case involved a claim to property, the contest and administrative appeal were conducted pursuant to the Adminis-

trative Procedure Act. Such cases are not resolved by the discretionary powers of the Secretary, which do not arise. As there was no discretion exercised by the Board in making its decision, it is difficult to understand the Court's holding that the decision constituted an abuse of discretion.

soning that development of all four claims would be imprudent." The opinion also noted that proceedings against a fifth Wildcat Hill claim had been dismissed. Mr. Justice Blackmun related the Board's action to the "prudent person" test and its correlative marketability standard, and opined at 333:

I believe that, as in *Coleman*, the Court of Appeals may have unduly restrained the Secretary's authority to evaluate claims of mineral discoveries on public lands; its ruling appears to be based on the perception, possibly a misperception, that the Secretary's "excess reserves" analysis does violence to the statute. In light of that ruling, one now may expect the assertion of additional claims involving "valuable" mineral deposits not marketable in the foreseeable future.

"It is still proper here that the Secretary 'take into account the economics of the situation.'" *Roberts v. Morton*, 549 F.2d 158, 163 (10th Cir. 1976), quoting from *Converse v. Udall*, 399 F.2d 616, 622 (9th Cir. 1968). *Roberts v. Morton*, *supra*, affirmed a decision of this Board styled *United States v. Zweifel*, 11 IBLA 53, 80 I.D. 323 (1973), in which one man located 2,910 association placer mining claims for himself and as agent for 250 colocators, filing the majority of said claims within a span of 10 months.

The McCall v. Andrus Decision

The decision in *Baker v. United States*, *supra*, was handed down by the Court of Appeals for the Ninth Circuit on Feb. 11, 1980. On July 10, 1980, that Court issued its decision in *McCall v. Andrus*, 628 F.2d

1185, *cert. denied*, 49 USLW 3710 (Mar. 23, 1981); as related in the syllabus, in part:

The Court of Appeals, Farris, Circuit Judge, held that: (1) [Board of Land Appeals] in concluding that claimant would have a reserved supply of sand and gravel for 100 years and that, without expanded market, it was not economically feasible to produce material on contested tracts was proper application of test for determining whether land was mineral in character; (2) testimony of government expert that he had examined claims and that contested areas were not mineral in character because materials from them could not have been mined and marketed for profit at time of his examination or at any time earlier constituted substantial evidence of prima facie case by government that lands were not mineral in character, and testimony of one of claimant's experts that sand and gravel on contested area could have been marketed at profit but that he had not made market study was not enough to undermine substantiality of government's case; * * *. [Italics added.]

William A. McCall, Sr., and another had acquired 26 association placer mining claims of 80 acres each, located for deposits of sand and gravel in the Las Vegas Valley. The 2,080 acres comprising the claims adjoined the boundaries of the city of Las Vegas and lay approximately 6 miles westerly from the Clark County Courthouse in the center of the city. Some of the claims and/or portions of claims had been developed and material therefrom was being extracted and sold at a profit. The claimants had applied for patent to all the claims. Two patents had been granted in response, one for 40 acres and one for 190 acres, covering parts of five

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claims. Contest proceedings were initiated, the complaint charging that the remaining portions of these five claims, amounting to 170 acres, were not mineral in character.

At the hearing the evidence, including that presented by the Government, established that on each 10-acre subdivision of the contested portions of the several claims there existed sand and gravel which was inferentially of the same character as the material under the patented portions of these same claims and under other patented claims adjacent. However, most of the contested areas were overlain by a dense, cemented caliche-type conglomerate which would make extraction of the commercial sand and gravel beneath more difficult and expensive than on the patented claims adjacent. Moreover, the evidence showed that this mineral material in easily recoverable form exists over many square miles of the Las Vegas Valley, and that there were numerous sand and gravel operators in the area at the time of the hearing and that there had been many active operators there for the preceding 30 years, with operations being conducted on widely dispersed tracts, including the patented portions of the five claims involved in the contest proceeding. In addition the hearing examiner noted that the contestees had already received patents for 230 acres containing over 3,500,000 yards of sand and gravel which, "If they had a market for this amount they would have a reserve supply

for one hundred years." On the basis of these facts the examiner held that the contested portions of the claims were "nonmineral in character" and void, notwithstanding that there existed on each of the contested portions mineral of the same type and quality as on the patented portions which had been found by the Department to be valid claims. Underlying this holding was a finding that given the limitations of the market to absorb the material, the vast local abundance of it, and numerous competitive suppliers, coupled with the fact that the Department had already awarded the claimants patents to Federal lands containing 100 years' reserve supply, it would not have been prudent or reasonable to attempt development of the contested deposits at any time prior to July 23, 1955, when common sand and gravel ceased to be locatable, because these deposits were more costly to develop than what was already available in superabundance.

On appeal, this Board reversed the decision of the hearing examiner as to three of the contested 10-acre subdivisions where mining operations were actually conducted, and affirmed his decision that the remaining portions were null and void because they were "nonmineral in character." *United States v. McCall*, 7 IBLA 21 (1972).

Suit for judicial review of this Board's decision was dismissed on summary judgment by the United States District Court for the District of Nevada, and the claimants

appealed to the Court of Appeals for the Ninth Circuit.

In affirming the Board's decision the Court observed:

[6, 7] McCall's contention that the Board based its decision on the absence of actual mining is incorrect. The Board adopted the conclusions of the hearing examiner who stated:

"It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. [The contestees] have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.

"The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955."

This is a proper application of the test for determining whether land is mineral in character. [Italics added.]

McCall v. Andrus, supra at 1188.

Again, in this case the Court did not employ the phrases "*too much*" or "excess reserves," although it did stress the fact that if appellants had a market for all the material on other lands which they claimed and had been granted title to "they would have a *reserve supply* for one hundred years." (Italics added.) The Court then said, "*McCall presented no contrary evidence to show that a market existed in Las*

Vegas in 1955 in which he could have sold at a profit more sand and gravel than the amount contained in the already patented areas." *Id.* at 1189 (Italics added). Clearly, the Court was of the opinion that the claimants had a market for *some* of the material, but they were asserting claims to *more land and mineral than could be profitably exploited* and which, therefore, constituted an *additional* "reserve supply" on which a prudent man would not be justified in expending his labor and means to develop in the reasonable anticipation of creating a valuable mine. This precisely parallels the rationale of this Board in the *Baker* case, *supra*.

However, in *McCall*, the Court attempted to distinguish *Baker*, saying at 628 F.2d 1189:

Our recent decision in *Baker v. United States*, 613 F.2d 224 (9th Cir. 1980), is not controlling here. *In Baker*, the Board had refused to grant a patent for three entire claims even though it found that a valid discovery had been made on each claim.¹⁴ [Italics added.] The claims were all composed of similar material. The Board invalidated two of the claims because it found that Baker had located claims in excess of the reasonably anticipated market need for the mineral (the "too much" test). We held that there was no statutory support for the Board's action. Unlike *Baker*, here the character of the land claimed was con-

¹⁴ The sentence emphasized in the quotation contains two misstatements of fact. First, the Board's decision in *Baker* held that *two* claims of the Wildcat Hill Group were invalid, not three claims. Second, the Board's decision did not find "that a valid discovery had been made on each claim." That finding had been made in the decision of the Administrative Law Judge who presided at the hearing, but was expressly reversed by the Board as to the two claims held to be invalid upon appeal to the Board.

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tested. The claims which were held invalid here were all covered by caliche material. The hearing examiner noted that it was not economically feasible to extract the type of material on these tracts since there were large deposits of easily removable sand and gravel on the other tracts.

The Court has thus approved a finding by this Board that claims to lands on which there are mineral deposits which exceed the ability of the market to absorb at a profit are invalid because such *lands* are "non-mineral in character," but rejected a similar finding where such *deposits* were characterized as "excess reserves."

The "Mineral in Character" Concept

The term "mineral in character," or its antonym, "nonmineral in character" is unfortunately ambiguous as a term of art. It can be used interchangeably to describe either a geologic condition in the land or an economic condition. That is, "nonmineral in character" may describe *land* which is virtually barren of the mineral which is the subject of an alleged discovery, or it may describe *land* on which there are vast deposits of the mineral claimed which are of no commercial value because of the superabundant supply available to meet a limited demand. To illustrate this duality of usage of the same term, consider two hypothetical examples.

First, a 160-acre association placer claim is located for gold based upon a discovery of placer gold in an alluvial wash. The gold

is present in the wash and may be economically recovered and disposed at a profit. However, the wash occupies only parts of two 10-acre subdivisions of the 160-acre claim, while the remaining fourteen 10-acre subdivisions which comprise the upland portion of the claim are devoid of any trace of gold. Each such barren, upland 10-acre tract may be invalidated on the basis that it is "nonmineral in character," which clearly it is because the mineral which was discovered and served as the basis for the location of the claim simply does not exist on that portion of the claim.

The second hypothetical example concerns two association placer claims of 80 acres each held by the same claimants and located prior to 1955 on a vast and extensive deposits of common pumice. The total reserves are estimated at not less than ten million tons, and perhaps as much as twenty million tons may be present on the two claims. There are two other operators of competitive sources active in the area. The only buyer is the local paving contractor, who uses the pumice as an additive in concrete to surface roads on jobs within a 40-mile radius. Beyond that distance there are plentiful additional sources which are cheaper for the contractor to use because of hauling costs. Any of the three local competitive producers could easily supply the contractor's entire needs from a single 20-acre pit for the next 50 years, but the contractor divides his purchases between them on the basis of which is

closest to the particular job site. Even if the two competitors discontinued operations and the claimants gained the entire market, there is enough pumice on the two claims to supply that limited market for 250 years. The claimants are mining from a single pit on two 10-acre subdivisions of one claim. The remaining portions of the claim being operated and the additional claim not being operated are properly described as "nonmineral in character," despite the presence of great quantities of pumice on every portion of both claims. This is explained by the Ninth Circuit's decision in *McCall v. Andrus*, *supra*, where the Court took notice of the Department's finding that McCall had already been granted patents to public lands containing a reserve supply of mineral ample for 100 years; that he offered no evidence of a market for any more; that without an expanded market it was not economically feasible to produce material from the contested tracts; and that consequently the additional material was without value as mineral. The court then said:

This is a proper application of the test for determining whether land is mineral in character. The test is whether "the known conditions at the time of [the patent] proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." *Diamond Coal and Coke Co. v. United States*, 233 U.S. 236, 239-40, 34 S. Ct. 507, 509, 58 L. Ed. 936 (1914) (concerning

whether land claimed as a homestead was mineral land not subject to homestead claims). See also, *United States v. Southern Pacific Co.*, 251 U.S. 1, 40 S. Ct. 47, 64 L. Ed. 97 (1919); *Standard Oil Co. of California v. United States*, 107 F.2d 402 (9th Cir.), *cert. denied*, 309 U.S. 654, 60 S. Ct. 469, 84 L. Ed. 1003 (1940); *United States v. Bunkowski*, *supra* at 55.¹⁵

Id. at 1188.

Seven days before the Ninth Circuit issued its decision in *United States v. Baker*, *supra*, this Board published its decision styled *United States v. Williamson*, 45 IBLA 264, 87 I.D. 34 (1980), in which we discussed the interrelationship of the terms "mineral in character" and "excess reserves," as follows:

[8] Mineral in character and excess reserves can be seen as differing facets of a single concept. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. *United States v. Meyers*, 17 IBLA 313 (1974); *United States v. McCall*, 7 IBLA 21, 79 I.D. 457 (1972). The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. As such, it is the normal adjunct to a charge of no discovery. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character. *Id.* Thus, to the extent that

¹⁵ It is perhaps noteworthy that the Board's decision in *United States v. Bunkowski*, *supra*, 79 I.D. 43 (1972), was criticized by the Ninth Circuit in its *Baker* opinion as it "shares the same faulty premise" as the Board's *Baker* decision. However, in the *McCall v. Andrus* decision issued 6 months later, the Ninth Circuit cites *Bunkowski* twice with approval.

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a placer claim embraces 10-acre subdivisions which do not have the located mineral present, those portions which are nonmineral will be declared null and void.

[9] Questions relating to excess reserves, though they are interrelated to a determination of the mineral character of land, arise in a different context. The charge of invalidity due to the presence of excess reserves *admits* that the mineral, *qua* mineral, exists within additional claims, but raises the contention that because of the quantity of mineral in other claims owned by a mining claimant, the mineral in certain claims would have no market and thus is essentially valueless. [Italics in original.]

Id. at 293-94, 87 I.D. at 50.

Thus, because in the *McCall* case we were applying the "10-acre rule" to *portions* of claims which had been treated as valid otherwise, we regarded the *lands* containing the additional, unmarketable, valueless sand and gravel as "nonmineral in character," because the 10-acre rule provides for the elimination of aliquot 10-acre portion of *lands* which are "nonmineral in character" from otherwise valid placer claims. But in the *Baker* case we were eliminating two *entire claims* for the reason that the cinder *deposits* were unmarketable and valueless because the three other claims in that group contained more material than Baker's market could absorb over the next 200 years. Therefore, we characterized the *deposits* as "excess reserves." We might just as easily have said that the *lands* were "nonmineral in character."

Both terms relate to the absence

of a "valuable" deposit of mineral. In both *Baker* and *McCall* the claimants had applied for patents, and patents had been approved covering vast amounts of materials on some of the lands applied for. However, as declared in *Barton v. Morton*, 498 F.2d 288, 292 (9th Cir.), *cert. denied*, 419 U.S. 1021 (1974):

But there are other considerations. A patent passes ownership of public lands into private hands. So irrevocable a diminution of the public domain should be attended by substantial assurance that there will be a compensating public gain in the form of an increased supply of available mineral resources. The requirement that actual discovery of a valuable mineral deposit be demonstrated gives weight to this consideration.

In sum, the terms "mineral in character" and "nonmineral in character" refer to the *land* which is the subject of the claim, while the terms "excess reserves" and "reasonable reserves" refer, in certain circumstances, to the *deposit* of mineral which serves as the object of the claim. All of these expressions relate to whether or not there has been a qualifying discovery of a valuable deposit of mineral on that particular claim or portion thereof.

Instructions on Remand

Oneida Perlite Corp., which did not appeal the decision of the Administrative Law Judge, was requested to file a brief analyzing the effect of the decision of the Ninth Circuit in *Baker v. United States*, *supra*, on the instant appeal. It re-

sponded by asserting that the Administrative Law Judge committed reversible error in determining that the principal issue was "excess reserves" and in finding certain claims were invalid by reason of being located for "excess reserves." Oneida now contends that it is entitled to be issued a patent to the entire 1,960 acres, and requests "a rehearing by an Administrative Law Judge freed from the inhibiting shackles of excess reserves." Oneida says further:

It is also respectfully submitted that, because of the confusion of both fact and law out of which the decision to patent only 580 acres was concluded, this Board cannot render a decision without becoming a long distance trier of facts or substituting its collective guess for the apparent guess of the Administrative Law Judge. This case should consequently be remanded for a *de novo* hearing pursuant to the altered state of the law.

Counsel for the Forest Service, the appellant before this Board, argues that because Oneida filed no appeal from the decision of Judge Morehouse, that decision "became final as to any disallowances made by him, and properly so, based upon the state of the law as it then existed."

In other circumstances we would agree with appellant. However, in this instance we are disposed to remand for rehearing for two distinct reasons. First, some of the issues raised by appellant cannot be decided by this Board on the basis of the record before it, and more evidence must be adduced on these issues. Second, in light of the pro-

nouncements by the Court of Appeals for the Ninth Circuit in *Baker v. United States*, *supra*, and *McCall v. Andrus*, *supra*, this Department should strive to conform any final administrative determination to the prevailing law of that circuit. Accordingly, the case will be remanded for rehearing.

As we have heretofore explained at length, the term "excess reserves" is *not* a rule of law invented by the Department, nor does it represent a superimposition on existing law of some new test of the validity of a mining claim. It is merely a descriptive phrase used in certain circumstances to characterize *deposits* which are not "valuable" within the meaning of 30 U.S.C. § 22 (1976) because the claimant already possesses an ample supply of such mineral to satisfy his share of a limited market for years into the future, and the additional deposits so described are consequently of no economic value because they cannot be presently marketed at a profit. Thus, claims located for deposits of such economically worthless minerals are invalid because they are not supported by a "discovery" of a "valuable" deposit of mineral within the boundaries of *each* claim. Therefore, on rehearing charge b. of the contest complaint (referring to excessive reserves) will be dismissed because it is redundant of charge a. of the complaint (referring to the absence of discovery).

It being understood that the term "excess reserves" is merely a descriptive phrase, there is no need

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that it be stricken from the lexicon of terms employed in the administration of the mining law, and references thereto shall not be deemed to have prejudicial effect.

Charge c. of the contest complaint (referring to the nonmineral character of the land), which was dismissed by Judge Morehouse, will be reinstated on rehearing in view of the holding in *McCall v. Andrus*, *supra*.

On remand evidence will be adduced and specific findings will be made by the Administrative Law Judge on the following issues:

1. The extent of the present market for perlite which can be satisfied by material from these claims, or any of them.

2. The extent to which deposits of perlite on these claims cannot presently be marketed at a profit, if any.

3. What types of perlite exist on these claims which at present can be marketed at a profit.

4. What types of perlite exist on these claims which cannot presently be marketed at a profit.

5. Whether each type of perlite presently marketable at a profit from these claims has value peculiar to that particular type, or whether some other type would be equally satisfactory to the purchaser. This inquiry focuses on whether it would be prudent to develop separately and produce from several deposits of distinctive types of perlite to meet a market demand which could not be satisfied from the production of other types.

6. Whether the pumicious perlite found on the Wright Creek No. 2 claim is a locatable mineral, or a common variety of pumice or pumicite which is not subject to appropriation under the mining laws pursuant to 30 U.S.C. § 611 (1976).

7. Whether the thick rhyolite cap which allegedly covers portions of the area claimed is analogous to the cemented caliche cap described in *McCall v. Andrus*, *supra* at 628 F.2d 1188, and has a similar effect on the costs or projected costs of extracting, removing, and marketing the mineral from those areas.

8. Whether the area of the Wright Creek No. 3 claim which embraces the improved spring and which was ordered to patent by Judge Morehouse is nonmineral in character as determined by each aliquot 10-acre subdivision concerned, bearing in mind that water is not a locatable mineral. *Andrus v. Charlestone Stone Products Co., Inc.*, *supra*.

9. Whether the land which is the situs of the mill can be patented as land which is mineral in character and embraced within the boundary of a valid mining claim, or whether it must be relocated as a millsite claim or claims with appropriate configuration pursuant to 30 U.S.C. § 42 (1976), understanding that millsites may be located only on nonmineral land. The object of this inquiry is not to deprive Oneida of the land on which its mill is situated, but to ensure that any grant contemplated is in conformity with applicable law, so that no further proceedings are necessitated.

10. Whether each claim individually is supported by a qualifying discovery of a valuable deposit of mineral, taking into account the limitations of the market, if any, and the other sources of supply available to that market, including, but not limited to, supplies available from the other claims in the same group. *Melluzzo v. Morton, supra*; *Clear Gravel Enterprises, Inc. v. Keil, supra*.

11. The extent to which specific 10-acre aliquot parts of subdivisions on each claim which is otherwise valid must be eliminated as nonmineral in character, if any.

Hypothetical, theoretical, and speculative opinion evidence of the sort rejected by the Court in *Osborne v. Hammitt, supra* at 985, will not be relied upon as the basis for a finding. *Cf. United States v. Gibbs*, 13 IBLA 382, 389-90 (1973). "Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained." *Barrows v. Hickel, supra* at 83.

Any stipulated agreement between the Forest Service and Oneida Perlite Corp. as to facts, issues, or disposition of lands involved will be submitted to the presiding Administrative Law Judge for approval upon his determination that it comports with the facts and law bearing on the matter which is the subject of the stipulated agreement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for rehearing.

EDWARD W. STUEBING

Administrative Judge

WE CONCUR:

BRUCE H. HARRIS

Administrative Judge

DOUGLAS E. HENRIQUES

Administrative Judge

**APPEAL OF KORDICK AND SON,
INC., & STEVE P. RADOS, INC.
(A JOINT VENTURE)**

IBCA-1255-3-79

Decided August 27, 1981

Contract No. 7-07-DC-07284, Specifications No. DC-7284, Bureau of Reclamation.

Denied.

Contracts: Disputes and Remedies: Substantial Evidence—Contracts: Disputes and Remedies: Burden of Proof

Where the Board finds appellant's evidence with respect to two alleged conversations to be little more than conclusory hearsay without reference to literal substance and appellant alleged that certain drawings had been approved by the Government, when the clear language of the responses to the submitted drawings indicated rejection, the Board holds that appellant has failed to sustain its burden of proof, because of failure to prove the allegations of its complaint by any substantial evidence, and denies the claim of appellant for costs incurred to furnish and install insulating fittings required by the specifications in connection with the construction of a pipeline.

10. Whether each claim individually is supported by a qualifying discovery of a valuable deposit of mineral, taking into account the limitations of the market, if any, and the other sources of supply available to that market, including, but not limited to, supplies available from the other claims in the same group. *Melluzzo v. Morton, supra*; *Clear Gravel Enterprises, Inc. v. Keil, supra*.

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(A JOINT VENTURE)

August 27, 1981

APPEARANCES: Walter S. Rados, Santa Anna, California, and Marin A. Kordick, Irvine, California, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY
ADMINISTRATIVE
JUDGE DOANE*

*INTERIOR BOARD OF
CONTRACT APPEALS*

Background

The subject contract, dated Sept. 27, 1977, between Kordick and Son, Inc., and Steve P. Rados, a joint venture, hereinafter, "contractor" or "appellant," and the Bureau of Reclamation of the U.S. Department of the Interior, hereinafter, "Bureau" or "Government," required the furnishing and laying of 96- and 102-inch-diameter pipes and constructing structures for about 2.3 miles of pipeline to transport water for municipal and industrial use through the Main Aqueduct "B" Line. The work to be performed on this project was located about 6 miles north of Boulder City, Nevada, in Clark County, and was part of the Southern Nevada Water Project, Second Stage, encompassing Main Aqueduct "B" Line station 56 + 30.13 to station 186 + 52.82.

The estimated contract price was \$3,216,283. Appellant received its notice to proceed on Sept. 29, 1977. The time allowed for completion

was 400 calendar days from the date of receipt of such notice. The date for completion of all work under the contract was extended 23 calendar days to Nov. 26, 1978. On Nov. 27, 1978, the contract was considered to have been substantially completed.

By letters to the Bureau, dated Apr. 19 and June 6, 1979, appellant claimed additional compensation in the amount of \$16,033.50 for the cost of furnishing and installing four *insulating fittings* (couplings) at joints where line-pipe containing a steel cylinder are joined to steel pipe. By his findings of fact and decision of Jan. 22, 1979, the contracting officer (CO) denied the claim for reasons substantially as follows: (1) that the specifications of subparagraph 3.1.5b(4) clearly required either flexible or rigid insulating fittings to obtain electrical discontinuity at joints where line-pipe alternatives containing a steel cylinder are joined to steel pipe; (2) that insulating fittings are not shown on the drawings because of the pipe alternatives allowed by the specifications and, therefore, the contractor could have selected a type of pipe containing a steel cylinder which would not be joined to steel pipe thus eliminating the requirement for insulating fittings; (3) that no employee of the Bureau could be found, as contended by the contractor, who ever orally advised the contractor that insulating fittings would not be required; and (4) that in addition to the specifi-

cation cited above, the last paragraph of a letter to the contractor, dated Jan. 3, 1978, also indicated that insulated fittings would be required.

It is undisputed that the specifications allowed one of four options to the contractor with respect to the type of line-pipe which could be furnished for the project; that two of the alternatives contained steel cylinders and two did not; and that the type of pipe ultimately chosen by the contractor for the project was the prestressed embedded cylinder pipe which did contain a steel cylinder (Tr. 39-46). Neither is it disputed that the drawings did not show insulated fittings at the four locations where they were to be installed, but did show steel connections at those locations (Tr. 46), nor that the specification at paragraph 3.1.5b(4)(b) provides as follows: "(4) Electrical isolation in the form of either flexible or rigid insulating fittings as specified herein shall be provided as required to obtain electrical discontinuity at: * * * (b) Joints where line-pipe alternatives containing a steel cylinder are joined to steel pipe."

The contractor appealed to this Board from the CO's decision and alleged in its complaint the following:

1. Prior to the bid we were informed by the Bureau that insulated fittings were not required on the Project.

2. In November of 1977, Mr. George Metz'ler of the Conduit Fabricators Co., our sub-contractor for the Cathodic and Corrosion monitoring systems, was informed by your Mr. Veda that the in-

sulated fittings were not required. This confirmed our pre-bid information.

3. There is no indication that these fittings would be required on the original drawing. Also, the submittals from Conduit Fabricators did not include any insulation couplings and the submittals were approved as submitted.

The Government denied, by its answer, each of appellant's allegations. A 1-day hearing was held at Los Angeles, California, pursuant to the request of appellant. The Government filed a posthearing brief, but by letter, dated Feb. 15, 1980, appellant declined to do so, stating, "We will accept the Board's decision in regards to all relevant material as it stands in the record."

The principal question to be resolved by the Board is whether appellant sustained its burden of proof in establishing entitlement to the claimed extra costs for furnishing and installing the subject four insulating fittings.

Discussion

An examination of the record reveals that appellant's claims are not supported by any substantial evidence.

The first paragraph of appellant's complaint alleges that prior to the bid, appellant was informed by the Bureau that insulated fittings were not required on the Project. The second paragraph alleges a conversation in November 1977 to the effect that insulated fittings were not required. The only witness for appellant, Mr. Martin Kordick, testified that the prebid information resulted from a conversation be-

(A JOINT VENTURE)

August 27, 1981

tween a Mr. Don Eichner of appellant's staff and "somebody back in Denver" (Tr. 24 and 39). He did not identify the Government employee with whom Mr. Eichner was alleged to have conversed. The evidence relied upon for the second conversation stems from a letter, dated Jan. 30, 1978, from a Mr. George W. Menzler, corrosion specialist of Arizona Corrosion Control, Inc., a subcontractor, addressed to appellant (AF Exh. 3b), which stated in pertinent part:

Dear Ernie:

I visited the site where Aqueduct "B" is being installed and consulted with Marty Kordick then Bob Burneel and Bob Welsh from the Bureau of Reclamation, and then called Mr. Ueda [sic] at the Denver office and came up with the following requirements:

* * * * *

2. Due to the fact that all components that are being installed are concrete coated and lined, no insulation fittings will be necessary.

As pointed out in the Government's brief, it is significant that appellant failed to produce either Don Eichner or George Menzler as a witness. Thus, appellant's evidence adduced to prove the first two paragraphs of its complaint amounted to little more than conclusory hearsay, without reference whatever to the literal substance of either alleged conversation.

Mr. Harry K. Uyeda, a graduate civil engineer, has been employed by the Bureau since 1960 in the Material Science Section of the Applied Sciences Branch of the Divi-

sion of Research, and since 1971 has been specializing in corrosion control by cathodic protection (Tr. 55). He was the principal and only witness for the Government. His testimony included the following pertinent points: That direct current flow of direct current electricity causes corrosion of metals; that steel corrodes at the rate of about 22 pounds per ampere year, reducing it to iron rust; that such fact comes from the application of an electrochemical formula based on Ohms law with the weight loss determined by Faraday's Equivalent; that a simplified explanation of the theory of cathodic protection for the subject pipeline is that by requiring a means of interrupting the flow of electric current through the steel structure by use of insulated fittings made of a different metal, in this case, high silicon cast iron, the corrosion to the steel pipe is eliminated and the corrosion is transferred to the fittings which can be replaced without great cost over the life of the pipeline; that he was the author of the standards from which the cathodic protection and monitoring paragraphs of sec. 3.1.5 of the specifications were made (Tr. 64).

Mr. Uyeda further testified that he had no recollection of any telephone conversations with contractor personnel prior to the bid opening; that he did recall talking to George Menzler around November of 1977 and recalled essentially repeating the specification requirements for corrosion control; that he

did tell Mr. Menzler that he did not have to have insulated fittings if he chose certain options, but did have to have them if he chose certain other options; and that he did not outright tell him that there would be no insulated fittings required (Tr. 71). Later on in his testimony (Tr. 75-76) he opined that the whole problem surrounding the erroneous statement of paragraph 2 of the Jan. 30, 1978, letter resulted from miscommunication somewhere.

The third paragraph of appellant's complaint alleges that the submittals from Conduit Fabricators did not include any insulation couplings and the submittals were approved as submitted. The evidence totally refutes the accuracy of that allegation.

Appellant's exhibits A, B, C-1, and C-2 were drawings prepared by Arizona Corrosion Control, Inc., appellant's subcontractor, and were submitted by appellant to the Bureau in November 1977 and February 1978. By letter dated Jan. 3, 1978 (AF Exh. 4) the Bureau stated that appellant's exhibit A was not satisfactory and in the concluding paragraph stated: "Therefore, please submit plan drawings of the pipeline showing locations of test stations by type, insulating fittings by type, cathode connections, and metallic casings. Also provide details of the proposed test stations as well as the design for the impressed current cathodic protection system."

In a letter dated Mar. 27, 1978 (AF Exh. 5) the Bureau answered

the second submittal by the following language:

The submittal fails to conform to the specifications as follows:

1. The drawings fail to show the locations of insulating fittings required by subparagraph 3.1.5.b(4) (a) of the specifications, i.e., insulating fittings are required at joints where line pipe alternatives containing a steel cylinder are joined to steel pipe. Therefore, insulating fittings are required at stations 125+44.65, 150+32.20, 150+93.02, and 186+41.84 where the embedded cylinder prestressed concrete pipe joins to fabricated steel closure sections (steel pipe).

* * * * *

Please submit a revised design meeting these requirements. The type of insulating fittings proposed should be completely identified.

Finally, the transcript, at page 41, disclosed the following admission by Mr. Kordick after explaining that the final choice of the optional type of pipe was made because of the considerable savings that could be realized by appellant: "A. [answer] At this juncture in time, the [*sic*] gentlemen—I am going to tell you something. *We had forgotten about couplings.*" (Italics supplied).

This admission, that appellant had *forgotten* about the couplings (referring to insulating fittings) seems to us to absolve the Government from any liability for claimed extra costs, notwithstanding, and we so find, that appellant has failed to present any substantial evidence in support of any of the three allegations of its claim.

Based on the foregoing, we hold that appellant has failed to sustain

August 28, 1981

its burden of proof of entitlement to the claimed extra costs.

Decision

Wherefore, the claim of \$16,033.50, for costs allegedly incurred by appellant to furnish and install the subject four insulating fittings, is hereby denied.

DAVID DOANE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF EVERGREEN HELICOPTERS, INC.

IBCA-1388-8-80

Decided August 28, 1981

Contract No. YA-554-CTO-118, Bureau of Land Management.

Sustained in part.

Contracts: Disputes and Remedies:
Damages: Generally—Contracts: Performance or Default: Breach

In a contract which provided for helicopter spraying of herbicide on grass after spring sprouting and the Government, after giving notice to proceed and granting permission to the contractor to mix the herbicide for the entire project, changed its mind about the readiness of the grass for spraying and imposed a noncontractual requirement that the grass be 4 inches high before spraying, the Board found that the Government breached its duty not to interfere with the contractor's performance and that

the contractor was entitled to damages in the form of standby costs for its helicopter and for the tank truck in which the herbicide was mixed.

APPEARANCES: J. Chris Edwardsen, General Counsel, Evergreen Helicopters, Inc., McMinnville, Oregon, for Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

The Bureau of Land Management (BLM) awarded Contract No. YA-554-CTO-118 to Evergreen Helicopters, Inc. (Evergreen), on Mar. 5, 1980. The contract called for herbicide spraying on 193 acres of forest land, 106 acres which the parties referred to as the north area and 87 acres at another location referred to as the south area. The contract provided that the starting date for spraying would be after spring sprouting of the target species of grass (Appeal File Exh. 15).

The Government gave the contractor notice to proceed on Mar. 10, 1980. On Mar. 19, 1980, the Government notified the contractor that spraying would begin on Mar. 25, 1980. The contractor requested and received permission from the Government to mix all of the herbicide for both areas at one time. Government personnel observed the mixing in a tank truck at Evergreen's head-

quarters in McMinnville, Oregon, on Mar. 25, 1980. The contractor's crew and the Government personnel then traveled from McMinnville to the north area but no spraying took place on March 25 because of bad weather (Appeal File Exh. 17; Tr. 81, 82).

The environmental coordinator, who was employed by the BLM but who had no responsibility for contract administration, inspected the north area on March 25 and decided that the grass was not ready to be sprayed. He inspected the area again on the morning of March 26 and became convinced that spraying the north area at that growth stage would not be effective. He expressed this view to the project inspector and his supervisor, who decided not to spray at that time (Tr. 83, 122-24).

No spraying was accomplished on March 26 because of bad weather. On March 27 the south area was sprayed. Before returning to the north area, the project inspector advised Evergreen's pilot that the north area would not be ready to spray for a week to a week and a half (Tr. 85). After Evergreen's crew and the Government personnel returned to the north area, both the Government project inspector and the environmental coordinator told Evergreen's pilot that the north area would not be sprayed for a week to a week and a half (Tr. 87) or for a week to 10 days (Tr. 122).

Evergreen's helicopter remained at the north area from March 27 to April 1, when a written stop work

order was received and Evergreen was able to retrieve its helicopter and use it for other work (Tr. 4, 46).

On April 10 the project inspector called Evergreen to advise that the north area would be ready to spray on April 11 (Appeal File Exh. 17). The written start work order was issued on April 11. Due to repairs on Evergreen's helicopter, it did not become available until late in the day on April 11, when no spraying could be accomplished because of bad weather. Spraying was begun and completed on the north area on Apr. 12, 1980 (Tr. 91, 92).

Evergreen claimed that it lost the use of its helicopter for 4 days from March 28 to April 1, when the stop work order was issued, and that it lost the use of the partially filled chemical truck for 15 days from March 28 to April 11 (Tr. 52-64).

Decision on Liability

Evergreen argues that the Government, by failing adequately to inspect the north area prior to issuing the notice to proceed, breached an implied obligation on the part of the Government to do nothing to prevent, interfere, or hinder Evergreen in its performance of the contract.

We do not agree that the Government failed to make an adequate inspection of the north area prior to issuing the notice to proceed. The project inspector personally inspected the south area and sent an employee of the BLM, whom he trusted, to inspect the north area.

The employee reported that the grass was green and it was ready to spray (Tr. 100). The difficulty arose when the environmental coordinator inspected the north area on March 25 and 26 and was "thoroughly convinced that the spray wouldn't be very effective if we did, indeed, spray at that growth stage" (Tr. 124). The view of the environmental coordinator was that the grass should be at least 4 inches tall before spraying would be effective (Appeal File Exh. 18). While this view may be a sound one, it is not in accord with this contract, which requires only that the spraying will take place after spring sprouting of the grass (Contract, Item 1, Special Instructions, Appeal File Exh. 15). It should not be necessary to observe that a considerable period of time can elapse after sprouting and before the growth reaches 4 inches.

By imposing a requirement that the grass be 4 inches tall, the Government departed from the terms of the contract and reached "the implied provision of every contract, whether it be one between individuals or between an individual and the Government, that neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance." *Lewis-Nicholson, Inc. v. United States*, 213 Ct. Cl. 192, 204 (1977). Accordingly, the Board finds that Evergreen is entitled to damages flowing from the Government's breach of its obligation.

Decision on Damages

Evergreen claimed loss of use of its helicopter for 4 days from March 28 to April 1, when it received the written stop work order and was able to retrieve its helicopter and use it for other work.

The Government argues that the statements by the project inspector to Evergreen's pilot on March 27, to the effect that the north area would not be ready to spray for a week to a week and a half, constituted a stop work order. This argument ignores the fact that the contract required stop work orders to be in writing and the project inspector testified that he was not authorized to sign a stop work order (Tr. 106). A conversation between a company representative and the Government's project inspector, who has no authority to issue a stop work order, cannot be construed as a stop work order under any circumstances.

The Government's argument that Evergreen's appeal must be decided under the suspension of work clause does not address the nature of Evergreen's appeal. Evergreen did not submit a claim under the suspension of work clause but instead characterized its claim as arising from the Government's breach of its duty not to interfere with or delay Evergreen in the performance of the contract. In view of the Board's finding, above, that the Government did commit such breach, the Government's attempt to limit the relief available to that

provided in the suspension of work clause is without merit. The subsidiary arguments that Evergreen should not recover for Sundays or days of bad weather because this contract described such days as nonwork days are dependent upon the Government's erroneous assertion that Evergreen's claim must be considered under the suspension of work clause. Evergreen does not claim that it would have worked in bad weather or on Sundays under this contract but rather that it was prevented from using its equipment for other work where the provisions of this contract do not apply (Tr. 44).

Evergreen submitted a cost analysis for the daily cost of one of its helicopters based on the fleet average costs for the previous year divided by the 111 days which the average helicopter was able to work during the year. Evergreen's calculations yielded an average cost of \$1,517 for each revenue-producing day (Appellant's Exh. A). The contracts administrator for Evergreen testified that the figures presented in exhibit A "are representative of the amount that we hope to obtain when we bid the job" (Tr. 61).

The Government attempted to show that the cost of a standby helicopter should be considerably less than \$1,517 per day. The contracting officer's authorized representative testified that he had learned from a contracting officer in Boise, Idaho, that a helicopter similar to the one furnished by Evergreen could be obtained on a standby basis for \$400 per day (Tr. 141). The Government did not offer in evi-

dence any copies of contracts where such service was actually purchased. The record will not support a finding that the contracts for standby helicopters awarded in Boise, Idaho, are comparable to the instant contract.

Evergreen's cost calculations from which it derived a cost of \$1,517 per day for its helicopter leave much to be desired. The inclusion of unacceptable and unsubstantiated cost elements in the yearly total and the use of non-standard accounting practices make it difficult to determine the actual cost with any degree of mathematical certainty.

Evergreen included \$15,260 for interest in its yearly total. Its contracts administrator testified that the interest claimed represented the annual cost of the money tied up in the helicopter (Tr. 53).

In *Dravo Corp. v. United States*, 594 F.2d 842 (1979), the Court of Claims denied a claim for imputed interest for the use of equity capital, stating that unless the evidence shows that the Government's actions caused a clear necessity for borrowing, the evidence is insufficient to prove a claim for interest. In the present case, there is not even an allegation that the Government's actions caused Evergreen to borrow any money. The amount of the interest must be excluded from the calculation of cost.

Evergreen also included \$9,900 as the yearly cost of per diem at a rate of \$30 per man day. There is no evidence to show that any member of the crew was paid per diem during the period for which standby

costs are claimed. On the basis of failure of proof, per diem costs must be excluded from the cost calculation.

Another questionable item is the amount of \$9,000 for the yearly cost of a pickup truck. Evergreen's contracts administrator testified that the pickup truck used on this contract was not at the job site during the 4 days for which loss of use of the helicopter was claimed, but the pickup truck was probably at Evergreen's headquarters in McMinnville during that time (Tr. 73). There is no evidence that Evergreen was deprived of the use of the pickup truck during the 4 days in question and the costs of the pickup truck must therefore be excluded from the calculation.

Evergreen included \$8,500 for other costs, which included the cost of purchasing and maintaining a spray system for the helicopter and the cost of maintaining a trailer to transport the helicopter (Tr. 71, 72). The contracts administrator offered no breakdown as to the amount of these costs allocable to the spray system, which was used on this contract, and the amount allocable to the trailer, which was not (Tr. 72).

Overhead was included in Evergreen's cost calculations in the amount of \$25,500, a figure derived by taking 15 percent of the insured value of the helicopter. It was not explained why the helicopter was insured for \$170,000 when the fleet average cost of such aircraft was \$109,000. No explanation was offered for the unusual accounting

procedure of figuring indirect costs as a percentage of an arbitrary insurance value rather than as a percentage of direct costs. The prescribed method of treating indirect costs under the Federal Procurement Regulations is found in 41 CFR 1-15.203.

Actual costs incurred by a contractor are presumed to be reasonable. *Ocean Technology, Inc.*, ASBCA No. 21363 (Apr. 28, 1978), 78-1 BCA par. 13,204. In the present case, however, the foregoing deficiencies in Evergreen's evidence on costs have resulted in a record that will not support a finding as to the actual costs incurred by Evergreen for its helicopter. It is clear that the delay in performance, caused by the Government's unwarranted reversal of its opinion that north area was ready to spray, resulted in increased costs to Evergreen. Accordingly, the Board finds, in the nature of a jury verdict, that Evergreen is entitled to recover \$3,500 for the loss of use of its helicopter during the period from Mar. 28 to Apr. 1, 1980.

Evergreen's claim for loss of use of its tank truck was for the 15 days from Mar. 28 through Apr. 11, 1980. To establish the amount claimed, Evergreen's contracts administrator testified that someone higher up in the management had told him that it cost \$60,000 to operate the tank truck for a year. He used that figure and divided it by 111 days to arrive at a cost of \$541 per day, but was unable to offer any evidence in support of the \$60,000 figure for operating costs (Tr. 51-53, 67).

Such conclusory evidence, based

on hearsay and unsupported by any documentation, is entitled to little, if any, weight. We turn instead to the evidence furnished by the Government in its exhibit 28, which is a portion of an inter-agency agreement between the State of Oregon, and U.S. Forest Service, and the Bureau of Land Management, setting forth the rates these agencies will charge each other for the use of fire fighting equipment (Tr. 139). The exhibit lists standby rates for fire trucks which are similar to the tank truck used by Evergreen to mix the herbicide for spraying, except that the fire trucks lack the agitator used in Evergreen's truck to keep the chemical mixed (Tr. 139).

The contract required a tank truck with a minimum capacity of 1,000 gallons but no maximum capacity was specified (Contract at 34, Appeal File Exh. 15). The truck actually used by Evergreen had a capacity of between 4,000 and 5,000 gallons (Tr. 76). Government's exhibit 28 shows that the standby rate for a fire truck having a capacity of 4,000 to 4,999 gallons is \$16.90 per hour, or \$405.60 for a full 24-hour day.

Evergreen claimed compensation for loss of use of its tank truck from March 28 through April 11, a period of 15 days. For the period from March 28 to April 1, when Evergreen received the written suspension of work order, the Government argues that Evergreen should not recover because the weather would have prevented spraying on March 28, 29, and 31, and March 30 was a Sunday which was a nonworking

day under the contract. As in the helicopter claim, this argument misconstrues the nature of Evergreen's claim. If the Government had not interfered with Evergreen's performance of the contract on March 27, the spraying would have been completed on that date and Evergreen could have used its equipment for other work where the weather and Sunday provisions of this contract did not apply. The Board finds that Evergreen is entitled to recover for loss of use of its tank truck on March 28, 29, 30, and 31.

For the period from April 1 to April 11, the Government again argues that Evergreen should not recover the standby costs of the tank truck for April 6, a Sunday, and April 7, 8, and 9 when bad weather would have prevented spraying. The Government further argues that there should be no recovery for April 10 and 11 because Evergreen did not have a helicopter ready to spray and repairs to the one that was eventually used prevented spraying on those dates. In the alternative, the Government argues that Evergreen could have mitigated its damages by storing the chemical mixture in plastic containers or by dumping it after the Government project inspector advised on April 1 that the Government would probably pay for any additional herbicide if it had to be dumped (Tr. 88).

The Government's arguments with respect to mitigation of damages are flawed by the lack of evidence to show that the actions suggested by the Government would, in fact, have saved money. Para-

graph 11 of the Specifications requires the contractor to dispose of surplus herbicide and herbicide containers in a manner which completely safeguards the public welfare. In the absence of any evidence of record as to the cost of complying with this provision of the contract, the record will not support a finding that Evergreen could have mitigated its damages by following the Government's suggestions.

When the Government granted permission for Evergreen to mix the herbicide for both the north and south areas, it had determined that both areas were ready to spray. The reversal of the Government's position on the north area was not authorized by any provision of the contract and was the direct cause of immobilizing Evergreen's tank truck so that it could not be used for other work. The restrictions in this contract against spraying on Sunday or in bad weather do not provide a basis for denying recovery on those days for loss of use of the tank truck for other work. When Evergreen received the written order to resume work on April 11 it was unable to do so because of repairs to its helicopter. Evergreen cannot reasonably expect to recover standby costs for its truck on April 11 when the Government was no longer causing any delay and the repairs prevented performance.

Accordingly, the Board finds that Evergreen is entitled to recover standby costs for its tank truck for 10 days for the period April 1 through April 10. Together with the Board's finding, above,

that Evergreen was entitled to 4 days standby costs before issuance of the stop work order, the total period for recovery of standby costs for the tank truck is 14 days. At the rate of \$405.60 provided in the interagency agreement in Government's exhibit 28, the amount of the recovery is \$5,678.40 for loss of use of the tank truck.

Summary

By reason of the Government's interference with the performance of this contract, Evergreen is entitled to recover \$3,500 for loss of use of its helicopter and \$5,678.40 for loss of use of its tank truck, a total recovery of \$9,178.40.

G. HERBERT PACKWOOD

Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW

Chief Administrative Judge

APPEAL OF DEAN PROSSER & CREW

IBCA-1471-6-81

Decided August 28, 1981

Contract No. (Not applicable), Bureau of Land Management.

Government Motion to Dismiss granted.

Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Formation and Validity: Implied and Constructive Contracts—Rules and Practice: Appeals: Dismissal—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Standing to Appeal

A Government motion to dismiss an appeal is granted where no express contract between the parties exists, there is no evidence from which an implied in fact contract could be inferred, and the Board is without jurisdiction over contracts implied in law, assuming appellant is seeking such relief.

APPEARANCES: Dean Prosser, Gold Hill, Oregon, for Appellant; Arthur V. Biggs and Eugene A. Briggs, Department Counsel, Portland, Oregon, for the Government.

*OPINION BY CHIEF
ADMINISTRATIVE
JUDGE McGRAW*

*INTERIOR BOARD OF
CONTRACT APPEALS*

The Government has filed a motion to dismiss the instant appeal citing, *inter alia*, sec. 2(4) and 6(a) of the Contract Disputes Act of 1978 (41 U.S.C. §§ 601(4) and 605(a) (Supp. II 1978)). Not cited by the Government in its motion but considered by the Board in reaching its decision is sec. 8(d) of the Contract Disputes Act of 1978 (41 U.S.C. § 607(d) (Supp. II 1978)).¹

On June 4, 1981, the appellant filed an appeal with this Board from a decision by the Bureau of Land Management (hereafter BLM) on Mar. 16, 1981, to reject the original

bid of Mar. 5, 1981, of the Foothills Creek residents (sometimes referred to as the Crew) to hand clear and plant the 22-acre unit #553 on Foothills Creek. In the notice of appeal the appellant states: "[N]ow that we have satisfactorily completed a BLM project with 700 hours and our own resources, all for free, it seems timely to make this appeal again, and to the proper Board."

In support of the appeal the appellant alleges (i) that the policy of the Department of the Interior stresses the use of nonchemical methods of forest management wherever possible; (ii) that the bid the Foothills Creek residents submitted on Mar. 5, 1981, was for the hand clearing and planting of the 22-acre proposed spray site #553, as the residents felt they were all adversely affected (their homes and livelihoods) by chemical forest management; (iii) that the bid was for far less than the equivalent cost of herbicides; (iv) that the bid was rejected principally on the ground that BLM had not solicited bids for the work, although BLM has authority to negotiate contracts under \$10,000, as was the case here;² (v)

² The notice of appeal states that the appeal had been submitted to the IBLA (Interior Board of Land Appeals) on Mar. 17, 1981. Accompanying the notice of appeal was a letter dated Mar. 17, 1981, in which the appellant states:

"The citizens of Foothills Creek request that the BLM solicit competitive bids for the hand-clearing of the proposed spray site on Right Fork, Foothills Creek. In light of all the facts which have been brought to your attention (presence of endangered species, documented sensitive individual in the vicinity, our willingness to work immediately and for a price under the BLM's estimated herbicide costs), we believe that the BLM should follow the mandate of the Dept. of the Interior to use this environmentally feasible alternative of hand-clearing."

¹ The section of the Act cited reads as follows:

"(d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims."

August 28, 1981

that on Apr. 3, 1981, BLM agreed to let the Foots Creek residents do the project for free;³ (vi) that the crew had invested 700 hours of its time and considerable expense in gas and tools but in March it had presented a viable, inexpensive alternative to herbicide management with its bid which was rejected; and (vii) that the project has cost the crew money and time and that they are being penalized for BLM's mismanagement (failure to acknowledge pine tree damage).⁴

In an affidavit which accompanied the Government's motion to dismiss the appeal, Mr. Hugh Shera, Medford District Manager, Bureau of Land Management states:

4. The Bureau records disclose that at no time has the Bureau of Land Management awarded, entered into or made a contract with Dean Prosser with respect to the 22 acre tract of land identified as Unit #553.

³ In a letter to the Board under date of Aug. 10, 1981, the appellant states:

"1.) The BLM repeatedly refused to publicly solicit bids and to contract with us fairly in spite of our timely and extremely low bid (March 5). 2.) Our contract for a timely, efficient low-cost means of doing the project was rejected by BLM in favor of a less efficient and more costly means. A paid contract not made with us in March was the worst sort of breach of contract, because then in April, when the BLM discovered that our proposal was indeed the most efficient means after all, then we were told we could do the project for free. 3.) The breach of contract is this: we worked 700 hours on a free contract because the BLM chose to disregard our contract for paid work."

⁴ In a letter to Mr. and Mrs. Dean Prosser under date of June 12, 1981, Mr. Gerald Nilles, BLM Area Manager, states:

"9. The crew volunteered to do this work for nothing if the BLM would not use herbicides on this unit. We sprayed several other units in the Rogue Resource Area with the same atrazine and 24D mix scheduled for Foots Cr. and received virtually no damage at all to the pine trees in those units."

5. Since there has never been a contractual relationship between Dean Prosser and the Bureau of Land Management regarding Unit #553, Dean Prosser has never submitted any claim against the Government relating to a contract for a decision of a contracting officer.

6. The Bureau records show that Dean Prosser and other residents of the Foots Creek area volunteered to donate without charge and did so donate their labor and materials to hand clear and plant the 22 acres of land known as Unit #553 and that the Bureau accepted this donation of services and materials in accordance with Section 307 of the Federal Land Policy Management Act (43 U.S.C. § 1737 (c) (1976)). Dean Prosser and the other residents volunteered to do this work on a without charge basis to avoid the Bureau's use of herbicides to clear this unit.

(Affidavit dated July 20, 1981, at 1, 2).

The Government acknowledges that it did solicit bids for a contract involving the use of herbicides for the spraying of 22 acres of land in the Foots Creek area; that it received an unsolicited proposal from Dean Prosser and Crew dated Mar. 5, 1981; that it subsequently accepted the offer of Dean Prosser and other residents of the Foots Creek area to donate without charge their labor and materials to hand clear and plant the 22 acres of land known as Unit #553; that the Bureau accepted the offer of Dean Prosser & Crew in accordance with the provision of the Federal Land Policy and Management Act, *supra*, and that the work of clearing and planting the 22-acre tract of land was performed by the appellant.

The appellant does not deny that it offered to perform the work in

question for free but advances the thesis that it is entitled to be paid for such work because its unsolicited proposal for the same work had been improperly rejected (nn. 2, 3, and accompanying text). The appellant has cited no authority for its position, however, and we are aware of none.

Generally speaking, matters within the discretion of the contracting officer are not subject to review by this Board. This is true not only with respect to decisions made prior to the time of contracting,⁵ but even after the contract is awarded.⁶ In this case there was no express contract and the admissions made by the appellant preclude a finding as to the meeting of the minds of the parties⁷ from which a contract implied in fact can be inferred.⁸ While the appellant's po-

sition appears to be that as a matter of law⁹ it should be paid for the services rendered and materials furnished in the course of hand clearing and planting the 22-acre tract of land involved in this case, the Court of Claims does not have jurisdiction over contracts implied in law;¹⁰ nor do we.¹¹

Decision

On the basis of the authorities cited and for the reasons stated, the Government's motion to dismiss the appeal is granted.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

⁵ *Circleville Metal Works, Inc.*, ASBCA No. 13177 (June 4, 1969), 69-1 BCA par. 7,718 (Government's decision to readvertise the procurement involved a policy matter and as such was outside the authority of the Board to review).

⁶ *Pirate's Cove Marina*, IBCA-1018-2-74 (Feb. 25, 1975), 75-1 BCA 11,109 (construing a concessionaire contract under which the contracting officer was authorized to relieve the contractor of its obligations when he determined that such action was in the interests of the United States, the Board found that in the absence of a clear showing of flagrant abuse, it could not look behind the contracting officer's failure to exercise his discretion in favor of the appellant).

⁷ As stated in *Porter v. United States*, 204 Ct. Cl. 355, 365 (1974), "[t]he general rule in government contract law is that a contract implied in fact is one 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.' *Baltimore & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923); *Algonac Manufacturing Co. v. United States*, 192 Ct. Cl. 649, 673-74 * * *." (Footnote omitted.)

⁸ In *Porter v. United States*, n.7 *supra*, the Court of Claims found that an implied in fact

contract could not be inferred from the circumstances involved in that case.

⁹ In *Algonac Manufacturing Co. v. United States*, *supra* at 649, the Court of Claims had occasion to note the basic difference between a contract implied in fact and a contract implied in law. Respecting the latter term the Court of Claims quotes with approval from the decision in *Baltimore & Ohio R.R. v. United States*, *supra* at 592, 597 in which the Supreme Court had stated: "The 'implied agreement' * * * is not an agreement 'implied in law,' more aptly termed a constructive or quasi contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress * * *." (*Algonac Manufacturing Co. v. United States*, *supra* at 673).

¹⁰ The Court of Claims has no jurisdiction over contracts implied in law. *Merritt v. United States*, 267 U.S. 338, 341 (1925). ("The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law * * *"); *Putnam Mills Corp. v. United States*, 202 Ct. Cl. 1, 8 n.3 (1973).

¹¹ Under the Contract Disputes Act of 1978, the jurisdiction of the various boards with respect to the claims brought before them is the same as that of the Court of Claims (n.1, *supra*).

GEOTHERMAL LEASING IN DESIGNATED WILDERNESS AREAS*

M-36937

June 11, 1981

Act of December 24, 1970—Geothermal Resources—Words and Phrases

"*Mineral*." Geothermal steam, as defined in sec. 2(c) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1001(c), is not a "mineral" as the term is used in the mineral leasing laws. Congress generally did not intend the Steam Act to be treated as a "mineral leasing law."

Act of September 3, 1964—Geothermal Leases: Lands Subject to

Congress, with the passage of the Geothermal Steam Act, 30 U.S.C. § 1001 *et seq.*, intended that geothermal leases be deemed as within the mineral leasing exception of sec. 4(d)(3) of the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3). Designated wilderness are open to geothermal leasing to the same extent they would have been at the date of their creation. Such leases are subject to the provisions of sec. 4(d)(3) of the Wilderness Act.

OPINION BY OFFICE OF THE SOLICITOR

TO: DIRECTOR, BUREAU OF LAND
MANAGEMENT

THROUGH: ASSISTANT SECRETARY—
LAND AND WATER RESOURCES
FROM: SOLICITOR

SUBJECT: GEOTHERMAL LEASING IN
DESIGNATED WILDERNESS AREAS

By memorandum of Nov. 3, 1980,
you requested this office to comment

*Not in chronological order.

on an opinion prepared by the Office of General Counsel, Department of Agriculture, on the captioned subject and to respond to certain questions on how BLM and Forest Service would correlate geothermal leasing on Forest Service lands in the event that we concur in the General Counsel's opinion. That opinion concluded that since geothermal resources were not minerals, they were not subject to the mineral leasing laws exception found in sec. 4(d)(3) of the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3), and therefore not available for leasing. In our letter to the General Counsel of Jan. 9, 1981, we suggested how BLM and Forest Service might handle applications for geothermal leases in designated wilderness areas administered by Forest Service if geothermal leasing in those areas were held not permissible under present law. This memorandum presents our opinion as to whether geothermal leasing is in fact permissible.

ISSUE

May the Secretary of the Interior issue geothermal leases for lands that are within the boundaries of designated wilderness areas?

SUMMARY

Based on an examination of the Geothermal Steam Act, the Wilderness Act of 1964, their respective legislative histories and pertinent case law, we conclude that geothermal steam (as defined in sec. 2(c) of the Geothermal Steam Act

(Steam Act), 30 U.S.C. § 1001(c)) is not a "mineral" as that phrase is used in the mineral leasing laws and that Congress generally did not intend the Steam Act to be treated as a mineral leasing law, but that wilderness areas designated subsequent to Dec. 24, 1970, are open to leasing under the Steam Act.

I. Geothermal Resources Are Not "Minerals" Within the Meaning of the Mineral Leasing Laws.

A. Legislative History

One of the early issues faced by Congress in considering legislation for geothermal resource disposal was the nature of that resource. One of the first bills introduced in 1962, H.R. 9515, 87th Cong., 2d Sess., would have amended 43 U.S.C. § 971 (providing for permits to build bathhouses next to mineral and medicinal springs) to provide for permitting of lands for geothermal development. A second legislative proposal, H.R. 11084, 87th Cong., 2d Sess., would have inserted the words "or geothermal steam" immediately following the word "gas" wherever that word appears in the Mineral Leasing Act of 1920.

At this same time, and for a few years previous, individuals had attempted appropriation of geothermal resources through the existing mineral and water disposal laws. Geothermal developers utilized among other tools placer mining claims, oil and gas leases, and state water appropriation permits in attempts to acquire rights to geother-

mal resources which would allow them to begin development. Needless to say, the system adopted by the individual developer influenced his perception of the nature of the thing being developed.¹

The Department responded by examining each of the federal mineral and water disposal laws in turn to determine if geothermal resources were susceptible to acquisi-

¹ One commenter made the following observation:

"The legal draftsman is met at the outset with a question: 'What are we looking for * * * leasing * * * purchasing * * * going to develop?' And many answers come back.

"The subject at hand involves a resource which is, basically, a gas. Or a liquid. Or a solid. In any case it either is or is not a 'mineral.'"

"We deal, from an examination of the nomenclature used in technical papers, in contracts for private geothermal resource development, records and reports of the Department of the Interior, variously with: geothermal water, geothermal steam, geothermal minerals, hot spring water and heat, earth thermal resources, earth heat, natural steam, geothermal products, earth-heatpower, geothermal steam and associated resources, geothermal water and associated resources, or "all fluid products of geothermal action * * * and any mineral or other product derived therefrom."

"As will become evident, the definition chosen very directly affects property and contractual rights. So too, may determination in any given instance that the product extracted from the earth is derived from meteoric water rather than magmatic water. And in turn, those seeking to acquire rights under present Federal law must early determine whether: to locate a mining claim under the General Mining Law of 1872; to file a lease offer under the Mineral Leasing Act of 1920; to file a prospecting permit application under the Mineral Leasing Act of 1920; to seek to obtain rights under the Mineral and Medicinal Springs Act of 1925; to file under the Materials Act of 1947; to obtain a water well drilling permit under applicable law of the state in which it is proposed to explore for geothermal resources—or to do all, or more than one, of these things simultaneously."

Geothermal Steam Leasing: Hearings on S. 883 before the Senate Subcommittee on Minerals, Materials and Fuels, Part I, 88th Cong., 1st Sess. at 78-79 (1963). (Footnotes omitted.)

June 11, 1981

tion. In an opinion dated Aug. 28, 1961, the Solicitor held that geothermal steam contained in public lands was not subject to sale as a mineral material under the Materials Act of 1947, *as amended*, 30 U.S.C. § 601 *et seq.* Solicitor's Opinion M-36625, "Authority of the Department of the Interior to dispose of geothermal steam contained in the public lands" (Aug. 28, 1961), reprinted in *Geothermal Steam Leasing: Hearings on S. 883* before the Senate Subcomm. on Minerals, Materials and Fuels, Part I, 88th Cong., 1st Sess. at 70-71 (1963). That opinion also held that hot springs which would be susceptible to beneficial development for geothermal use had been withdrawn from state water law appropriation by Executive Order No. 5389 of July 7, 1930.

Likewise, while seeking geothermal resource leasing legislation the Department consistently took the position that no conversion rights (*i.e.*, rights to trade or exchange existing mining claims or mineral leases for geothermal leases) be accorded to holders of either unpatented mining claims or mineral leases since neither the General Mining Law nor the Mineral Leasing Act of 1920 authorized the acquisition of geothermal development rights. *See e.g.*, Hearings on S. 883, Part II, *supra* at 107; S. Rep. No. 1508, 88th Cong., 2d Sess. 9-10 (1964); H.R. Rep. No. 2140, 89th Cong., 2d Sess. 26 (1966); *Disposition of Geothermal Steam: Hearings on H.R. 7334, H.R. 10204,*

S. 1674 before the House Subcomm. on Mines and Mining 33, 35 (1966); H.R. Rep. No. 91-1544, 91st Cong., 2d Sess. 6-7, 10 (1970). Indeed, the issue of conversion rights was one of the principal reasons for President Johnson's veto of S. 1674, *See* H.R. Doc. 47, 90th Cong., 1st Sess. 7-8 (1967); H.R. Rep. No. 91-1544, *supra* at 6.

This debate over conversion rights highlighted the question of the nature of the resource. Both Congress and the Executive Branch were well aware that geothermal resources were not "mineral" within the meaning of the mineral leasing laws. H.R. Rep. No. 2140, *supra* at 7 (S. 1674 not an "extension of the mineral laws"); *Id.* at 8 (geothermal leasing bill allowing for development of otherwise locatable mineral by-products not to be construed as precedent for general leasing system for locatable minerals); Hearings on H.R. 7334, *supra* at 33-34 (geothermal steam "is not a mineral under the public land laws"); S. Rep. No. 1508, *supra* at 10 (mineral deposits contrasted with "another resource," *i.e.*, geothermal). In addition, both Congress and the Executive Branch were well aware that existing statutes did not authorize the disposition of geothermal steam from the public lands.² *See, e.g.*, H.R.

² While both the Department and the Congress agreed that the mineral laws did not cover geothermal resources, they disagreed as to what preference, if any, should be granted to those who had attempted appropriation of geothermal resources under the mining and mineral leasing laws. Congress prevailed in allowing the preference. *See* 30 U.S.C. § 1003.

Rep. No. 91-1544, *supra*, at 5; S. Rep. No. 1508, *supra* at 1-2.

B. Case law

There are three cases helpful in addressing the question whether the Geothermal Steam Act is a law pertaining to mineral leasing.

The first case is *United States v. Union Oil Co. of California*, 549 F.2d 1271 (9th Cir.), *cert. denied sub nom. Ottoboni v. United States*, 434 U.S. 930 (1977), *rehearing denied*, 435 U.S. 911 (1978). The case was brought by the Attorney General pursuant to the direction in sec. 21(b) of the Steam Act, 30 U.S.C. § 1020(b), that an action be brought to obtain an authoritative judicial determination whether the mineral reservation in lands where the surface estate had been patented included geothermal resources.³ The *Union Oil* case involved lands patented under the Stock-Raising Homestead Act of 1916, 43 U.S.C. § 291 *et seq.*

After stating that "no one contends that water cannot be classified as a mineral" in the broadest sense of the word, *Union Oil*, *supra* at 1273 n. 5, the court turned to an examination of Congress' intent in enacting the Stock-Raising Homestead Act and its mineral reservation provision, 43 U.S.C. § 299. A review of the legislative history persuaded the court that Congress meant to create a surface estate sufficient for stock raising or forage

farming and a subsurface estate to be retained in government control for separate disposition. *E.g.*, *id.* at 1276, 1276 n.11, 1277, 1279. The Ninth Circuit concluded:

the mineral reservation is to be read broadly in light of the agricultural purpose of the grant itself, and in light of Congress's equally clear purpose to retain subsurface resources, particularly sources of energy, for separate disposition and development in the public interest. Geothermal resources contribute nothing to the capacity of the surface estate to sustain livestock. They are depletable subsurface reservoirs of energy, *akin* to deposits of coal and oil, which it was the particular objective of the reservation clause to retain in public ownership. *The purposes of the [Stock-Raising Homestead] Act will be served by including geothermal resources in the statute's reservation of "all the coal and other minerals."* Since the words employed are broad enough to encompass this result, the Act should be so interpreted.

Id. at 1279. (Italics added.)

The court at various points in the discussion tends toward classifying geothermal resources as a mineral. It never does so, however, since the question of the scope of the reservation is resolved by the legislative intent behind the Stock-Raising Homestead Act, to sever reserved subsurface resources from the conveyed agricultural estate. *Id.* at 1280 n. 19.

The Ninth Circuit did hold water to be a valuable mineral deposit for the purposes of the general mining laws. *Charlestone Stone Products Co., Inc. v. Andrus*, 553 F. 2d 1209 (9th Cir. 1977). On a writ of certiorari, the Supreme Court reversed

³ Sec. 21(b) was added by the House Committee on Interior and Insular Affairs to S. 368 in 1970, because of the conflicting views on the issue which had been presented to the Committee. H.R. Rep. No. 91-1544, *supra* at 8.

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in *Andrus v. Charlestone Stone Products Co., Inc.*, 436 U.S. 604 (1978). The Supreme Court rejected the Ninth Circuit's line of reasoning that since water was a mineral, in the broadest sense of the word, it was therefore subject to the mining laws. *Id.* at 610-611. Instead, the court looked to the purpose and meaning of the general mining laws, and their history and implementation, in concluding that water was not within the scope of those laws.⁴ While not dispositive on the question of geothermal resources, the fact that the court held water not subject to location under the mining law while denying a petition for rehearing on its original denial of a writ of certiorari in the *Ottoboni* case supports the distinction that the latter case turned upon the nature and purpose of the statutory reservation rather than the nature of the resource involved.⁵

⁴In this respect, the court's conclusion is the same as the Department's position in the often-cited Weinberg letters of Dec. 16, 1965, that water is not a mineral in the public land laws. Letters to Mr. Walter P. Capaccioli and Mrs. H. S. Gilmore, of Dec. 16, 1965, from Deputy Solicitor Edward Weinberg, reprinted in H.R. Rep. No. 91-1544, *supra* at 15-18. Mr. Weinberg went on to reason that geothermal steam was therefore not reserved to the United States under such acts as the Stock-Raising Homestead Act. As discussed previously, the Ninth Circuit arrived at the contrary conclusion based not on the nature of the resource but rather on the intent of the reservation.

⁵Petitioners in *Ottoboni* sought rehearing of the denial of certiorari after the Supreme Court had granted certiorari in *Charlestone Stone Products*. They expressly argued that the government was trying to have both sides of the argument, i.e., water a mineral under the Stock-Raising Homestead Act but not a mineral under the general mineral laws. See Petitioner's Brief for Rehearing at 4, 6, *Ottoboni v. United States*, *supra*. While no implication as to the merits of the case is

The only other case is *Reich v. Commissioner of Internal Revenue*, 52 T.C. 700 (1969), *aff'd*, 454 F.2d 1157 (9th Cir. 1972), where geothermal steam was found to be included within the word "gas" for the purpose of depletion allowances under 26 U.S.C. § 613(b).⁶ The tax court had held that: (1) steam, not heat, was the commercial product of the wells, since it was the steam's pressure that drove turbines; (2) steam was a gas within the meaning of secs. 613(a) and (b) (1) by ordinary commercial usage and technical definition; (3) steam was an "exhaustable resource"; and (4) there was nothing to show that Congress did not consider steam in enacting sec. 613(a) and (b). Given the finding that steam is an exhaustible natural resource, it is not surprising that the court looked for some place in 26 U.S.C. § 613(b) to pigeon hole geothermal steam.⁷ Again, as in *Union Oil*, the court's conclusion is

ordinarily to be drawn from the denial of certiorari, *United States v. Kras*, 409 U.S. 434 (1973), the Supreme Court had the argument of inconsistency before it and in our view confirmed the construction expressed herein by its action in *Charlestone Stone Products*. As pointed out above, when the holding of the Ninth Circuit's decision in *Union Oil* is compared with the holdings in the Supreme Court's decision in *Charlestone Stone Products*, the alleged inconsistency is resolved. See Government's Brief in Opposition to Petition for Rehearing at 3-8, *Ottoboni v. United States*, *supra*.

⁶Congress in the Energy Tax Act of 1978, P.L. 95-618, 92 Stat. 3174, specifically provided depletion allowance rates for geothermal resources and further provided that geothermal resources would not be treated as gas.

⁷Sec. 613(b) provided, in 1969, for varying percentage rates of depletion allowances depending on the mineral involved. A review of that section indicates that "gas" was probably the most logical place to put "steam."

not that geothermal resources are minerals for the purposes of the mineral leasing laws but rather that it was a "gas" for the purposes of the tax law.⁸

The most that can be said is that the Ninth Circuit in attempting to fit a "recent" resource into existing statutory and case law has often resorted to the analogy of leasable minerals. Neither the Ninth Circuit nor any other court has held, however, that geothermal resources are minerals for the purposes of the mineral leasing laws.

C. Effect of Section 26.

Sec. 26 of the Steam Act, which amends sec. 11 of the Multiple Mineral Development Act of 1954, 30 U.S.C. § 530, to include geothermal leasing in its provisions was suggested as an amendment to H.R. 2370 by the Department in 1970. Its purpose was described as amending the Multiple Mineral Development Act of 1954 (30 U.S.C. § 521 *et seq.*) "to make the Geothermal Steam Act a 'mineral leasing law' and to make geothermal resources a 'Leasing Act mineral' *within the meaning of the 1954 Act.*" H.R. Rep. 91-1544, *supra* at 14. (Italics added.)

As the quoted language makes clear and other provisions of the Steam Act suggest, however, this provision was only for the purpose of allowing and reconciling multiple development of locatable minerals and leasable geothermal resources on the same lands. In in-

cluding this provision the Department wisely forestalled the problems which had existed prior to the 1954 Act arising from different mineral lessees or applicants under the 1920 Leasing Act and mining claimants seeking various minerals on the same lands. See *Roos v. Altman*, 54 I.D. 47 (1932); *Sullivan v. Tendolle*, 48 L.D. 337 (1921).

The provisions of sec. 3 of the Steam Act suggest that sec. 26 is limited to questions of multiple "mineral" development. Sec. 3 authorizes the Secretary to issue leases on lands administered by him, including withdrawn lands. We have previously advised you informally that lands "withdrawn" from "mineral leasing" are available for geothermal leasing without modification of existing public land orders. In part, this is because sec. 3 makes withdrawn lands available for leasing, but it is also in part because geothermal leasing is not included within the meaning of the phrase "mineral leasing" in the standard public land order foreclosing mineral leasing.

D. Conclusion

We are of the opinion, therefore, that geothermal resources are not "mineral" as that word is generally understood in the mineral leasing laws. Further, geothermal leasing generally is not included in the phrase "mineral leasing laws" unless Congress has indicated an intent so to include it for specific purposes.

II. Wilderness Areas Designated Subsequent To The Geothermal

⁸ Cf. *United States v. Shurbert*, 347 F.2d 103 (5th Cir. 1965), holding "mined" ground water an exhaustible resource subject to a depletion allowance.

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Steam Act Are Subject To Geothermal Leasing.

Sec. 4(d)(3) of the Wilderness Act provides that, until midnight Dec. 31, 1983, "the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to Sept. 3, 1964, extend to those national forest lands designated * * * as 'wilderness areas.'" 16 U.S.C. § 1133 (d)(3) (1976). The question posed is whether Congress, with the passage of the Geothermal Steam Act, intended to include geothermal leasing in the mineral leasing exception of sec. 4(d)(3). We are persuaded that it did.

A. Legislative History

As concluded in Part I of this memorandum, geothermal leasing is generally not included in the phrase "mineral leasing laws" unless Congress has indicated an intent to so include it for a specific purpose. With respect to wilderness areas, such an intent is found in the legislative history of the Steam Act itself.

During hearings on H.R. 7334, H.R. 10204 and S. 1674 held in 1966, Committee Chairman Aspinall explored the scope of exclusions of lands from leasing under what is now sec. 15 of the Steam Act with Assistant Secretary of the Interior Anderson. Since that discussion and the Department's response is pivotal to the present issue, we present it in full.

Mr. ASPINALL. * * * You suggested that you did not want any development in na-

tional park areas and one or two other areas. Do you want any development in wilderness areas or primitive areas?

These are policy questions. This is the reason we have the Secretary here.

Mr. ANDERSON. Sir, as far as involvement in the wilderness area and in the primitive areas and other areas are concerned, what we are primarily interested in here is to protect the major purpose for which these areas are set forth, just like the national parks. Now, we have provided here that we may lease, may provide for leasing on the wildlife areas. The wilderness areas are in a different category, and I am not sure, Mr. Chairman, where they would fall.

Mr. ASPINALL. I think perhaps the Department had better answer that question, too. So unless there is an objection the answer will be received and placed in the record at this place. We have been through all this, Mr. Secretary.

Hearings on H.R. 7334, H.R. 10204, S. 1674, *supra* at 48. The Department responded by letter of July 13, 1966, to Congressman Aspinall stating:

Under S. 1674, geothermal leasing is not prohibited in wilderness and primitive areas.

Section 4(d)(3) of the Wilderness Act of September 3, 1964 (78 Stat. 894), continues mineral leasing laws in effect within the National Forest Wilderness until midnight December 31, 1983, subject to regulation by the Secretary of Agriculture and to protective reasonable stipulations that he may impose. After that date mineral leasing is prohibited.

If S. 1674 is enacted in its present form, we would apply to geothermal leasing the same policy that applies to mineral leasing. We would have no objection, however, to writing that policy into the bill.

Under the provisions of section 3(b) and (c) of the Wilderness Act, primitive areas in the national forests, and road-

less areas meeting size standards in the National Park System and National Wildlife Refuge System, and all roadless islands in the National Wildlife Refuge System, are currently undergoing review on the basis of which recommendations will be submitted by the President to the Congress with respect to whether each area or island is suitable or not suitable for preservation as wilderness. Whether the mineral leasing laws should continue to apply is one of the questions involved in the review. Similarly, whether geothermal leasing should be completely precluded in such areas or islands, or whether it should remain as a matter for administrative discretion, will be considered. Such questions are amenable to legislative resolution as the review reports are received and considered by the Congress.

Id. at 49.

The Department's testimony and comments in the July 13, 1966, letter are not entirely logical. They imply that the reason geothermal leasing would be allowed is because it falls within the "mineral leasing" language of sec. 4(d)(3) of the Wilderness Act. That is inconsistent with Anderson's own testimony as to the "mineral" character of geothermal resources. Hearings on H.R. 7334, *supra* at 33-34. Further, those comments imply that geothermal leasing would apply to existing, designated wilderness. That implication, in turn, ignores the language in 4(d)(3) that such leasing be allowed "to the same extent" as occurring at the time of designation, even though there was no geothermal leasing authority then in existence. (*See* discussion *infra*.) Despite the fact that there existed some confusion in the logic of the

underpinnings of the Department's comments and testimony, it is clear that the Department intended that geothermal leasing would be allowable in wilderness areas consistent with the Wilderness Act. Congress' agreement with this result is evidenced, in part, by sec. 15 of the Steam Act.

Sec. 15(c) contains the list of lands which are excluded from leasing. They include lands administered under the National Parks Act of 1916, national recreation areas, wildlife refuges, ranges and management areas, lands acquired or reserved for protection of endangered species and Indian trust or restricted lands. Congress chose not to include wilderness areas in this statutory list of excluded lands. In light of the fact that the Department told the Congress how it intended to administer the Steam Act in wilderness areas, the absence of wilderness from sec. 15 corroborates Congressional agreement.⁹

This conclusion that Congress intended geothermal leasing to take place in designated wilderness does not automatically open all areas of the Wilderness Preservation System to leasing. As previously noted, the language of sec. 4(d)(3) of the

⁹ Congress was well aware of the scope of the exclusions in the Steam Act inasmuch as the provision dealing with wildlife refuges, game ranges and management areas was added and deleted in several bills over the course of congressional deliberation. *See, e.g.*, S. 883 [Committee Print] of Oct. 1, 1963; Hearings on S. 883, *supra* at 91-105, 107; S. Rep. No. 1508, *supra* at 7, 8, 12; sec. 4 of S. 883 of the House (as referred to Committee on Aug. 31, 1964); S. Rep. No. 683, 89th Cong., 1st Sess. at 3 (1965); H.R. Rep. No. 2140, *supra* at 4; 9; S. Rep. No. 91-1544, *supra* at 5.

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Wilderness Act provides for leasing "to the same extent as applicable prior to Sept. 3, 1964." We believe that the operative date for fixing the nature and scope of the applicable "mineral" leasing laws and mining laws (including geothermal resource leasing) is the date on which the area is designated as wilderness.¹⁰ This is consistent with the Wilderness Act itself, which applies the mineral leasing laws as they existed prior to the date of its passage to the wilderness areas it designated. It is also consistent with Congressional statements in later wilderness bills indicating that for purposes of administration of the areas under sec. 4(d)(3) any reference to the effective date of the Wilderness Act should be deemed to be a reference to the effective date of the bill. *E.g.*, Rattlesnake National Recreation Area and Wilderness Act of 1980, P.L. 96-476, 94 Stat. 2271, § 2(b).

For those areas designated as wilderness by the Wilderness Act prior to Dec. 24, 1970, geothermal leasing would not be allowed since there was no "same extent" with regard to the geothermal leasing as of the dates of designation of those wilderness areas. For wilderness areas designated since 1964, as previously stated, we are of the opinion that the "same extent" language fixes the leasing system as of the

date of designation and not the date of passage of the Wilderness Act. Thus, lands designated as wilderness subsequent to the passage of the Steam Act would be available for leasing under that Act to the "same extent" they were prior to designation. However, lands designated prior to the passage of the Steam Act would not be available for leasing.

III. Conclusions

We are of the opinion that geothermal resources are not "mineral" as that term is used in the mining and mineral leasing laws. Further, Congress generally has not included geothermal leasing when it uses phrases such as "mineral leasing laws." However, in certain instances, Congress has deemed geothermal leasing to fall within the phrase "mineral leasing." Such inclusion is to be shown by clear legislative intent.

We are further persuaded that Congress did intend geothermal leasing to be within the scope of the phrase "laws pertaining to mineral leasing" in sec. 4(d)(3) of the Wilderness Act, and that designated wilderness areas remain available for geothermal leasing to the "same extent" they were at time of designation. This means that only lands in wilderness areas designated subsequent to the passage of the Steam Act in 1970 would be available for geothermal leasing.

WILLIAM H. COLDIRON

Solicitor

¹⁰ It follows from the conclusions of this memorandum that the other provisions of sec. 4(d)(3) of the Wilderness Act apply in like manner to geothermal leasing as they do to the mineral leasing and mining laws.

**CORINNE MAE HOWELL & HER
MINOR CHILDREN, GARY AR-
NOLD HOWELL, RICHARD DE-
WAYNE HOWELL & DARCY
LYNN HOWELL**

V.

UNITED STATES

9 IBIA 70

Decided September 9, 1981

Decision on petition for reconsideration in Alaska Native Disenrollment contest following decision ordering appellants disenrolled from the roll of beneficiaries of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977).

Reconsideration denied.

**1. Indian Tribes: Alaskan Groups—
Alaska Native Claims Settlement Act:
Disenrollment: Metlakatla Natives—
Administrative Authority: Estoppel**

Exclusion of appellant members of the Metlakatla Community from benefits under provisions of the Alaska Native Claims Settlement Act held not to be precluded by a contrary result reached in a prior Administrative Law Judge's decision in a similar case. The determination by the agency factfinder in the separate but similar situation is not binding upon the Board of Indian Appeals, which renders final decision for the Department in disenrollment appeals referred on appeal to the Board.

APPEARANCES: Barbara J. Blasco, Esq., and Stephen R. West, Esq., for appellants Corinne Mae Howell, Gary Arnold Howell, Richard Dewayne Howell, and Darcy Lynn Howell; Bruce Schultheis, Esq., Anchorage Solicitor's Office, for appellee.

**OPINION BY
ADMINISTRATIVE
JUDGE ARNESS**

**INTERIOR BOARD OF
INDIAN AFFAIRS**

On June 29, 1981, appellants requested the Board to reconsider its June 11, 1981, decision holding that they should be disenrolled as beneficiaries under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977). (9 IBIA 3, 88 I.D. 575 (1981)). Appellants argue that the doctrines of res judicata, stare decisis, and collateral estoppel prevent the Board from reaching a decision contrary to that reached in *United States v. Anderson*, Docket No. AL 77-57D, decided Nov. 30, 1977. That case allowed disenrollment contestees who had one-fourth or more Native ancestry other than Tsimshian to be enrolled under ANCSA whether or not they were also enrolled in the Metlakatla Community on Apr. 1, 1970.¹ This argument must be rejected for several reasons.

[1] First, *Anderson* was decided by an Administrative Law Judge of the Office of Hearings and Appeals. It was not appealed as permitted by 43 CFR 4.1010. The Secretary's final review authority over disenrollment contests is vested in the Interior Board of Indian Appeals, sitting as an Ad Hoc Appeals Board, not in Departmental Administrative Law Judges. 43 CFR 4.1(b)(6) and 4.1010. Therefore,

¹ The Apr. 1, 1970, date is made determinative by 25 CFR 43h.11.

September 9, 1981

whatever *res judicata*, *stare decisis*, or collateral estoppel arguments may be raised against the Department by the contestees in *Anderson*, those arguments cannot be used to bind the Secretary to an interpretation of law which the Board has determined to be incorrect.²

Second, even if the decision in *Anderson* were held to be prior precedent of equal dignity with a Board ruling, the Board would not be precluded from correcting an erroneous prior interpretation of the statute. See *McDade v. Morton*, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974). The Board decision in this case clearly sets forth and rejects the mistake of law upon which *Anderson* was based. *Howell v. United States*, 9 IBIA 3, 88 I.D. 575 (1981). Therefore, to the extent that the present decision could be construed as a departure from the prior administrative position, that departure is adequately shown to be neither arbitrary nor capricious. See *Squaw Transit Co. v. United States*, 574 F.2d 492 (10th Cir. 1978); *FTC v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970).³

² Appellants argue that they will be treated differently from the similarly situated contestees in *Anderson* as a result of this decision. To the extent that disparate treatment results, it is the consequence of an earlier erroneous interpretation of the law. Prior error, however, cannot be raised as a bar to the correction of that error. Furthermore, the Board cannot assume that the prior erroneous determination in the *Anderson* cases will go uncorrected.

³ Both of these cases acknowledged the agency's right to change its policy, but ordered the agency to explain its departure from prior rulings.

Third, appellants' reliance on *Anderson* ignores the existence of a subsequent ruling by the Board on this issue. In *Alaska Native Disenrollment Appeals of James Edward Scott, Sr. and Robert Charles Scott*, 7 IBIA 157, 86 I.D. 333 (1979), the Board upheld the disenrollment under ANCSA of an individual who was an enrolled member of the Metlakatla Community on Apr. 1, 1970. Because that fact alone was found to be dispositive under ANCSA, the Board did not consider the individual's Native ancestry. Similarly, in *Henry Sam Littlefield, Jr.*, 7 IBIA 128, 133, 86 I.D. 217, 219 (1979), the Board's opinion observed "that membership in the Metlakatla Indian Community on April 1, 1970, presents a bar to enrollment under the Alaska Native Claims Settlement Act."⁴ Thus, the decision now under consideration conforms with established Board precedent.

Finally, appellants' argument misconstrues the doctrines of *stare decisis*, *res judicata*, and collateral estoppel in the appellate process. According to appellants' interpretation of these doctrines, an appellate tribunal could never correct an error made at the hearing level, but would be bound to perpetuate the error of the earlier decision. Such reasoning puts form over substance and negates the essence of the appellate process—reviewing and correcting error.

⁴ The Board went on to find in *Littlefield* that the appellant was not a member of the community and so was eligible for enrollment under ANCSA.

For these reasons, appellants' request for reconsideration is denied.

FRANKLIN D. ARNESS

Administrative Judge

WE CONCUR:

WM. PHILIP HORTON

Chief Administrative Judge

JERRY MUSKRAT

Administrative Judge

ATOMIC FUEL CO., INC.

3 IBSMA 287

Decided September 17, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement from that portion of a Dec. 23, 1980, decision, in Docket No. CH 0-295-R, by Administrative Law Judge Tom M. Allen, which vacated Cessation Order No. 80-I-43-7, issued to Atomic Fuel Co., Inc., for failure to abate a violation of the approximate original contour requirements (30 CFR 715.14) promulgated under the authority of the Surface Mining Control and Reclamation Act of 1977.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

Filing an application for review of a notice of violation does not stay that notice.

APPEARANCES: James M. McElfish, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor, Office of the Solicitor,

Washington, D.C., for appellant, Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On June 17, 1980, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited the surface mine (State permit 2087) of Atomic Fuel Co., Inc. (Atomic), in Buchanan County, Virginia. During his inspection of the mine, the inspector, acting pursuant to his authority under the Surface Mining Control and Reclamation Act of 1977 (Act),¹ issued Notice of Violation No. 80-I-43-25 (NOV) charging Atomic with a violation of the approximate original contour requirements of 30 CFR 715.14, and prescribing a 90-day period for abatement of the violation. Atomic filed an application for review of the NOV on June 30, 1980.

The inspector returned to the mine on Sept. 24, 1980, after the abatement period had elapsed. He determined that Atomic had not properly abated the violation and accordingly issued Cessation Order No. 80-I-43-7 (CO). On Oct. 23, 1980, during the pendency of the application for review of the under-

¹ Act of Aug. 3, 1977, P.L. 95-87, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

lying NOV, Atomic applied for review of the CO.

The proceeding for review of the NOV was consolidated with the proceeding for review of the CO, and the Administrative Law Judge held a hearing in the case on Oct. 28, 1980.²

In his Dec. 23, 1980, decision, the Administrative Law Judge, among other actions, affirmed the issuance of the NOV in part but vacated the CO because Atomic had filed for review of the NOV before issuance of the CO. He stated: "[S]ince the violations were challenged by the applicant prior to the issuance of the cessation order, said cessation order should not have been issued until a resolution of the validity of the [NOV] had occurred and for that reason only the same should be set aside * * *" (Decision at 4).

OSM appealed, and only OSM

filed a brief with the Board on review.

Discussion

[1] The action vacating the CO was clearly erroneous. The Act and the regulations provide that the filing of an application for review of a notice of violation does not enjoin the issuance of a cessation order under the authority of sec. 521(a)(3) of the Act.³ That section requires the issuance of a cessation order upon failure to abate a violation. (The inspector "*shall* immediately order a cessation of surface coal mining and reclamation operations or the [appropriate] portion" (*italics added*) of the operations if abatement has no occurred.) The regulations are to the same effect. 30 CFR 722.13. Moreover, the Act specifically provides in sec. 525(a)(1) (as do the regulations, even more explicitly, in 43 CFR 4.1116) that the filing of an application for review shall not operate as a stay of any order or notice (unless temporary relief is granted).⁴ If such

² Although the Administrative Law Judge's decision of Dec. 23, 1980, includes the designation "Application for Temporary Relief" in the caption (along with "Application for Review"), and although both the decision (at 4) and the transcript (at 4, 6, and 92) mention temporary relief, there is no application for temporary relief in the record certified to us by the Administrative Law Judge. OSM suggests that the Administrative Law Judge treated the application for review of the CO as an application for temporary relief. OSM Brief at 2. Whether or not that is so, the Administrative Law Judge conducted the consolidated hearing by receiving testimony on the merits of the NOV first, correctly stating that the outcome "may eliminate the necessity for considering an application for temporary relief either way" (Tr. at 6). At the conclusion of that portion of the hearing and in the decision the Administrative Law Judge also correctly stated that since he had upheld the violation a hearing on temporary relief was unnecessary (Tr. at 92; Decision at 4). Thus, even if there were an application for temporary relief, as the Administrative Law Judge indicated (Tr. at 92), it was properly denied.

³ 30 U.S.C. § 1271(a)(3) (Supp. II 1978).

⁴ The Administrative Law Judge acknowledged this provision but disregarded it, saying: "[I]t has been the customary practice in Region I [of OSM] not to issue a cessation order for failure to abate where an application has been filed when no imminent or foreseeable danger to person, property or the environment will occur or be occasioned by the delay." Decision at 4 n.2. OSM denies there is such a customary practice; what it says it does occasionally is postpone reinspection or extend the period of abatement within the 90-day maximum when an application for temporary relief has been filed and a hearing has been scheduled near the end of the abatement period. OSM Brief at 10-11. Even if OSM had such a policy, there was no testimony concerning it introduced at the hearing.

filing may not operate as a stay, the most notable effect of that provision, at least as far as notices are concerned, is that the running of the abatement period time will continue.

The proper and only avenue for avoiding the effect of sec. 525 (a) (1) is to obtain an order granting temporary relief under the authority of sec. 525(c). Here, Atomic did not file for temporary relief from the NOV and could not have obtained in it any event because the Administrative Law Judge affirmed the issuance of the NOV. Finally, the Department contemplates the possibility that a cessation order may be issued during the pendency of review of an underlying notice of violation, for the regulations require the applicant, in 43 CFR 4.1170, to file in a notice of violation review proceeding a copy of a cessation order issued because of the failure to abate that underlying notice of violation.

Therefore, the decision appealed from is reversed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

DIAMOND COAL CO.

3 IBSMA 292

Decided September 17, 1981

Appeal by the Office of Surface Mining
Reclamation and Enforcement from

those portions of a Mar. 31, 1980, decision by Administrative Law Judge Tom M. Allen in Docket Nos. NX 9-63-P and NX 0-25-P vacating four violations charged against Diamond Coal Co. and setting penalty assessments for two other notices of violation at amounts below those proposed by OSM.

Reversed in part, affirmed in part,
and remanded in part.

1. Surface Mining Control and Reclamation Act of 1977: Topsoil: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Contaminant." Where OSM shows that spoil materials have been mixed with topsoil it has made a prima facie case of a violation of 30 CFR 715.16 for failure to protect the topsoil from contaminants.

2. Surface Mining Control and Reclamation Act of 1977: Signs and Markers: Generally

Where a mine identification sign is located on one side of a highway and is clearly visible from the other side from which there is access to the mine's nearby processing facility, the Board is unwilling to say that that is insufficient to comply with the requirement of 30 CFR 715.12 (b).

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

Even where the petitioner, in a civil penalty proceeding, admits the validity of the issuance of a notice of violation and the hearing proceeds on the penalty

amount issues only, the Administrative Law Judge is not bound to accept the admission when the penalty amount evidence raises a question in his mind whether the violation in fact occurred.

4. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

Where the parties have agreed to the existence of a violation and a penalty hearing is conducted on the basis of that agreement, if the Administrative Law Judge determines, either during or after the hearing, that the evidence may not support a violation, he shall make that determination known to the parties and, if necessary, reopen the hearing to allow OSM an opportunity to prove its case and the operator to counter that proof.

5. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

Although the Hearings Division is not bound to accept the OSM Assessment Branch's evaluation of the evidence in terms of assigning civil penalty points, where an Administrative Law Judge finds a violation occurred, he is required to adhere to the point system in 30 CFR 723.13 unless he determines that a waiver would further abatement of violations of the Act.

APPEARANCES: John Philip Williams, Esq., Office of the Field Solicitor (Knoxville), and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; and Charles J. Baird, Esq., Baird and Baird, Pikeville, Kentucky, for Diamond Coal Co., Inc.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

In the Hearings Division, this case was a civil penalty proceeding consolidated to review the merits of and the assessments proposed for seven notices of violation and one cessation order. The enforcement documents collectively charged 21 violations of the Surface Mining Control and Reclamation Act of 1977 (Act) ¹ at Diamond Coal Company's (Diamond) mine and processing plant in Pike County, Kentucky. On May 20, 1980, we granted the Office of Surface Mining Reclamation and Enforcement's (OSM) petition for discretionary review of the Administrative Law Judge's Mar. 31, 1980, decision concerning six of the alleged violations reviewed. We discuss these violations under four parts below.

I.

[1] On Dec. 21, 1978, an OSM inspector issued Notice of Violation No. 78-II-18-9 to Diamond. The first violation charged was for "a failure to prevent topsoil from being contaminated by spoil and waste materials" contrary to the requirements of 30 CFR 715.16. The evidence established that there were spoil materials on the topsoil pile. See Decision at 5. The Administrative Law Judge nevertheless vacated the violation on the basis of

¹ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

his construction of the following portion of the regulation: "§715.16 * * * The topsoil shall be segregated, stockpiled, and protected from * * * contaminants *which lessen its capability to support vegetation* * * *." (Italics supplied.) The major controversy in this portion of the case has been over the proper construction of the phrase underscored above. Diamond agrees with the decision's approach that the phrase implies there are potentially two classes of contaminants, those that lessen the capability of the topsoil to support vegetation and those that do not. OSM's argument is that contaminants, by definition, lessen that capability and that the phrase is essentially gratuitous, being descriptive of all contaminants.² We are persuaded that OSM has the better argument.

"Contaminate" is the "admixture or introduction of undesired substances to a medium, thereby reducing the value of the medium or making it unfit for its intended use."³

Where, as in this case, OSM proves that spoil materials such as shale and coal were mixed with topsoil, the probability is high that the capacity of the topsoil to support

vegetation will be reduced. Based on that probability, a presumption arises that the topsoil is less capable of supporting vegetation, and OSM has made a prima facie case of a violation of the topsoil handling requirements of 30 CFR 715.16. An operator, of course, may rebut the presumption and overcome OSM's prima facie case by showing that the materials involved do not lessen the capability of the topsoil to support vegetation. Diamond made no such showing in this case.⁴ We reverse the Administrative Law Judge's decision vacating Notice of Violation No. 78-II-18-9 and remand the case in order to give Diamond the opportunity to make the necessary showing if it wishes to do so.

II.

On Feb. 12, 1979, an OSM inspector issued Notice of Violation No. 79-II-36-10 for three alleged violations at Diamond's processing and loading facility. That portion

² OSM also argues that the system established by the various topsoil handling provisions supports its position. For instance, there is the materials variance provision of sec. 715.16(a)(4), and there is the presumption in the removal provision of sec. 715.16(a)(1) and (2) that certain materials should be segregated because of their greater capacity for supporting vegetation.

³ A *Dictionary of Mining, Mineral, and Related Terms*, U.S. Department of the Interior at 254. See also *American Casualty Co. of Reading, Pa. v. Myrick*, 304 F.2d 179 (5th Cir. 1962), at 183.

⁴ Diamond did argue that it should be relieved of liability for the apparent violation because the placement of spoil on the pile was inadvertent and because, in any event, there was so little that no notice of violation should have been issued. As to inadvertence, it cannot be a defense. The purpose of the enforcement program is to require correction of violations regardless of their origin, not to impose liability based on intent. Regarding the quantity of spoil, the Administrative Law Judge made no finding. He apparently was satisfied that the elements necessary to establish a violation were present, other than the element he based on the phrase in sec. 715.16. At the hearing the Administrative Law Judge stated that an area 5 by 10 feet on a topsoil pile 40 feet square and 10 feet high was "disturbed" by contaminants (Tr. 89). This could well be enough contamination to inhibit the topsoil's capacity to support vegetation, depending on the nature of the contaminants.

of the decision from which review has been sought involves only one of those alleged violations, failure to post a mine identification sign at the entrance to the tippie from a public road in violation of the requirements of 30 CFR 715.12(b). The Administrative Law Judge vacated the violation because of his conclusion, relying on the reasoning of *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979), that OSM did not have enforcement authority over the facility.

Whether or not this particular tippie is subject to the authority of OSM, the facts are that the mine access road and the tippie are on opposite sides of U.S. Highway 23 and that a mine identification sign on the mine side of the highway was clearly visible from the tippie side. In these circumstances, we are unwilling to say that the sign is insufficient to comply with the requirement OSM charged Diamond with breaching. Accordingly, we affirm.

III.

[3, 4] On Feb. 21, 1979, an OSM inspector issued Notice of Violation No. 79-II-36-11, charging six violations. Violations 4 and 5 charged Diamond with allowing spoil and debris to remain on the downslope in violation of 30 CFR 716.2 at two separate locations in the mine area. Diamond admitted the violations at the hearing, and the parties proceeded to present evidence only on the penalty amount issue. At the conclusion of the presentation, the

Administrative Law Judge orally upheld the violations and assessed penalties. In his written decision, however, and without further opportunity for presentation of evidence or argument by the parties, he reversed his oral ruling and vacated these violations. In the decision, he announced that his review of the transcript disclosed that the evidence presented on the penalty issues led him to the conclusion that there had not been a violation committed at either of the sites. His findings were that in each case the allegedly violative condition was caused by a slide occurring below an already reclaimed bench area and that the slides occurred without any causative action by Diamond. Moreover, as to violation 4, the area affected was outside the permit. Besides apparently concluding that Diamond was not responsible for the conditions because they occurred naturally below the area disturbed and after reclamation, the Administrative Law Judge also concluded that the material alleged to be spoil could not be because it came from an area not disturbed by Diamond and not as a result of any disturbance (Decision at 9-11).

OSM argues that, since Diamond admitted the violations at the hearing, OSM made no effort to present evidence supporting their existence and, therefore, the Administrative Law Judge's finding that they did not exist was made in the absence of notice and an opportunity to be heard on that issue.

We agree. OSM may indeed have evidence not presented at the hearing which would support its enforcement action (although, contrary to its assertion, it did present evidence which, at least in the Administrative Law Judge's view, did not relate solely to penalty issues and which detracted from the validity of its action). Thus, although the Administrative Law Judge properly did not ignore evidence he took to be contradictory to the fact of a violation, he should have informed the parties of his misgivings before proceeding further and given them an opportunity to present evidence and argument on the issue. Therefore, we vacate the decision on these violations and remand to the Hearings Division for taking further evidence and hearing further argument as appropriate.

IV.

On Jan. 25, 1979, an OSM inspector issued Notice of Violation No. 79-II-36-4, and on Aug. 3, 1979, an inspector issued Notice of Violation No. 79-II-55-17. Both charged violations of 30 CFR 715.17(a), excess suspended solids in discharge from a sedimentation pond. In each case the excess was caused, at least in part, by a slide from an already reclaimed outslope area off the permit. The OSM Assessment Branch had proposed penalties of \$1,800 and \$420, respectively, for the violations, based on 38 and 21 points. *See* 30 CFR 723.14.⁵ The Administrative Law Judge

affirmed the issuance of the notices with respect to these violations but reduced the penalties to \$40 each, based on two points for each violation.

[5] OSM is required to assign 15 points for the probability of a violation if it in fact occurred, 30 CFR 723.13(b)(2)(i), and at least 8 points if the damage the violated standard was designed to prevent extends outside of the permit area. 30 CFR 723.13(b)(2)(ii)(B).⁶ These two violations did occur and did extend outside Diamond's permit area. The Administrative Law Judge, however, assigned only one point for probability of occurrence and one for damage for each of these two violations. Although an Administrative Law Judge is not bound to adopt the Assessment Branch's evaluation of the evidence in assigning points, where, as here, he finds a violation occurred, he is required to adhere to the point system contained in 30 CFR 723.13 unless he determines that a waiver would further abatement of violations of the Act. 43 CFR 4.1157(b)(1). In this case the Administrative Law Judge did not make this determination or incorporate any basis or reasons for doing so. *See* 43 CFR 4.1127.⁷ Since we re-

⁵ 45 FR 58780, 58783 (Sept. 4, 1980).

⁷ This waiver is circumscribed. It may not be granted, for example, on the basis of an argument that a reduction in a proposed assessment could be used to abate other violations of the Act. 43 CFR 4.1157(b)(1). Even where it is granted, the Administrative Law Judge's decision should explain specifically how abatement of violations of the Act will be furthered. *Cf.*, 30 CFR 723.16 (45 FR 58780, 58784-58785, (Sept. 4, 1980)).

⁶ 45 FR 58780, 58784 (Sept. 4, 1980).

mand the case for the reasons stated in Parts I and III, we also remand this portion of the case so that the Administrative Law Judge may consider whether to make this determination, with additional argument from the parties if appropriate.

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

WEST VIRGINIA ENERGY, INC.

3 IBSMA 301

Decided September 17, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement from an Oct. 3, 1980, decision by Administrative Law Judge Sheldon L. Shepherd, vacating Notice of Violation No. 79-I-38-44 and Cessation Order No. 79-I-38-53 issued to West Virginia Energy, Inc., on the ground that the operation subject of the enforcement action was beyond regulation under the Act because of the Government-financed construction exemption of sec. 528(3).

Reversed except for remittance of penalties.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally

Where an operator removes coal in the process of rehabilitating a State road

but there is no proof that the State expended funds to finance the project comprising at least 50 percent of the cost of the project, the project does not fall within the definition of "Government-financed construction" in 30 CFR 707.5, and the operator therefore cannot claim the exemption from applicability of the Act appearing in sec. 528(3).

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Action—Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally

The Board will not uphold a cessation order issued for a failure to abate a violation charged where that failure is premised on noncompliance with a remedial measure which has no rational relationship to the violation charged.

APPEARANCES: Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, and James M. McElfish, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for appellant Office of Surface Mining Reclamation and Enforcement; George J. Anetakis, Esq., Frankovitch and Anetakis, Weirton, West Virginia, for appellee West Virginia Energy, Inc.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

Appellee/respondent West Virginia Energy, Inc. (Energy), conducts a surface mining operation

(State permit 32-78) in Brooke County, West Virginia. To facilitate its mining, Energy has used a public road, known as Forty-Nine Hill, for the purposes of access and haulage; this road was fully permitted and bonded.

The West Virginia State Highway authority received a significant number of complaints and expressions of concern from area residents regarding Energy's use of Forty-Nine Hill. Typical of those concerns were apprehensions about failed brakes on coal trucks and the potential consequences of confrontations between coal trucks and school buses, which also used the road. Because of the complaints, the highway department approached Energy seeking a solution. After discussions, Energy and the State signed an agreement which provided the following: (1) Energy would upgrade another existing public road (McCords Hill Road, State Route 67-2) for use as an access and haul road for a distance of 2,000 to 2,500 feet (while the State worked on another shorter section of the same road for the same purpose); (2) the State would provide Energy with certain assistance on the latter's portion of the project, including the provision of new culvert pipes to replace old, nonfunctioning culverts; and (3) upon completion of the project, Energy would dedicate the improvements to the State. The agreement also called for Energy's compliance with State highway grading and reclamation requirements. McCords Hill Road,

too, had been the subject of complaints from public users, albeit not as a result of an operator's usage. Although not as heavily traveled as Forty-Nine Hill (*i.e.*, apparently no school buses), it does provide access to a number of private residences, and, having been built in the area of an old underground mine and over some coal deposits, it was extremely unstable and the subject of a continuing series of slips as a result.

Energy owns the land on which McCords Hill Road is located, but the road is not on its permit. Anticipating that it would be removing coal in the conduct of the road rehabilitation project, Energy inquired of the State whether a permit would be required (Tr. 124-25). The State replied that no permit was necessary insofar as there was an agreement covering the project and that there was a performance bond (which Energy had posted for completion).

The preliminaries completed, Energy undertook the project, changing the existing contour of the land and ultimately disturbing about 5 acres, including a well-constructed hollow fill used for the storage of excess spoil. The Administrative Law Judge found that no area was disturbed (other than the fill) that was not part of the roadway, its right-of-way, or areas contiguous thereto, the disturbance of which was necessary to the proper completion of the project. Energy also worked on some old underground workings some distance from the road. Before Energy com-

September 17, 1981

pleted its efforts on them, the workings had been the source of drainage which had had considerable impact on the preexisting road's problems with stability. During the course of the road project, Energy removed and placed into interstate commerce 800 tons of coal. Although the State did provide some materiel to Energy and although it expended a considerable amount of effort on its part of the project, no State funds were used to complete Energy's part of the project.

On Sept. 5, 1979, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector issued Notice of Violation No. 79-I-38-44 (NOV) to Energy for conducting surface mining operations without a permit with respect to the area of the road improvement project, in contravention of 30 CFR 710.11. The NOV required two remedial actions: (1) No further coal removal without permit and (2) return of the disturbed area to its predisturbance condition through revegetation and grading. OSM proposed an assessment of \$2,500 for the alleged violation. It was based upon a total of 45 points, computed in the following manner:

Seriousness	Points
1. Probability of occurrence.....	15
2. Extent of potential or actual damage	8
Subtotal	23
Lack of Good Faith.....	10
Negligence	12
Total	45

After an assessment conference the lack of good faith points were eliminated, resulting in a total of 35 points, for which a \$1,500 penalty was assessed.

On November 21 the inspector issued Cessation Order No. 79-I-38-53 (CO) for failure to comply with the second remedial action requirement (revegetation and grading). Two days later OSM terminated this order, ultimately proposing a second \$1,500 penalty. Energy applied for review of the enforcement documents and the proposed penalties.

Discussion

After the ensuing hearing the Administrative Law Judge concluded that the extraction activity under review was within the exemption of sec. 528(3) of the Act.¹ The basic underpinnings of this conclusion were that "[t]here was no evidence to indicate that the * * * coal * * * removed was any more than was necessary" for Energy to fulfill the terms and obligations of its road rehabilitation project agreement with the State (and thus the extraction was "incident to") (Decision at 4) and that this activity was "part of a State (partially financed) highway construction" (Decision at 4-5). According-

¹The referenced Act section reads as follows: "Sec. 528. The provisions of this Act shall not apply to any of the following activities: * * * (3) the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority."

ly, he vacated the NOV and the CO. OSM appealed.

OSM's argument on appeal is that there has been a late regulatory explication of the sec. 528(3) exemption which makes clear that whatever else can be said about the road project here, it is beyond the exemption. The clarifying regulatory changes are (1) reference in the construction exemption provision in 30 CFR 700.11(d) to new 30 CFR Part 707 and (2) promulgation of that new part.² Sec. 707.5 sets out definitions applicable to the exemption, including "Government-financed construction," which is defined as "construction funded 50 percent or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds, but shall not mean government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments."

[1] Clearly, the project involved here does not fall within the regulatory definition of "Government-financed construction"; there was no proof that the State expended *any* funds, much less that any funds expended totaled 50 percent or more of the project's cost nor that they came from the particular sources required by the definition.³

² As pointed out by OSM's brief, Subchapter A of Chapter VII of 30 CFR, which includes Part 707, is applicable during both the interim and the permanent programs.

³ Even assuming that the separate Energy and State efforts were actually part of one large endeavor so that inquiry could be made

Thus, the operations were not within the exemption.

Having reversed the Hearings Division the substantive considerations in the appeal, we must now consider the two \$1,500 penalties that were assessed by OSM. One was for having been under a cessation order for 2 days (\$750 per day pursuant to 30 CFR 723.14) and the other was for the 35 points that OSM had assigned pursuant to 30 CFR 723.12-13.

[2] The NOV was for having mined without the permit required by 30 CFR 710.11. The abatement required was twofold: (1) to cease mining until a permit was obtained and (2) to rehabilitate the disturbed area. We have already held that the absence of a permit does not insulate one from having to observe the performance standards of regulations. *Claypool Construction Co., Inc.*, 1 IBSMA 259, 86 I.D. 486 (1979); *Delight Coal Corp.*, 1 IBSMA 186, 86 I.D. 321 (1979). Consequently, one who should have a permit is chargeable with substantive violations even in the absence of the required permit. Energy, however, was not charged with any violation other than that of operating without a permit. The only remedial action appropriate to such a violation is to cease mining until a permit is obtained. By

about the relative costs of the separate efforts, there was no evidence to establish those facts. Energy complains that OSM did not consider that proposition and make that inquiry, but Energy's position is incorrect. A party seeking an exemption must prove the elements thereof. Thus, where there is no evidence going to those elements, Energy, being the exemption seeker, may not prevail.

the end of the abatement period, Energy had complied with that requirement (Tr. 20-21). What it did not comply with until the CO was issued was the reclamation requirements. Those requirements, though, no matter how germane they might have been to a notice of violation that charged a violation of one of the substantive performance standards, *e.g.*, revegetation pursuant to 30 CFR 715.20, are completely inappropriate to a single charge of mining without a permit. Those remedial requirements cannot stand, and if they fall so must any cessation order that was based upon them. See *Renfro Construction Co., Inc.*, 2 IBSMA 372, 377, 87 I.D. 584, 587 (1980). The CO before us was issued for failure to perform the improperly prescribed remedial action. It and the penalty attendant to it are, consequently, rescinded. *Little Byrd Coal Co., Inc.*, 3 IBSMA 136, 88 I.D. 503 (1981).

The \$1,500 assessment for having mined without a permit was in accordance with the regulatory formula for determining the penalty for an ascribed 35 points. 30 CFR 723.13. If we agree that 35 points were proper, that might be the end of it. But we do not agree. Under "seriousness," OSM assessed 23 of a possible 30 points. 30 CFR 723.12 (c). Fifteen of those points, the maximum allowable, were for "probability of occurrence." The event which the violation was designed to prevent was mining without a permit. There are not degrees of mining without a per-

mit. The probability of the occurrence, given the fact of mining and the lack of a permit, was 100 percent. Therefore the maximum point assessment was appropriate. The other 8 points for "seriousness" were for "extent of damage." The regulatory guidelines for the assessment of penalty points for "extent of damage" are found in 30 CFR 723.12(c)(2) and (3). Subparagraph (3) provides a formula for computing extent of damage points where the violation involved concerns a requirement "to keep records, give notice, or conduct any measuring or monitoring * * *." It is not applicable to this case since the violation charged, mining without a permit, is not described in any of the three categories mentioned in that subparagraph.

There are two separate methods under sec. 723.12(c)(2) for determining the proper number of extent of damage points to be assigned, each depending upon the geographical extent to which the damage or impact the violated standard is designed to prevent in fact occurs. Under sec. 723.12(c)(2)(i), up to seven points may be assigned if that damage or impact remains within the permit area, and under sec. 723.12(c)(2)(ii) from 8 to 15 points may be assigned if that damage or impact extends beyond the permit area. When the violation charged is mining without a permit, there is no permit area against which to judge which of these provisions to apply, so their applicability at all is in doubt at the

outset. Moreover, the language of these provisions, making the assignment dependent upon the location of the "damage or impact the violated standard is designed to prevent," suggests that they apply to violations of substantive performance standards and not to essentially procedural ones like mining without a permit. Thus in this case no points for extent of damage are appropriate.

Under "negligence," Energy has been assessed 12 of a possible 25 points. Twelve points are the most assessable for mere negligence. The additional points are permitted only where recklessness or intentional conduct is invoked. 30 CFR 723.12 (d). Considering that Energy was supported by the State in determining it was not required to have a permit, we cannot agree that its degree of negligence would support the assignment of more than three negligence points.

Thus, in our view the total number of points that should have been assessed is 18.⁴ Eighteen points would support a penalty of \$360. However, there is no requirement that a penalty be assessed when there are fewer than 30 points. 30 CFR 723.12(a). Given what we believe to have been Energy's partial reliance on State advice, its openness and its performance (when pressed), it is our opinion that no

purpose would be served by collecting a \$360 penalty.

Therefore, the decision under review is reversed as to the fact of violation and the ruling on exemption, but the penalty assessment proposal is vacated.

MELVIN J. MIRKIN

Administrative Judge

WILL A. IRWIN

Chief Administrative Judge

NEWTON FRISHBERG

Administrative Judge

APPEAL OF ELLIOTT'S ROOFING CO.

IBCA-1330-1-80

Decided September 23, 1981

Contract No. H50C14201356, Bureau of Indian Affairs.

Sustained in part.

Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)—Contracts: Construction and Operation: Estimated Quantities—Contracts: Disputes and Remedies: Equitable Adjustments

Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the approximate quantities estimated by the Government in the invitation for bids and there was no provision included therein requiring or requesting that the quantities specified be verified by prospective bidders, the Board finds that the substan-

⁴ Lest this be considered criticism of OSM, it is obvious that OSM was attaching points for failure to rehabilitate. Our examination is addressed solely to the failure to have a permit.

tially greater amount of roofing required to complete the contract work than the Government had estimated constituted a first category differing site condition for which the contractor is entitled to an equitable adjustment in the contract price.

APPEARANCES: Susan A. Hopkins, Attorney at Law, Dill & Showler, Redlands, California, for Appellant; Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
McGRAW*

*INTERIOR BOARD OF
CONTRACT APPEALS*

The contractor has timely appealed the denial of its claim for additional compensation in the amount of \$33,635.66 on the ground that the amount of built-up roofing required for performance of the contract was greatly in excess of the approximate quantity reflected in the invitation for bids and that the difference between the approximate quantity on which its bid was based and the actual quantity of roofing required for contract performance constituted a differing site condition for which it is entitled to an equitable adjustment. An oral hearing on the claim was held in Riverside, California, on August 12, 1980.

Findings of Fact

1. An invitation for bids was issued on June 7, 1979, with an opening date of July 11, 1979. The invitation called for the installation of

built-up roofing on various buildings at Sherman Indian High School, Riverside, California, in accordance with the requirements of Specifications No. H60-21-9-3500-9-23. Among the items of information included on the face of the invitation¹ were the following: "Bidders are requested to visit the project site and should contact Mr. McAllister at Sherman Indian High School, Riverside, California. * * * THIS PROJECT IS TOTALLY SET-ASIDE FOR SMALL BUSINESS."

2. Contract No. H50C14201356 was awarded to the contractor by the Bureau of Indian Affairs on July 20, 1979, in the amount of \$199,680.² The contract incorporated Standard Form 22 (Instructions to Bidders),³ General Provisions (Construction Contract) (Standard Form 23-A, Apr. 1975 Edition), and Specifications for the Installation of Built-Up Roofing.

¹ Appeal File (hereinafter AF) D.

² This was approximately \$150,000 higher than the lower figure the Government had estimated for the job and approximately \$100,000 higher than its higher estimated figure.

³ The following provision was included therein:

"2. Conditions Affecting the Work. Bidders should visit the site and take such other steps as may be reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Failure to do so will not relieve bidders from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government will assume no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of the contract, unless included in the invitation for bids, the specifications, or related documents."

Included among the contract provisions⁴ are the following:

**UNIT PRICE SCHEDULE
SCOPE OF WORK**

Furnish all labor, materials, equipment, tools and incidentals necessary, and perform all work in connection with preparation, restoration, and miscellaneous work necessary for the installation of built-up roofing, complete, on various buildings at Sherman Indian High School, California, in strict accordance with the specifications attached hereto for the prices applicable to each location below:

Item No.	Location	Amount bid
1.	Hogan, Building No. 1----	\$24,960.00
2.	Kiva, Building No. 2-----	24,960.00
3.	Wigwam Lodge, Building No. 3-----	24,960.00
4.	Teepee, Building No. 4----	24,960.00
5.	Teepee, Building No. 6----	24,960.00
6.	Teepee, Building No. 7----	24,960.00
7.	Teepee, Building No. 8----	24,960.00
8.	Teepee, Building No. 10---	24,960.00
Total amount bid----		199,680.00

Due to the limitation of funds, the Government reserves the right to make award on one, a combination, or all eight (8) buildings.

GENERAL PROVISIONS (Construction Contract)

13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor

to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

* * * * *

GENERAL CONDITIONS

* * * * *

GC-3 VISIT TO SITE AND SITE CONDITIONS: Bidders are expected to visit the site and to inform themselves concerning all the conditions under which the work is to be done. Failure to visit the site will in no way relieve the Contractor from the necessity of furnishing any materials and performing any work that may be required to complete the contract in strict accordance with the true intent and meaning of the drawings and specifications without an additional cost to the Government.

Information contained in the specifications or shown on the accompanying drawings as it relates to conditions at the site, is believed to be reliable but such information is furnished for the convenience of the bidders and no guarantee of the accuracy of the information is made or implied.

* * * * *

**TECHNICAL PROVISIONS
ROOF SURFACING**

1. **SCOPE:** Furnish all plant, labor, equipment, services, appliances and materials, and perform all operations in connection with the installation of built-up roofing, complete, in strict accordance with this specification. Work includes installation, the Contractors option, 4-ply fibrous glass roofing felts with gravel surfacing may be applied as specified hereinafter in lieu of the 4-ply asbestos

⁴ A.F.D.

roofing felts with gravel surfacing specified.

a. *Structures Requiring Re-roofing:*

- (1) Hogan, Bldg. #1—approximately 22,000 sq. ft.
- (2) Wigwam Lodge, Bldg. #3—approximately 22,000 sq. ft.
- (3) Tepee, Bldg. #4—approximately 22,000 sq. ft.
- (4) Yucca, Bldg. #6—approximately 22,000 sq. ft.
- (5) Wauneka, Bldg. #7—approximately 22,000 sq. ft.
- (6) Dawaki, Bldg. #8—approximately 22,000 sq. ft.
- (7) Ramona, Bldg. #10—approximately 22,000 sq. ft.
- (8) Kiva, Bldg. #2—approximately 22,000 sq. ft.

(AF D).

3. In response to the invitation the contractor submitted a bid in the amount of \$199,680 broken down as shown in Finding 2, *supra*. The instant contract was awarded on July 20, 1979. Notice to Proceed dated Aug. 7, 1979, was received by the contractor on Aug. 13, 1979, thereby establishing Aug. 14, 1979, as the start date and Oct. 12, 1979, as the completion date for contract performance (AF A, B, and C).

4. At the preconstruction conference on July 31, 1979, the contractor is reported to have raised a question as to the sizes of the roofs. In a letter written to the attention of the contracting officer under date of Aug. 15, 1979 (AF 1), the contractor stated:

[W]e believe an error has been made in the listing of sizes of roofs to be roofed.

Your Specifications (Technical) page 4 paragraph 1. Scope list all eight buildings as having 22,000 square feet to be roofed for a total of 176,000 sq. feet.

We bid this area for a total of \$199,680.00 or a price of \$113.45 per Square. (100 sq ft.)

Enclosed is a roof plan (existing site conditions) typical of each building; giving a tolerance [*sic*] of 6 inches each way. These dimensions show an area of 25,706 square feet per building, or more than 3,706 square feet additional. This totals 29,648 square feet more than specifications show. This is more area than one complete building, as shown.

This amounts to more than \$33,635.66 at the price per square we quoted in the bid price. Consequently we are at a loss to know just what to do. Do we roof only part of each building? If so which part do we not roof?

If we are to roof the entire buildings we must assume there has been an error in your calculations. Since we bid this job as per your specifications we only figured the areas you listed.

What shall we do? Do we roof certain areas; or do we roof it all and bill you for an extra? An urgent reply is requested.

5. By letter dated Aug. 29, 1979 (AF 2), the Bureau of Indian Affairs (hereinafter BIA) responded to the contractor's letter of Aug. 15, 1979, stating: "The area of 22,000 square feet given for each building in the technical specifications page 4 were approximate as stated therein."

The position taken by BIA was elaborated upon in the contracting officer's decision of Jan. 14, 1980 from which the instant appeal was taken. Citing GC-3 VISIT TO SITE AND SITE CONDITIONS and THE CONDITIONS AFFECTING THE WORK PROVISIONS (Clause 2 of SF 22 and General Provision 13 of SF 23-A) in support of the position taken in

his decision, the contracting officer stated:

The "Bid Schedule" lists each building by name and number and requires bidders to enter their bid price for each building by the unit. Therefore, it is important to note that the unit price is by the building and not the square foot.

The word "Approximately" as used in the technical provisions for roof surfacing, Page 4, was intended to alert prospective bidders the fact that the measurements given therein were other than [*sic*] precise or exact.

In addition, the specifications explicitly gives notice to all prospective bidders to visit the project site prior to submitting their bids, to ascertain the general and local conditions *which can affect the work* or the cost thereof and failure to do so would not relieve the bidder *from his responsibility for estimating properly the difficulty or cost of successfully performing the work.* [Italics in original.]

6. At the hearing appellant's only witness, Mr. William J. Elliott, testified that the bid submitted was based on the number of square feet reflected in the specifications. Mr. Elliott also testified: (i) that if the Government had not provided figures as to the size of the buildings to be reroofed, the appellant would have measured the buildings; (ii) that normally bidders are given a directive to measure the roofs on which bids are being requested rather than being given the size of the roofs covered by the solicitation; (iii) that in response to a question raised by him at the preconstruction conference he was advised that the dimensions shown for the roofs in the specifications were

stated as approximates;⁵ (iv) that the day following the preconstruction conference the appellant had measured the roofs and found they varied about 16 percent⁶ from the dimensions shown in the Government's specifications; and (v) that many things besides the interpretation bidders place upon the approximate size of the buildings could cause the bids received to vary substantially.⁷

7. At the time the bids were opened, Mr. Elliott was out of the state. He had prepared the company's bid prior to his departure, however, and it was hand-carried to the bid opening by the appel-

⁵ To Mr. Elliott the term "approximate" on a job of the size covered by the contract would involve 4 or 5 squares per building (a square consists of a hundred square feet) and should not involve a variance from the dimensions specified of more than 5 percent (Tr. 16-17; 34-35).

The Government's witness McAllister (supervisory general engineer) considers the term approximate to cover a range from a low of 5 percent to a high of 25 percent of the dimensions given (Tr. 56).

⁶ Based upon the measurements made the appellant calculated the total amount of re-roofing required for all eight buildings to be 29,648 square feet more than the specifications indicated or 3,706 additional square feet per building (25,706 less 22,000) (Tr. 28).

After the preconstruction conference Mr. McAllister and other BIA personnel made measurements of particular buildings on three occasions but came up with different results each time. The differences were attributed to the methods employed in the measurements. On one of these occasions Building No. 4 and Building No. 2 were measured at 25,267 and 25,303 square feet respectively compared to 25,706 square feet to which Mr. Elliott had testified (Tr. 50-51).

⁷ On redirect examination Mr. Elliott testified that there would be other things besides the size of the building that would make the bids submitted vary, after which he stated: "I have bid so far this year 71 jobs. I was second on 44. I only got 5." (Tr. 38-39).

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lant's superintendent, Mr. Carl Hansen. Prior to that time Mr. Elliott had sent Mr. Hansen to visit the job to see if there was anything likely to cause them trouble such as any machinery or other items not shown on the plans (Tr. 7-10). Mr. Hansen testified to having gone to the site several times and to have talked to Mr. McAllister on one of such occasions. Mr. McAllister had no recollection of Mr. Hansen having visited the site prior to bid opening, however, and there was no entry in Mr. McAllister's diary indicating that Mr. Hansen had visited the site during the period in question. Mr. McAllister testified that three other bidders on the project did visit the site prior to the opening of bids and that they did take measurements of the roof using tapes or wheels. His diary contained entries reflecting the visit to the site of the other three bidders. There is no contention by either Mr. Elliott or Mr. Hansen that any measurements of the buildings in question were made or that it was ever contemplated that any such measurements would be made incident to the site visit (Tr. 47-48; 60-70).

8. At the time of the hearing Mr. Donald H. McAllister (supervisory general engineer, BIA, Sherman Indian High School), had been at the school for 5 years as facility manager. Mr. McAllister testified (i) that he had prepared the specifications with which we are here concerned; (ii) that the approximately

22,000 square feet figure shown in the specifications for each of the eight buildings had been derived from what was shown in the building book and the plans for such buildings; (iii) that the term "approximate" was used in the specifications because he did not know the exact size of the roofs; (iv) that aside from what was shown in the building book or the plans for the buildings, no prebid measurement had been made by the Government; and (v) that when Mr. McAllister drew up the specifications he intended the bidders to go out to the site and measure the size of the roofs.⁸

9. As has been noted previously (n.5, *supra*), the term "approximate" conveyed to Mr. Elliott the thought that on a job of the size covered by the instant contract, there might be variation from the roof sizes shown of 4 or 5 squares per building but should not involve a variance of more than 5 percent. The Government has also acknowledged that the term "approximate" could be interpreted to mean a variation from the dimensions given in the specifications of not more than 5 percent. If a variation in the

⁸ Tr. 60-61. The following colloquy occurred between the hearing member and Mr. McAllister at page 61 of the transcript:

"Q. But rather than relying on a boiler plate [clause] there, if you intended the bidders to measure these roofs, why didn't you just say so?

"A. I have never seen in a specification where you require the actual bidder to measure it. You require him to visit the site and determine the extent of work that's required, and that's what the general conditions, I believe, state."

amount of roofing required of precisely 5 percent above that indicated in the specifications had occurred, the contractor would have reroofed 184,800 square feet or 8,800 square feet in excess of the 176,000 square feet indicated in the specifications.

Discussion

This is another differing site conditions case involving roofing in which there is a significant difference between the amount of work estimated by the Government in the invitation and the amount of work required to be performed in order to complete the contract.⁹ The two principal questions¹⁰ to be decided are (i) the meaning to be ascribed to the term "approximately"

⁹In a very recent case this Board found a differing site condition to be present where under a reroofing contract the quantity of roofing required to be used was substantially greater than the approximate quantities shown in the invitation and it was determined that the quantity of roofing involved in the work could not have been ascertained by a prebid onsite investigation. See *Singleton Contracting Corp.*, IBCA-1413-12-80 (Aug. 12, 1981), 88 I.D. 722, 81-2 BCA par. —.

¹⁰In the decision from which the instant appeal was taken the contracting officer called attention to the fact that the bid schedule listed each building by name and number, after which he stated: "[I]t is important to note that the unit price is by the building and not the square foot." (Finding 5).

The same argument was made but was rejected in *Lee R. Smith—Contract Builder*, ASBCA No. 11135 (Sept. 23, 1966), 66-2 BCA par. 5857, in which the contractor was found to be entitled to an equitable adjustment for a changed condition because the actual quantity of reroofing necessary was substantially in excess of the quantity represented by the Government in the invitation for bids and in which, at page 27,179, the Armed Services Board stated: "While conceding that the quantity was substantially in excess of the quantity stated in the invitation for bids, the Government denied the claim on the ground that the contract called for re-roofing of the specified buildings at a lump sum price."

and (ii) the obligation a bidder has, if any, to verify dimensions given in the specifications as advertised for bids where, as here, the invitation qualified the dimensions listed for the roofs of the eight buildings involved¹¹ by stating them to be "approximately 22,000 sq. ft.," while advising bidders that they were "expected to visit the site and to inform themselves concerning all the conditions under which the work is to be done" (Finding 2).

In the very early case of *Carson Construction Co.*, IBCA Nos. 21, 25, 28, and 34 (Nov. 22, 1955), 62 I.D. 422, the Board was confronted with the question of interpreting the term "approximate." There the Board stated at page 434:

The plans indicated that the rock lines were "approximate." To be approximate, however, the lines would have to be close to or near to the elevations indicated on the plans, for it is in these terms that the dictionary defines the term "approximate." [12] Moreover, in a number of cases in which approximate quantities or factors have been involved in construction

¹¹The claim has been presented on the basis that for each of the eight buildings the amount of roofing installed in excess of the quantity shown in the invitation (approximately 22,000 square feet) totalled 3,706 square feet or 16.85 percent ($3706 \div 22,000$).

¹²Construing the term approximately in *Lee R. Smith*, n. 10, *supra*, the Armed Services Board stated at page 27,180: "The dictionary meaning of 'approximately' is 'very near, near to correctness, nearly exact'. It is derived from the Latin word 'proximus', meaning, 'the nearest, next' * * * The Government concedes that the actual quantity was at least 691 squares, which is substantially in excess of approximately 610 squares."

According to the figures used in calculating the amount of the equitable adjustment in the *Smith* case, the contractor involved there installed approximately 13.27 percent more roofing than had been indicated in the specifications.

contracts, the courts have held that the figure stipulated in the contract could not be unreasonably exceeded. Thus, the 1 foot 6 inches indicated on the plans as the depths of the footings were neither maximums nor minimums but approximate dimensions. [Footnote omitted.]

The parties involved in this appeal have widely divergent views as to the amount of variation connoted by the use of the term "approximately" before the 22,000 square feet of roofing estimated to be required for each of the eight buildings covered by the invitation for bids (Finding 2). To the appellant's Mr. Elliott, the term contemplates a variation from the dimensions specified of not more than 5 percent, while to the Government's witness, Mr. McAllister, the term covers a range from as low as 5 percent to as high as 25 percent of the dimensions specified (n.5, *supra*).

If we were to give effect to the higher percentage figure of 25 percent used by Mr. McAllister in his testimony, this would mean that in performing the work covered by the contract, the contractor might conceivably be required to perform as little as 132,000 or as much as 220,000 square feet of roofing¹³ for the contract price of \$199,680 (Finding 2). To accept Mr. McAllister's view of what is embraced within the term "approximately" in the circumstances of this case would

convert competitive bidding into a gambling transaction,¹⁴ where the bidder receiving the award could reap a windfall or suffer a substantial loss depending upon how much and in what direction the amount of work required varied from the Government's estimate.

The Board notes, however, that in his testimony Mr. McAllister acknowledged that the term "approximate" could be construed to mean a variation from the quantity of roofing specified by as little as 5 percent. At the hearing, Mr. Elliott recognized that the term "approximate" may involve a variation from the roofing dimensions specified in the invitation of up to 5 percent (n. 5 *supra*). On the basis of this testimony and the meaning ascribed to the terms "approximate" and "approximately" in the cases cited (n. 12, *supra* and accompanying text), the Board finds that the term "approximately" as used in the invitation for bids involved in this appeal encompasses variations from the

¹³ The 25 percent variation would involve 44,000 square feet up or down from the total estimated quantity for all eight buildings of 176,000 square feet (22,000 x 8). Multiplying the 44,000 square feet so determined by the contractor's bid price of \$113.45 per square produces the figure of \$49,918.

¹⁴ See *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 517, 522-23 (1947), in which, after quoting and commenting on a specification provision which said that the estimated quantities listed in the contract schedule were to serve only as a basis for canvassing offers and for determining the approximate amount of consideration of the contract, the Court of Claims stated: "But it certainly does not mean that Article 4 of the contract which promises a modification of the contract to conform to unforeseen subsurface or latent conditions, 'or unknown conditions of an unusual nature, differing materially from those ordinarily encountered * * *' is to be canceled out of the contract. Neither does it mean that all considerations of equity and justice are to be disregarded, and that a contract to do a useful job for the Government is to be turned into a gambling transaction."

roofing dimensions specified therein of 5 percent.

We turn now to consideration of the question of the effect to be given to the provisions of the specifications relating to visits to the site. While there is a conflict in the evidence as to whether a representative of the contractor did visit the site prior to the opening of bids (Finding 7), we find it unnecessary to resolve the conflict in the circumstances present in this appeal. The material question to be decided here is whether the contractor was obligated to verify the roofing dimensions given in the invitation. In this connection, we note the absence of any contention by the appellant that it undertook to verify such dimensions in the course of the prebid visits to the site that it allegedly made.

Irrespective of whether the appellant did make a visit to the site prior to bid opening, it is chargeable with knowledge of what would have been revealed by a reasonable prebid site examination. It is not chargeable with knowledge of information, however, which would not have been disclosed had such an examination taken place. *Maverick Diversified, Inc.*, ASBCA Nos. 19838, 19955, and 20091 (Aug. 26, 1976), 76-2 BCA par. 12,104 at 58,150.

In this case Mr. McAllister testified that when he drew up the specifications he intended that the bidders would go out to the site and measure the size of the roofs and that three of the bidders did visit

the site prior to the opening of bids and did take measurements of the roofs using tapes or wheels (Findings 7 and 8).

Except in those cases where by the terms of the invitation bidders are requested to verify the dimensions given by the Government,¹⁵ it does not appear that they are required to do so or that they are chargeable with the knowledge which they might have obtained had they done so. Addressing this question in *Oren Childers Paint Contracting Co.*, ASBCA No. 14165 (June 16, 1970), 70-1 BCA par. 8340, the Armed Services Board stated at 38,808:

Because the site examination is generally limited to those matters which are usually discoverable by a visual examination, thereby precluding the necessity for resort to detailed and unusually burdensome or expensive procedures, the requirement for taking actual on-site interior measurements of numerous buildings, as suggested by the Government, appears unreasonable. Under these circumstances, the use of disclaimers, caveats or exculpatory provisions by the Government is unavailing to restrict the appellant's rights reserved under the Differing Site Conditions clause. [¹⁶]

¹⁵ *Archie and Allan Spiers, Inc. v. United States*, 155 Ct. Cl. 614 (1961), is an example of such a case. There a claim based upon misrepresentation was denied where the Court of Claims found that the contract, the specifications, and the drawings relating to a contract to rehabilitate existing pipelines on Navy piers all contained warnings that the contractor should carefully check the dimensions contained thereon.

¹⁶ In *Swauger Contractors*, IBCA-609-12-66 (July 11, 1967), 67-2 BCA par. 6430, the Board construed a clause captioned "Conditions Affecting the Work" which contained language identical to General Provision 13 (Finding 2). Concerning that clause and another exculpatory clause, the Board stated at 29,818: "Provisions such as the 'Conditions
—Continued

At page 4 of the Government's posthearing brief, the Department Counsel quotes from a reference work which says that the contractor involved in the *Lee R. Smith* case (n.10, *supra*) had made no prebid examination of the site, because such an examination would not have disclosed the quantity. This is not an accurate reading of the holding in the *Smith* case. The basis for a decision favorable to the contractor in that case was not that the contractor was unable to verify the dimensions of the roofs as he was specifically advised to do in the invitation and as he failed to do. It was rather that the effort involved in verifying the dimensions furnished by the Government would have been entirely disproportionate to the amount of the procurement. This is clear from the opinion in the *Smith* case (n.10, *supra*) from which the following is quoted:

The principle of full and free competition by formal advertising pursuant to 10 U.S.C. Section 2304 dictates that the expense of bidding not be disproportionate to the dollar amount of the procurement. When it is considered that numerous bids are received under one invitation and that bidders are called on to prepare several times as many bids as they receive awards, [17] it is unreasonable to expect a bidder to incur the time and expense of making prebid on-site measurements of 20 buildings to verify the

Affecting the Work' clause, *supra*, relied upon exclusively by the Contracting Officer in denying this claim, or the 'Examination of Project Site' clause, do not operate to eliminate the Changed Conditions clause (footnote omitted)."

¹⁷ See n.7, *supra*.

Government's quantity representation when bidding on a contract for less than \$12,000.

(66-2 BCA par. 5858 at 27,181).

The invitation for bids with which we are concerned contained no provision requiring or requesting prospective bidders to verify the dimensions of the roofs furnished by the Government in the specifications. There was no information included in the plans or specifications¹⁸ from which bidders could have determined the dimensions of the roofs on which bids were being sought. The general language contained in the "Conditions Affecting the Work" clauses and in the "Visit to Site and Site Conditions" clause (Finding 2) is not sufficient to override the language of the Differing Site Conditions clause.¹⁹

Remaining for consideration is the question of the equitable adjustment to which the contractor is en-

¹⁸ Recovery has been denied where the board concerned found that the specifications contained an explicit reference to the "extent of the work indicated in the drawings" and the number of plans was not extensive from which the appellant could have ascertained the actual area involved. *Oren Childers Paint Contracting Co.*, text, *supra*. See also *A & M Gregos, Inc.*, ASBCA No. 17347 (May 29, 1973), 73-2 BCA par. 10,129.

¹⁹ *Swauger Contractors*, n.16, *supra*; *Fehlhaber Corp. v. United States*, 138 Ct. Cl. 571, 584 (1957): "Plaintiff had a right to rely on the Government's specifications and drawings and the Government is bound by any assertions made therein notwithstanding the fact that it was stated that that data would be for information only. Moreover, this court has repeatedly held that the specifications cannot alter the effect of the specific language of the *Changed conditions* sections of the contract." (Citations omitted).

titled for the differing site conditions claimed for in this case. The appellant has acknowledged that in preparing its bid for the quantity of reroofing indicated in the specifications, it interpreted the term "approximately" as embracing a variation of up to 5 percent from the quantity specified by the Government in the invitation (Finding 9). Since this was the interpretation the appellant placed upon the terms of the invitation, it presumably included an allowance in its bid for an upward variation of 5 percent from the quantity of reroofing on which bids were solicited. In any event, we find that in such circumstances a prudent contractor would have included an appropriate allowance²⁰ in its bid price as a hedge against such a recognized contingency occurring.

Decision

1. For the reasons stated and on the basis of the authorities cited, the Board finds that the appellant is entitled to an equitable adjustment under the Differing Site Conditions

clause²¹ in the amount of \$23,655.96 for the amount of roofing in excess of the aggregate quantity of roofing represented by the Government in the specifications as required for the performance of the contract, after giving effect to a 5 percent upward variation from the quantity of roofing specified found to have been provided for in the bid submitted (Finding 9, nn. 18-20, *supra*, and accompanying text).

2. The equitable adjustment provided for herein shall also include an allowance for interest on the above-stated amount of \$23,655.96 computed in accordance with the Contract Disputes Act of 1978 from Aug. 17, 1979.

WILLIAM F. MCGRAW,
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

GREATER PARDEE, INC.

3 IBSMA 313

Decided September 24, 1981

Appeal by Greater Pardee, Inc., from the Sept. 18, 1980, decision of Administrative Law Judge David Torbett, sustaining violation 1 of Notice of Violation No. 80-2-89-27, issued for failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimenta-

²⁰ The quantity of roofing furnished in excess of the Government's estimate represented an increase of 16.85 percent above that specified in the invitation for bids (n.11, *supra*). The bid submitted should have included an allowance for a variation in quantity of roofing from that specified of up to 5 percent. The claimed amount of \$33,635.66 multiplied by .2967 (.05 divided by .1685) results in the dollar figure of \$9,979.70. Deducting this figure from the claimed amount of \$33,635.66 results in a net amount of \$23,655.96. This figure is over and above the 5 percent allowance presumed to have been included in appellant's bid for contemplated variations from the quantity of reroofing specified by the Government in the invitation for bids.

²¹ The relief provided is for a first category differing site condition. See *Singleton Contracting Corp.* n.9, *supra*.

tion ponds prior to leaving the permit area as required by 30 CFR 717.17(a).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance standards.

APPEARANCES: Daniel R. Bieger, Esq., Norton, Virginia, for Greater Pardee, Inc.; Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, James F. Roberts, Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

**OPINION BY THE INTERIOR
BOARD OF SURFACE MIN-
ING AND RECLAMATION
APPEALS**

Greater Pardee, Inc. (Greater Pardee), has appealed the Sept. 18, 1980, decision of Administrative Law Judge David Torbett sustaining violation 1 of Notice of Violation No. 80-2-89-27, issued for "failure to pass all surface drainage from the disturbed area through a sedimentation pond or a series of sedimentation ponds prior to leaving the permitted area" in violation of 30 CFR 717.17 (a).

In its brief to this Board, appellant contends that it had been exempted by the regulatory authority, the Commonwealth of Kentucky, from the requirement that all surface drainage pass through a sedimentation pond. It further states that it has operated in accordance with its duly authorized State permit, and is therefore not responsible for the requirements of the Federal program.

[1] These arguments are the same as those presented by appellant to the Administrative Law Judge prior to his Sept. 18, 1980, decision.¹ We have thoroughly reviewed the record and the arguments advanced by the parties. The decision of the Administration Law Judge summarizes the evidence and applicable law and fully responds to appellant's arguments. We agree with his findings and conclusions and adopt his decision as the decision of the Board. A copy of the decision is attached as Appendix A.

Accordingly, that part of the decision appealed from is affirmed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

¹ The Board has consistently held that compliance with a state permit does not excuse noncompliance with the initial Federal regulations. *Rayle Coal Co.*, 3 IBSMA 111, 88 I.D. 492 (1981); *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979); and *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).

Appendix A

September 18, 1980

GREATER PARDEE, INC., APPLICANT v. OFFICE OF SURFACE MINING RECLAMATION AND EN- FORCEMENT (OSM), RESPONDENT	} Docket No. NX 0-219-R Application for Review Notice of Violation No. 80-2-89-27
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DECISION

APPEARANCES: Daniel R. Bieger, Esq., P.O. Box 668, Norton, VA 24273, for Applicant; Courtney W. Shea, Esq., Office of the Field Solicitor, 530 S. Gay Street, Knoxville, Tennessee 37901, for Respondent.

BEFORE: Administrative Law Judge Torbett

PROCEDURAL BACKGROUND

In accordance with § 525 of the Surface Mining Control and Reclamation Act of 1977 (the Act), Greater Pardee, Inc., Applicant applied on July 3, 1980 for review of a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement, Respondent.

A hearing was held before the undersigned on August 13, 1980 in Abingdon, Virginia. The schedule for the filing of briefs was set and these briefs have now been filed and fully considered. Where applicable parts of these briefs have been incorporated into this opinion.

FACTS

Reclamation Specialists Samuel Turner and Charles Saylor of the Office of Surface Mining conducted an inspection of the Greater Pardee, Inc., underground mine, permit no. 267-5032 on June 5, 1980. The two OSM inspectors met a representative of the mining company, Michael Fouts, at the intersection of the haulroad and a Kentucky state road. The inspectors examined the permit map and permit application package brought by Mr. Fouts and proceeded to the mine openings to conduct the inspection (Tr. 8, Resp. Ex. 1).

The surface disturbance of this underground mine consists of the two areas at the underground mine openings, connecting coal car tracks and a permitted haulroad. During the proceedings, the two underground mine opening areas were referred to as areas A and B. Area A was first described by Inspector Turner and is designated by the left yellow shaded area on Respondent's Exhibit 3 (Tr. 10).

On the date of the inspection, water was running in a culvert from the underground mine opening at Area A down a ditch line to the right of the tracks, as one is facing towards the mine opening (Resp. Ex. 5; Tr. 11-12). Some drainage crossed under the tracks at a culvert and some crossed further down at a crossover to the left side of the tracks (Resp. Ex. 6; Tr. 11-12). The drainage proceeded in a ditch down the left side of the tracks, away from the mine opening (Tr. 12-14; Resp. Ex. 7, 8, 9 and 10). The tracks are permitted for a width of ten feet. This drainage ditch was approximately on the edge of the permitted area (Tr. 19-20, 39). The drainage then crossed under the haulroad, and continued down the hollow towards a "blue line stream", the Trace Fork, without passing through a sedimentation pond (Tr. 13-14; Resp. Ex. 3).

Area B was the area surrounding the second underground mine opening, and is indicated by the uppermost yellow shade portion of Respondent's Exhibit 3. On the date of inspection, a black hose or pipe originating from inside this underground mine opening was discharging water to the right side of the disturbed area facing towards the underground mine (Tr. 14-15; Resp. Ex. 3). Also,

drainage from the uphill side of the underground mine collected in a depression to the left of the underground mine opening, and then traveled under the track through a culvert where it joined the discharge from the underground mine and continued down the hollow (Tr. 16-17; Resp. Ex. 3, 14 and 15). Nowhere at the minesite were there sedimentation ponds or silt control to control drainage resulting from precipitation falling on the disturbed area or discharges from the underground mine workings (Tr. 9, 13-14, 17, 23).

The inspectors testified that they checked the points of intersection of the permit road with the Kentucky state road and the permit road with the Virginia-Kentucky border and they could find no mine identification signs at either point (Tr. 18-19, 23; Resp. Ex. 3, 16 and 17). The inspectors did not question Mr. Fouts or any employee of the Applicant as to the location of mine identification signs. Mr. Fouts testified that a sign had been placed at the point of intersection of the permitted road with the haulroad to another minesite at the Virginia-Kentucky border (Tr. 30, 38). It was uncontested that there was no sign at the other intersection of the Kentucky state road with the permit road (Tr. 38).

The road in question is permitted from the Kentucky-Virginia boundary where it intersects the haulroad of another coal mine operation, to the first portal. The portion of the permitted road from the intersection with the Kentucky State highway, to the top of the mountain at the Kentucky-Virginia border is also a state road (Tr. 17-19, 36, 37; Resp. Ex. 3).

Notice of Violation 80-2-89-27 was issued containing two violations. Violation 1 was issued for "Failure to pass all surface drainage from the disturbed area through a sedimentation pond or a series of sedimentation ponds prior to leaving the permitted area" in violation of 30 CFR § 717.17. The remedial action given was to pass all surface drainage from

the disturbed area through a sedimentation pond or a series of sedimentation ponds prior to leaving the permitted area.

Violation 2 was issued for failure to post a mine identification sign in violation of 30 CFR § 717.12(b). The remedial action given was to post a mine identification sign at all points of access to the permitted area.

DISCUSSION AND CONCLUSIONS AS TO VIOLATION NO. 1

Violation No. 1 charged the Applicant with violating 30 CFR § 717.17 which provides in pertinent part:

"(a) *Water quality standards and effluent limitations.* All surface drainage from the disturbed areas, including disturbed areas that have been graded, seeded or planted and which remain subject to the requirements of this section, except for drainage from disturbed areas that have met the requirements of § 717.20 shall be passed through a sedimentation pond or series of sedimentation ponds prior to leaving the permit area."

This permit had a surface disturbance of nine acres (Appl. Ex. 1). It was the uncontroverted testimony of both Inspector Turner and Inspector Saylor that no sedimentation ponds existed to handle either the surface drainage from the permitted area or the discharge from the underground mine workings (Tr. 9, 14, 17, 23, 28-29).

There was testimony that at one of the underground portal areas described as area B, the uphill surface drainage was diverted underneath the permitted tracts, away from the permitted area (Tr. 16-17 and 28-29). The witness for the Applicant, Mr. Fouts, further testified that the surface drainage from off the permit area was diverted around the permit area at area A, however, no specific reference was made as to where this diversion occurred. Inspector Turner described the surface area of area A, indi-

cated the surface drainage pattern through blue arrows on Respondent's Exhibit 3, traced the discharge from the underground mine as it passed over the surface of the permit area before being discharged in Trace Fork, and described the lack of sedimentation structures to control surface drainage (Tr. 9-14, App. Ex. 4-10).

The undersigned concludes that surface drainage from the permit area did not pass through a sedimentation pond or series of sedimentation ponds.

The Applicant claims that it had been exempted by the regulatory authority, the State of Kentucky, from the requirement that all surface drainage pass through a sedimentation pond. The Respondent concedes in its brief (page 6 of Respondent's Brief) that "a regulatory authority, Kentucky in this case, could exempt an operation from that requirement that all surface drainage be passed through a sedimentation pond if it is demonstrated that the drainage area is small, and that the effluent limitations can be met without ponds. 30 CFR § 717.17(a)." Whether or not the State of Kentucky had exempted the Applicant from the requirements of 30 CFR § 717.17 is the controlling issue as to Violation No. 1.

Applicant held a surface disturbance mining permit from Kentucky for its underground mine. As Greater Pardee was an underground mine in operation before May 3, 1978 it had limited requirements necessary for it to obtain a permit under 405 KAR* 3:050. Section 4(2) states that:

"The application shall include the information described in this subsection through subsection (13) of this section, except that existing underground mining operations not engaging in new surface operations shall comply with only subsections (1), (2)(a) through (g), (3), (4) except for paragraph (c), (14) and (15) of this section."

It is uncontroverted that Greater Par-

dee, Inc. did not have to include the information set forth in 405 KAR 3:050 § 4(10) and that it was therefore exempt from submitting a surface water control and monitoring plan or demonstrating how it would comply with 405 KAR 3:130 with regard to protection of the hydrologic system.

Respondent contends that considering the permit of Greater Pardee, Inc. and the requirements of Kentucky regulations as a whole, that the exemption of Greater Pardee, Inc. from submitting certain information in its permit application was not intended to exempt it from the federal regulations requiring the passage of surface drainage through a sedimentation pond. The undersigned agrees with the contention of the Respondent.

To begin with, the Kentucky regulations regarding surface effects of underground coal mining are set forth at 405 KAR Chapter 3. A general provision of these regulations states as follows:

"Section 5. Obligations of Operators.
(1) General Obligation: (a) No person or operator shall engage in surface operations of underground coal mining without having obtained from the department a valid permit covering the area of land to be affected, except that underground mining operations existing on or before May 3, 1978, shall be August 3, 1980 make application to the department for a permit pursuant to the provisions of 405 KAR 3:050.

...
"(e) On or after May 3, 1978, any person or operator engaged in surface operations of underground coal mining shall comply with the requirements of this Chapter, except when compliance with this Chapter would preclude compliance with the requirements of Public Law 95-87, August 3, 1977/The Surface Control and Reclamation of 1977", and the regulations adopted pursuant thereto."¹

The general provisions of Kentucky regulations then provide the pre-existing underground mines should have a permit,

*Kentucky Administrative Register

¹ 405 KAR 3:020, see Exhibit "A".

and shall comply with both Kentucky and federal regulations. Section 2 of the General Provisions also provides that these regulations are to be construed as compatible with the federal regulations issued pursuant to the Surface Mining Control and Reclamation Act.² No where in the general provisions are pre-existing underground mines given exemptions from the performance standards. The only exemptions in from portions of the permitting requirements.

An examination of the Kentucky regulations setting forth permitting requirements again fails to reveal any exemption from Kentucky or federal performance standards. In fact, 405 KAR 3:050 § 1, (3) states that a permittee is not relieved of responsibility to comply with federal and state laws and regulations (Appl. Ex. 3).

Greater Pardee, Inc.'s permit contains on its face, the following statement:

"the permittee is advised that although some *planning aspects* for this mine was exempted in the application for permit, the environmental performance standards apply in addition to all applicable federal, state and local laws and regulations. [*italics added*]"

The underlined language indicates that the Responent's interpretation is correct. Kentucky exempted underground mines existing before May 3, 1978, from having to submit certain information to obtain a permit but this did not exempt an underground mine from any performance standards. Instead, the only exemption is from what submissions are necessary to obtain a permit.

The undersigned concludes that the language quoted above and contained on the face of the Applicant's permit specifically informs the Applicant that it is not exempt from the requirements of sedimentation ponds. Having previously concluded that there are no sedimentation ponds to control drainage from the Applicant's permitted area, the undersigned is of the opinion that the Respond-

ent, by a preponderance of the proof, had sustained Violation No. 1 of the Notice of Violation.

DISCUSSION AND CONCLUSIONS AS TO VIOLATION NO. 2

Violation No. 2 was written to the Applicant for failing to comply with 30 CFR § 717.12(c) which states:

"Signs identifying the mine area shall be displayed at all points of access to the permit area from public highways."

Greater Pardee, Inc. has a long permitted access road which intersects with other roads at two points. Coming from the underground mine portals, the first intersection is with a Kentucky state road. It is admitted by the Applicant's witness that no sign was posted at this point (Tr. 37-38). This is the point designated by the blue circle on Respondent's Exhibit 3, which is closer to the mine openings. It is obvious from the testimony and the exhibits that this is a point of access to the permitted road from the Kentucky state road which would be a public highway. As no sign was posted there, the violation in question was properly issued.

ORDER

It is hereby ordered that Notice of Violation No. 80-2-89-27 is sustained.

DAVID TORBETT
Administrative Law Judge

ROSS TIPPLE CO.

3 IBSMA 322

Decided September 24, 1981

Appeal by the Ross Tipple Co. from the Oct. 29, 1980, decision of Administrative Law Judge Joseph E. McGuire upholding the validity of Notice of Violation No. 78-II-7-12 and Cessation Order No. 79-II-7-9, and concluding that the appellant was engaged

² 405 KAR 3:020, see Exhibit "A".

in "surface coal mining operations" as that term is defined in 30 CFR 700.5 and, thus, subject to the jurisdiction of the Office of Surface Mining Reclamation and Enforcement.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Under the facts of this case a processing plant located 22 miles from the minesite that supplies coal to it is not "at or near" the minesite within the meaning of the definition of "surface coal mining operations" in 30 CFR 700.5.

APPEARANCES: Russel Wilson, Robbins, Tennessee, for Ross Tipple Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Glenda R. Hudson, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Ross Tipple Co. (Ross Tipple) has appealed the Oct. 29, 1980, decision of Administrative Law Judge McGuire upholding the validity of the enforcement action taken by the Office of Surface Mining Reclamation and Enforcement (OSM), and concluding that Ross Tipple was engaged in "surface coal mining operations" and, thus, subject to the jurisdiction of OSM.

A consolidated hearing on separate applications for review of the notice and cessation order was held on Jan. 31, 1980, in Knoxville, Tennessee. On Sept. 29, 1980, counsel for OSM advised the Administrative Law Judge that he had withdrawn his request for a supplemental hearing and further requested that a decision be prepared based upon the evidence then of record. OSM's request was granted and the Oct. 29, 1980, decision was issued accordingly.

The Administrative Law Judge's opinion in this case both sets forth the facts fully and applies the definition of "surface coal mining operations" to those facts consistently with Board interpretations of that definition before its recent decision in *Reitz Coal Co.*, 3 IBSMA 260, 88 I.D. 745 (1981). It is therefore attached in full as Appendix A.

The facts in this case do not differ sufficiently from those in *Reitz* to cause any of us to reach a different conclusion or express a different rationale than we did in *Reitz*. The Oct. 29, 1980, decision of the Hearings Division is therefore reversed and the July 31, 1979, order vacating the notice of violation and cessation order and ordering remittance of the \$2,200 civil penalty is hereby reinstated.

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

Appendix A

October 29, 1980

ROSS TIPPLE COMPANY, Applicant *v.* OFFICE
OF SURFACE MINING RECLAMATION AND
ENFORCEMENT (OSM), Respondent

Docket No. NX-9-17-P
Application for Review
Notice of Violation No. 78-II-7-12
Docket No. NX-9-49-R
Application for Review
Cessation Order No. 79-II-7-9

DECISION

Appearances: Russell W. Wilson, *pro se*;
Charles Gault, Esq., Office of the Solicitor,
Department of the Interior, for
Respondent.

Before: Administrative Law Judge
McGuire.

Background

This is a consolidated proceeding under section 525(a) (1) of the Surface Mining Control and Reclamation Act of 1977 (Act),¹ following the timely filing of separate applications for review of a notice of violation and a cessation order issued by the Office of Surface Mining Reclamation and Enforcement pursuant to section 521(a) (3) of the Act, as well as a constructive request for review of a proposed civil penalty assessed in accordance with the provisions of section 518 of the Act.

On December 20, 1978, immediately following an inspection of applicant's premises, respondent issued and served upon applicant Notice of Violation No. 78-II-7-12, in which it was alleged that applicant had failed to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds, in violation of 30 CFR 715.17(a). The required remedial action consisted of constructing a sedimentation pond or a series of sedimentation ponds, revegetating all areas disturbed by that construction, and preparing and submitting plans for permanent sediment control measures to the Tennessee De-

partment of Public Health, Division of Water Quality Control. That construction and the submission of plans were to be accomplished by 10 a.m. January 16, 1979. Applicant was assessed a proposed civil penalty of \$2,200 on January 16, 1979, and on February 26, 1979, applicant's application for review of Notice of Violation No. 78-II-7-12, together with its check in full payment of the proposed \$2,200 civil penalty, was received in the Hearings Division, Office of Hearings and Appeals. Although applicant did not formally request a review of the proposed civil penalty or otherwise comply with the requirements of 43 CFR 4.1152 at the time of submitting its \$2,200 check, that request for relief will be implied in order to grant applicant the widest range of relief affordable under the Act and the procedural rules.

On January 25, 1979, because of inclement weather, applicant requested and received an extension of the abatement period to 10 a.m. EST on February 22, 1979. On the latter date the abatement period was again extended for the same reason to 10 a.m. on March 21, 1979. The final inspection on that date resulted in respondent issuing and serving upon applicant Cessation Order No. 79-II-7-9 for the alleged failure to abate the conditions for which it had been previously cited. That cessation order was terminated on March 29, 1979. On April 19, 1979, applicant filed an application for review of that cessation order and on May 1, 1979, respondent filed a motion to consolidate. That motion was granted on May 10, 1979, and applicant's separate applications and request for review were ordered con-

¹ 91 Stat. 445, 511; 30 U.S.C.A. § 1275(a) (1) (Supp. I 1977).

solidated for purposes of hearing and decisionmaking.

After due notice, the consolidated hearing on applicant's separate applications and request for review was held as scheduled before the undersigned on June 19, 1979, in Knoxville, Tennessee. On July 31, 1979, the undersigned issued a written decision in which Notice of Violation No. 78-II-7-12 and Cessation Order No. 79-II-7-9 were ordered vacated and the proposed civil penalty amount, \$2,200, was ordered to be remitted to the applicant, with interest at the rate of 6 percent or at the then prevailing Department of the Treasury rate, whichever was greater. The order in that decision was based upon the June 22, 1979, ruling of the Interior Board of Surface Mining and Reclamation Appeals (Board) in *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979).

Respondent filed a timely notice of appeal, or alternatively, a petition for discretionary review, with the Board on September 7, 1979. On September 18, 1979, the Board issued its order granting respondent's petition for discretionary review. On October 26, 1979, respondent filed a motion to remand for further proceedings, together with its brief in support thereof. On December 3, 1979, the Board issued an order of remand in *Ross Tipple Co.*, 1 IBSMA 303 (1979), in which it was announced that, in deciding the *Western* case, it was the Board's intention that whether an operation is regarded as a "surface coal mining operation" depended upon the particular factual circumstances of each case. Accordingly, the matter was remanded to the undersigned so that a decision could be prepared based upon the particular facts of this case. Respondent filed a motion on December 17, 1979, in which it requested a supplemental hearing for the purpose of adducing additional evidence.

The requested hearing was scheduled on January 31, 1980, in Knoxville, Tennessee. The undersigned and respondent's counsel appeared at the scheduled hearing, but weather conditions prevented the

appearance of Russell Wilson of the applicant firm. Counsel for respondent advised that the additional evidence would be secured by way of discovery rather than by eliciting hearing testimony. However, on September 29, 1980, respondent's counsel advised the undersigned by letter that he had withdrawn his request for a supplemental hearing and further requested that a decision be prepared based upon the evidence then of record. Respondent's request was granted and this decision prepared accordingly.

Summary of Evidence

The oral and documentary evidence presented at the June 19, 1979, hearing furnished the following facts.

Russell Walter Wilson, age 26, testified that he received his Bachelor of Science degree in Business Administration from the University of Tennessee in 1975. He is the president and owns 50 percent of the outstanding stock of Ross Coal Company, a closely-held Tennessee corporation incorporated in 1976 or 1977. The remaining shareholder and only other officer of that corporation is Charles Ross. On June 6, 1977, he formed a partnership with the same Charles Ross and a third person, Russell Troxel, in order to do business as Ross Tipple Company. Ross Coal Company operates a surface coal mine in Scott County, Tennessee, and Ross Tipple Company is located in Robbins, Tennessee, some 22 miles distant. On December 12, 1977, Ross Coal Company, then described in the pertinent lease agreement as a copartnership consisting of Charles Ross and Russell Wilson, entered into a lease with The Cincinnati, New Orleans and Texas Pacific Railway Company, an Ohio corporation, to occupy and use as a tipple a triangularly shaped parcel of land, measuring 1.81 acres, of the latter firm's right-of-way property in Robbins, Tennessee.

The tipple operation is located on land adjacent to tracks of the Southern Railway Company and has a rail spur that will accommodate at least forty-five 100-ton railroad coal hauling cars. It is

manned by three employees and the tipple's equipment includes a scale house, conveyor belt, crusher, and loading ramps. Coal shipments received total some 3,000 tons weekly, equally divided between receipts from Ross Coal Company and another firm for which it processes and loads coal for interstate shipment in single 100-ton car lots to nearby Tennessee Valley Authority plants in Tennessee and other consignees in Georgia and South Carolina. However, on the date of the issuance of the pertinent notice of violation Ross Coal Company was supplying all of the coal processed at Ross Tipple Company.

During February and March 1979, two temporary sedimentation ponds were built on the tipple premises and on March 16, 1979, engineering plans were submitted to the Tennessee regulatory authority as part of applicant's original application for a coal tipple discharge permit. Those plans contained the information that the maximum daily surface discharge would be 2,500 gallons and that the average daily surface discharge was estimated at 250 gallons. Two permanent sedimentation ponds, being 0.94 acre and 0.4 acre in size, respectively, were provided for, as well as a drainage ditch to be constructed around the perimeter of the drainage area in order to control all runoff and cause it to pass through those sedimentation ponds. The applicant firm further stated in that application that the affected area would be revegetated immediately upon completion according to the reclamation rules and regulations covering revegetation activities. The State regulatory authority advised applicant of several deficiencies in the plans submitted on March 16, 1979, and applicant submitted amended engineering plans on June 18, 1979, the day prior to the hearing. At the time of the hearing the applicant firm was awaiting approval of that amended application. Mr. Wilson further testified that on March 21, 1979, the date upon which Office of Surface Mining Inspector Stephen Davis con-

ducted his final inspection and issued the cessation order, the appropriate remedial measures had been taken on the disturbed areas.

Kenny Totty, conservation engineer for Ross Tipple Company and Ross Coal Company, testified that in February or March 1978 he consulted with Nick Wright and Dewey Henry, both of whom then worked as biologists for the State regulatory authority, Tennessee Department of Public Health, Division of Water Quality Control, concerning the construction of sedimentation ponds. They advised him that none were necessary, owing to the small amount of acreage upon which the tipple operation was being conducted. Messers. Wright and Henry further advised him that the surface discharge could be effectively controlled by the use of crushed limestone rock at the points of discharge in the tipple area.

Stephen H. Davis testified that he holds an Associate of Arts Certificate in Forestry from the University of Kentucky and had been employed for some 14 months as a reclamation specialist supervisor at the Office of Surface Mining. He had been previously employed for 6½ years at the Tennessee Valley Authority as a reclamation inspector of surface and deep mines. On December 20, 1978, accompanied by Gary Chitwood, the foreman at Ross Tipple Company, he inspected applicant's tipple facility in Scott County, Tennessee, and cited applicant for failure to have the required sediment controls. It was noted that the applicant's triangularly shaped leased site was bounded on one side by a ditch some 3 feet deep which separated the tipple yard from the main rail line. Some of the coal, which had been stockpiled close to that ditch, had fallen into the ditch and coal dust was washing into it, also. The ditch ran some 200-300 yards before draining into a small stream nearby. He noted limestone piled some 2 feet high across the ditch at the point it left the coal storage yard. Except for that ditch there

were no drainage features and consequently rain would have caused drainage over, through, and away from the tipple area without having passed through a sedimentation pond. The limestone rock was heavily stained with iron deposits and small pools of water were observed in the ditch. When tested in the presence of Gary Chitwood, the water in these pools showed a pH factor of 4.5, or well below the minimum regulatory pH factor of 6.0, and when tested for iron, the reading exceeded the scale of the testing instrument. He observed massive amounts of iron and coal dust in the water that had been discharged from the tipple area and stated that this discharge would detrimentally affect the lower forms of the food chain, such as minnows, in nearby streams.

The tipple operation affected an additional area estimated as being some four-tenths (0.4) of an acre in size beyond the area leased for the tipple operation, owing to applicant's storage of spoil in that area. He felt that applicant's violation of 30 CFR 715.17(a) was negligent, as opposed to willful, and granted applicant until January 26, 1979, to abate the conditions. Inclement weather caused him to extend the period to February 22, 1979, initially, and eventually to March 21, 1979. On reinspecting the tipple area on the latter date he observed that all remedial work had not been completed, despite adequate periods of good weather during which that work could have been done. Because 30 CFR 722.12(d) provides that the total time for abatement as originally fixed and subsequently extended shall not exceed 90 days, he issued a cessation order on that date. He felt that the applicant firm had cooperated in abating the violation but that it had not taken extraordinary measures to do so.

Issues

The threshold issue presented by these facts is that of determining whether the activities of the applicant firm are subject to the enforcement authority of

OSM. That will depend upon whether its tipple operations are viewed as "surface coal mine operations," as that term is defined in section 701(28) of the Act² as well as in section 700.5 of the regulations.³ Should that issue be resolved affirmatively, five additional issues are suggested: (1) whether the pertinent notice of violation was properly issued; (2) whether the pertinent cessation order was properly issued; (3) whether the amount of the proposed civil penalty, \$2,200, is appropriate under these facts; (4) whether OSM has jurisdiction to enforce the Act and regulations under these facts, since, as applicant contends, its tipple operation was conducted on leased premises less than 2 acres and thus excluded from coverage under section 700.11(b) of the regulations;⁴ and (5) whether the activities of the applicant firm, if found to be in violation of the interim regulations, can be excused for the reason that applicant relied upon the statements of two former State regulatory employees to the effect that, owing to the size of the applicant's lease premises, no sedimentation ponds were required.

Discussion, Findings, and Conclusions

The construction of the term "surface coal mining operations" as it relates to coal loading facilities, tipples and preparation and/or processing plants, has been the principal issue in six Board rulings. The initial case was that of *Western Engineering, Inc., supra*. The applicant therein operated a river terminal at which coal was received from 8 to 10 mines located some 10 to 60 miles from that facility. It processed the coal and loaded it onto river barges for interstate shipment. The status of Western was found to be that of a contract handler of coal because it did not own, lease, or operate any coal mines, nor did it take

² 91 Stat. 445, 516; 30 U.S.C. § 1291(28) (Supp. I 1977).

³ 30 CFR 700.5.

⁴ 30 CFR 700.11(b).

title to any product it processed and loaded.

OSM had issued a cessation order for failure to abate conditions which allegedly violated the Act and Western sought temporary relief from that cessation order, urging that it was not subject to OSM's jurisdiction because it was not engaged in "surface coal mining operations," per se. In denying the application for temporary relief and finding that the tipple operator therein was engaged in "surface coal mine operations," the undersigned prepared and issued a written decision, dated March 7, 1979, in which it was held that Western's operation of that river terminal should be regarded as a "surface coal mining operation" for the reason that, where administrative powers are granted for the express purpose of effectuating broad regulatory programs which are deemed to be essential to the public welfare, the statutory interpretation given to the provisions of the Act should be that which insures that the full benefits of the legislation, as expressed in section 102 of the Act,⁵ can be realized. This was accomplished by so interpreting the definitional language at issue therein. Although the terms "coal loading facility," "tipple," "coal processing plant," "coal preparation plant," or similar terms were not used definitionally in the Act or regulations, those type facilities are recognized to be such integral components of the surface coal mining industry that Congress logically and pragmatically would almost certainly have intended that operations and activities of that type be covered under the Act and the regulations. However, the Board, in its June 22, 1979, reversing decision, declared at page 204:

"We find that since the definition of "surface coal mining operations" in the Act and regulations is ambiguous as it applies to Western's operations, and since it is not clear from the provisions of the ini-

tial regulatory program, taken as a whole, that operations such as Western's were intended by the Secretary to be subject to those provisions, the decision of the ALJ must be reversed."

There followed for Board review five cases involving the same central issue but presenting varying factual situations. Without particularizing the facts in each of those cases, the most recent of which was decided by the Board on September 26, 1980, in *Roberts Brothers Coal Co., Inc.*, 2 IBSMA 284, 87 I.D. 439 (1980), the facts of the instant case will be reviewed and the rulings of the Board applied. In its post-*Western* decisional activity in this area, the Board has announced that before a coal loading facility, a tipple, or a coal preparation and/or processing plant can be considered to be a "surface coal mining operation" and thus subject to OSM's jurisdiction, it must pass a two-part test: (1) its activities must be conducted in connection with a surface coal mine, and (2) the facility in question must be located at or near the minesite. *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980). The instant facts will now be analyzed to determine if the tipple facility was being conducted "in connection with" a surface coal mine and, if so, whether that the tipple facility was located "at or near the minesite."

The evidence discloses that on December 20, 1978, the issuance date of the relevant notice of violation, all of the coal processed at the Ross Tipple Company facility came from one mine, which was owned by Ross Coal Company. Ross Tipple Company has been described in the evidence as being a partnership formed on June 6, 1977, in order to operate the tipple in question. The partners were Russell Wilson, Charles Ross, and Russell Troxel. Meanwhile, Ross Coal Company was described in the testimony of Russell Wilson as being a closely-held Tennessee corporation which was incorporated in 1976 or 1977. The only officers and shareholders of that corporation were Russell Wilson, its president and 50 percent

⁵ 91 Stat. 445, 449; 30 U.S.C. § 1202 (Supp. I 1977).

shareholder, and Charles Ross, the remaining officer and thus the remaining 50 percent shareholder. Although Ross Tipple Company, the partnership, reportedly operated the tipple facility, it did not lease the 1.81-acre parcel on which the tipple facility is located. Instead, on December 12, 1977, Ross Coal Company, the corporate entity, but described in the written lease agreement as a copartnership consisting of Russell Wilson and Charles Ross, entered into a lease with the Cincinnati, New Orleans and Texas Pacific Railway Company, an Ohio corporation, to occupy and use as a tipple a parcel of land some 1.81 acres in size and located in Robbins, Tennessee (Applicant's Exh. 1).

In any event, aside from the forms of business entities that were chosen by Messrs. Russell Wilson and Charles Ross, one may very reasonably assume that Ross Coal Company and Ross Tipple Company were commonly owned. It has been previously noted that on the date of the issuance of the pertinent notice of violation, all coal processed at the Ross Tipple Company facility had been mined at the Ross Coal Company mine located some 22 miles away. Accordingly, common ownership and use of the tipple activity and that surface coal mine have been shown. In deciding *Drummond Coal Co., supra*, on June 3, 1980, the Board announced that the common ownership and use of an activity, such as a coal processing facility/plant and a surface coal mine, would be a sufficient basis for satisfying the connection test and thus the operation of such an activity, coupled with the operation of a surface coal mine, would be found to be conducted "in connection with" a surface coal mine. On that basis, I find that on December 28, 1979, the tipple facility operated by Ross Tipple Company was being operated in connection with the surface coal mine operated by Ross Coal Company.

The remaining inquiry involves whether that tipple operation was also being conducted "at or near the minesite," given the fact that some 22 miles sepa-

rated their respective locations. In that same ruling, *Drummond Coal Co., supra*, the Board also found that the preparation plant therein was located "near" the pertinent minesite since the jointly owned active mining pits were located within 30 miles. Therefore, I find that this tipple facility located some 22 miles from the commonly owned strip mine, was located "near" that minesite, thus falling within OSM's enforcement authority inasmuch as the applicant firm was engaged in "surface coal mining operations" as that term is defined in the Act and the regulations.

In deciding the second issue, that of determining whether respondent properly issued Notice of Violation No. 78-II-7-12, alleging one violation of the regulations, i.e., 30 CFR 715.17(a), the evidence will be examined to determine if the required measure of proof has been offered. Respondent's burden of proof is set forth in the procedural regulations at 43 CFR 4.1171:

"(a) In review of section 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, order, or modification, vacation, or termination thereof.

"(b) The ultimate burden of persuasion shall rest with the applicant for review."

A review of the testimony of the OSM inspector, Stephen H. Davis, discloses that the applicant firm had failed to install the required sedimentation pond(s) in order that all surface drainage from the disturbed area would have passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area, as required by 30 CFR 715.17(a). Applicant did not rebut that fact. Instead, its evidence disclosed that the sedimentation pond(s) had not been constructed because in reaching that decision it relied upon informal and inaccurate advice received from two former employees of the appropriate State regulatory authority. Respondent's evidence convinc-

ingly showed that there was surface drainage, that it did not pass through a sedimentation pond, and that the drainage left the disturbed area. This quantum of evidence, if not rebutted, is sufficient to establish a violation of 30 CFR 715.17 (a), *Black Fox Mining & Development Corp.*, 2 IBSMA 277, 87 I.D. 437 (1980). After reviewing the evidence addressed to this issue, I find that Notice of Violation No. 78-II-7-12, dated December 20, 1978, was properly issued.

The next issue outlined is that of determining whether Cessation Order No. 79-II-7-9, dated March 21, 1979, was properly issued. Under the terms of the pertinent notice of violation the applicant firm was granted until 10 a.m. EST on January 26, 1979, to complete the specific remedial action and thus abate the violative conditions. Inclement weather caused the abatement period to be twice extended to March 21, 1979, or some 90 days after the issuance date of the notice of violation. Inspector Davis testified that because there were adequate periods of good weather in which the remedial work could have been performed and because of the further fact that section 722.12 of the regulations⁶ does not permit the period for abatement to be extended beyond 90 days, he issued the pertinent cessation order on March 21, 1979, because his inspection of the applicant firm's tittle facility on that date revealed that the required remedial work had not been completed and that the offending conditions had not been abated. This testimony was not rebutted by the applicant firm. Because the violation had not been abated at the time the cessation order was issued on March 21, 1979, this finding alone is sufficient to sustain the issuance of the pertinent cessation order, *Hayden & Hayden Coal Co.*, 2 IBSMA 238, 241, 87 I.D. 414 (1980). Based upon that ruling as well as on the provisions of section 521(a)(3) of the Act⁷ and sec-

tion 722.13 of the regulations,⁸ I find that Cessation Order No. 79-II-7-9, dated March 21, 1979, was properly issued.

The third issue involves the appropriateness of the \$2,200 civil penalty assessed. Under 43 CFR 4.1155, OSM has the burden of going forward to establish a prima case and the ultimate burden of persuasion as to be fact of violation and as to the amount of the penalty. A prima facie case will have been made if respondent has presented sufficient evidence to establish essential facts which, if uncontroverted, would permit, if not compel, a finding in favor of OSM. *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 298, 85 I.D. 656, 658 (1979); *James Moore*, 1 IBSMA 216, 223, 86 I.D. 369, 373 (1979); *Dean Trucking Co., Inc.*, 1 IBSMA 229, 337, 86 I.D. 437 (1979). Since the fact of violation has been ruled upon previously in this decision in respondent's favor, the inquiry to be presently commenced will be that dealing solely with the appropriateness of the amount of the civil penalty.

Evidence in support of the appropriateness of the civil penalty took the form of the hearing testimony of OSM Inspector Stephen H. Davis. In addition, respondent placed in evidence a copy of the January 16, 1979, proposed assessment of penalty notice sent to the applicant firm by respondent's Assessment Office in Washington, D.C., including the method of computing the 42 penalty points, which resulted in a proposed civil penalty of \$2,200 (Respondent's Exh. F). Respondent's Assessment Office assigned 42 total assessment points in the following manner: No points were assessed because of previous violations, 30 total points were assessed because of the seriousness of the violation, that is, 15 points owing to the probability of occurrence and 15 points arising out of the extent of potential or actual damage, 12 points were assessed because of applicant's negligence and no

⁶ 30 CFR 722.12.

⁷ 91 Stat. 445, 504; 30 U.S.C. § 1271(a) (1) (Supp. I 1977).

⁸ 30 CFR 722.13.

points were added nor was there any point reduction based upon applicant's show of good faith.

Because no prior violations by applicant were shown, no penalty points were properly assigned under that criterion. The respondent properly assigned 15 penalty points owing to the probability of occurrence of the event intended to be prevented, namely, water pollution caused by the failure to install sedimentation ponds because that condition had, in fact, occurred and section 723.12 of the regulations⁹ provides for that total point assessment in that event. Regarding the assessment of the maximum 15 penalty points because of the extent of potential or actual damage, section 723.12(c) (2) (ii) of the regulations¹⁰ provides that 8 to 15 points shall be assigned if the damage or impact against which the violated standard is designed to prevent would extend outside the permit area. Respondent did not abuse its discretion in assessing 15 points on that basis because the evidence disclosed that the damage or impact had occurred beyond the permit area. Finally, the imposition of 12 assessment points for negligence is in order because an assessment of 13 through 25 penalty points requires a finding of a greater degree of negligence and the record does not show that applicant's violation of the regulation was reckless, knowing, or intentional. Therefore, I find that the assessment of 42 penalty points, converted to a civil penalty assessment of \$2,200, by the use of the conversion schedule contained in 30 CFR 723.13, was appropriate under these facts.

The gravamen of the next issue is the physical size of applicant's tippie facility premises. Applicant urges that its tippie operation is conducted on leased premises measuring some 1.81 acres, as shown by the copy of the pertinent lease (Applicant's Exh. 1) and thus is excluded from the Act's coverage, owing to the wording

of 30 CFR 700.11(b), which applicant contends is exclusionary as applied to areas measuring 2 acres or less. An orderly discussion of this contention requires an examination of that section of the regulations. 30 CFR 700.11(b) in its entirety provides that: "The regulations in this chapter apply to all surface coal mining and reclamation operations except * * * (b) The extraction of coal for commercial purposes where the surface mining and reclamation operation affects two acres or less * * *."

The applicant's argument is flawed in two respects. Initially, Ross Tipple Company was not engaged in the extraction of coal, per se, but rather as the operator of a tippie. Instead, Ross Coal Company, the commonly-owned enterprise, mined the coal. Secondly, this surface mining operation disturbed an area in excess of 2 acres inasmuch as the unrebutted testimony of the OSM inspector revealed that an area measuring some four-tenths (0.4) of an acre beyond the leased premises was being utilized as a spoil storage area, thus increasing the disturbed area to at least 2.21 acres, not considering the additional area represented by the water in the nearby stream affected by the entry of the unimpounded surface drainage. For either of the foregoing reasons, applicant has misplaced its reliance on 30 CFR 700.11(b) as relieving it of liability under the Act.

The final issue presented involves applicant's contention that, if its activities are found to be in violation of the Act or the regulations, its reliance upon the informal advice of two former State regulatory employees to the effect that the size of applicant's leased premises relieved it of the duty to install the required sedimentation ponds, should be viewed as an exculpatory factor. Applicant has failed to furnish authority, either in the Act, the regulations, or decisionally, which would entitle it to such consideration, and a search of those sources by the undersigned has proven unproductive. Accordingly, because it

⁹ 30 CFR 723.12.

¹⁰ 30 CFR 723.12(c) (2) (ii).

lacks statutory, regulatory, or decisional basis, this unsupported argument must be rejected as being without merit.

In summary, I find that on December 20, 1978, Ross Tipple Company, as the operator of the involved tipple facility, was engaged in "surface coal mining operations," as that term is defined in the Act and in the regulations; that Notice of Violation No. 78-II-7-12 and Cessation Order No. 79-II-7-9 were properly issued; that the \$2,200 civil penalty was appropriately assessed; that the physical size of applicant firm's tipple facility, as utilized, did not deprive OSM of enforcement jurisdiction; and finally, that applicant firm's activities, otherwise violative of the Act and the regulations, cannot be condoned because it received and acted upon improper advice.

Order

Applicant's separate applications for review of Notice of Violation No. 78-II-7-12, dated December 20, 1978, and Cessation Order No. 79-II-7-9, dated March 21, 1979, as well as its constructive request for review of the proposed civil penalty, are denied. It is further ordered that the sum of \$2,200, based upon 42 penalty points, is the total appropriate civil penalty for the two violations set forth in Notice of Violation No. 78-II-7-12.

The previous order of the undersigned, entered as part of the decision dated July 31, 1979, is hereby set aside and superseded by this order.

JOSEPH E. MCGUIRE

Administrative Law Judge

Appeal Information

This decision may be appealed in accordance with 43 CFR Subtitle A, Part 4, Subpart L, section 4.1100-4.1296, Special Rules to Surface Coal Mining Hearings and Appeals, by filing a notice of appeal and/or a petition for discretionary review within 30 days from receipt

of this decision with the Board of Surface Mining and Reclamation Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203.

MOUNTAIN ENTERPRISES COAL CO.

3 IBSMA 338

Decided September 25, 1981

Appeal by Mountain Enterprises Coal Co., from a decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-236-R that affirmed the validity of Notice of Violation No. 80-I-47-23, issued to the appellant for allegedly failing to eliminate all highwalls where mining reaffected previously mined lands that were not restored to the approximate original contour, in violation of 30 CFR 715.14(b) (1). Appellant likewise appeals from the modification of the Administrative Law Judge's decision by Board order dated Sept. 18, 1980.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Previously-mined Lands

The backfilling and grading requirements of 30 CFR 715.14 apply to previously mined lands where surface coal mining operations result in an adverse physical impact to the preexisting highwall which is reaffected by such operations.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining

Control and Reclamation Act of 1977: State Regulation: Generally

Compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance standards.

3. Estoppel

Failure to disavow a state memorandum implying OSM approval of its contents or failure to object to the issuance of a state permit containing terms inconsistent with Federal regulations does not constitute action that estops OSM from taking an enforcement action.

APPEARANCES: Benjamin F. Sutherland, Esq., Clintwood, Virginia, for Mountain Enterprises Coal Co.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, Marianne D. O'Brien, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Mountain Enterprises Coal Co. (Mountain Enterprises) has appealed the Aug. 28, 1980, decision of Administrative Law Judge Tom M. Allen upholding the issuance of Notice of Violation No. 80-I-47-23, which charged Mountain Enterprises with failure to eliminate all highwalls where mining has re-affected previously mined lands that were not returned to the approximate original contour, in violation of 30 CFR 715.14(b)(1).

For the reasons set forth below we affirm the Administrative Law Judge as modified by this decision.

Procedural and Factual Background

On Dec. 12, 1978, the deputy director of the Virginia Division of Mined Land Reclamation (DMLR) issued a directive to "[a]ll Coal Operators and Engineers." It stated that the Commissioner of the DMLR, "after consulting with the Office of Surface Mining personnel," had outlined the DMLR's "policies and interpretations" concerning second mining on preexisting highwalls. It read in pertinent part:

Additional Cut on Pre-Existing Highwalls

In situations when an operator wishes to take an additional cut on a pre-existing highwall and it is not economically feasible to take a large enough cut to obtain the necessary amount of material to completely eliminate the entire highwall then the following procedures are to be followed:

* * * * *

When an operator wishes to take an additional cut on a pre-existing highwall, the operator will be required to eliminate the highwall to the maximum extent possible. A determination will be made on a site specific basis based upon detailed plans submitted to the Division. [Italics supplied.]

On July 30, 1979, Mountain Enterprises applied to the DMLR for issuance of a surface mining permit. The permit application stated that Mountain Enterprises "plans to take an additional cut on the existing highwall left by previous

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mining of the Clintwood seam by Stabeth, Inc.”¹ Stabeth had left an unreclaimed highwall ranging in height from 60 to 80 feet for a distance of about 1.5 miles. On Aug. 27, 1979, DMLR approved the application and issued permit 3066 to the appellant. The regrading portion of the permit provided that all material was to be hauled back behind the mining operation to eliminate the existing highwall “as much as possible” (Respondent Exh. 1-C at 2). OSM received a copy of this permit on Aug. 30, 1979. Mining operations began after approval of the permit and terminated in March 1980. Reclamation continued until September 1980.

When appellant’s operation was inspected by OSM in September and October 1979, it was not cited for a violation. In October and November 1979 the Office of Surface Mining Reclamation and Enforcement (OSM) reviewed all permits issued by DMLR which OSM considered not to conform with the requirements of the Act.² This in-

cluded Mountain Enterprises’ permit because it authorized only partial reclamation of the highwall. DMLR was notified by OSM of all instances in which permits issued by DMLR did not conform to OSM’s interpretation of the Act and regulations. OSM assumed the position in discussions with DMLR that an operator would be cited by OSM if it was operating in compliance with a Virginia permit but not with the Federal regulations. A review of the record indicates that no Virginia operators, including Mountain Enterprises, were notified of OSM’s position, either by DMLR or by OSM.

On June 24, 1980, the OSM inspector visited the site for the purpose of discussing the highwall with appellant’s reclamations specialist and indicated that partial restoration of the highwall would probably be insufficient for purposes of compliance with Federal standards. On July 22, 1980, the inspector returned and issued Notice of Violation No. 80-I-47-23, which charged appellant with failing “to eliminate all highwalls where mining has reaffected previously mined lands that were not restored to the approximate original contour,” in violation of 30 CFR 715.14(b)(1).

The inspector testified that appellant partially reclaimed most of the preexisting highwall so that it had been reduced in those areas to a height of 40 to 60 feet (Tr. 98). In some areas the preexisting highwall was not affected. (Tr. 91). In other areas the highwall had been com-

¹ The “Operations” section of the permit application states in part that:

“Since this operation will consist of taking an additional cut on a preexisting highwall, all overburden will be retained on the solid portion of the existing Clintwood bench, and all highwalls will be eliminated to the *maximum extent possible*. The extent of highwall elimination will vary throughout the area due to the varying heights of the existing highwall.” (App. Exh. 7) (italics supplied).

“The highwall will be completely eliminated and covered with spoil except in those cases where an additional cut is taken on a preexisting highwall and the highwall will be eliminated to the *maximum extent possible* with available material.”

(App. Exh. 8) (italics supplied).

² Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

pletely eliminated. The inspector found that approximately 1,000 linear feet of unreclaimed highwall remained (Tr. 99). The evidence also shows that approximately 3 feet of spoil had been spread upon the bench for a distance of 150 to 250 feet from the face of the highwall toward the downslope.

On Aug. 18 and 22, 1980, respectively, appellant applied for review and temporary relief. On Aug. 28, 1980, the Administrative Law Judge issued a written decision affirming the notice of violation and denying the application for temporary relief. On Sept. 15, 1980, both appellant and OSM filed notices of appeal. OSM also moved to vacate that part of the decision which prohibited and enjoined OSM from requiring remedial action to abate the notice of violation and from assessing a civil penalty.

On Sept. 18, 1980, the Board issued an order granting OSM's motion and vacating the Administrative Law Judge's suspension of reclamation activities and imposition of civil penalties until the Board decided the issue on appeal, dismissed OSM's appeal and denied appellant's motion to vacate the imposition of penalty points. Both parties filed timely briefs with the Board.

Discussion and Conclusions

As a preliminary matter, Mountain Enterprises has appealed the Board's Sept. 18, 1980, order. 43 CFR 4.1116 provides that the filing of an application for review does

not stay a notice of violation or cessation order. If temporary relief is not granted in accordance with sec. 525(c), 30 U.S.C. § 1275(c) Supp. II 1978), as it was not by the Administrative Law Judge in this case, then the remedial action called for by the Notice of Violation, and the assessment of civil penalties based on it, cannot be stayed. *See Atomic Fuel Co., Inc.* 3 IBSMA 287, 88 I.D. 824 (1981).

Mountain Enterprises was issued Notice of Violation No. 80-I-47-23 which charged a violation of 30 CFR 715.14. That section provides in relevant part:

In order to achieve the approximate original contour, the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls, spoil piles, and depressions.

[1] In *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979), and *Miami Springs Properties*, 2 IBSMA 399, 87 I.D. 645 (1980), the Board has addressed the applicability of this requirement when previously mined land is involved. These cases make clear that the issue is whether the new mining has had an adverse physical impact on the orphaned highwall. *Cedar Coal Co.*, 1 IBSMA at 155, 86 I.D. at 256; *Miami Springs Properties*, 2 IBSMA at 403, 87 I.D. at 647.

Appellant argues that *Cedar* supports its partial reclamation of newly created highwall, and that such partial reclamation conforms

to the purpose of the Act.³ However, the facts of this case are readily distinguishable from those in *Cedar*. In that case, the Board found that the operator removed overburden from the base of the orphaned highwall, which resulted in new highwall exposure. There was no showing, however, that Cedar's removal of overburden resulted in any adverse physical impact on the orphaned highwall. In this case the orphaned highwall was not merely affected, it was removed. As the Administrative Law Judge found, Mountain Enterprises' additional cuts created a new highwall face some 60 feet back from the original face of the preexisting highwall (Decision at 4). Although some dispute exists as to whether all available material was used to eliminate the new highwall,⁴ it is nevertheless uncontroverted that it was not eliminated.

[2] Appellant's permit called for the elimination of the highwall to the "maximum extent possible" with available material. This procedure was approved by the DMLR in its directive dated Dec. 12, 1978. How-

³ See sec. 102(h) of the Act, which provides:

"It is the purpose of this Act to—

"(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public." 30 U.S.C. § 1202(h) (Supp. II, 1978).

⁴ OSM asserts that appellant trucked approximately 600 tons of overburden from permit 3066 to adjacent permit 2420, using this material to eliminate highwall on permit 2420 and to construct the hollow fill (Brief at 3).

ever, the evidence shows that approximately 3 to 4 feet of spoil had been spread upon the bench for a distance of 150 to 250 feet outward from the face of the highwall toward the downslope. Even if such reclamation could be deemed to comply with the grading requirements contained in the Virginia permit, or was otherwise authorized by the State, as Mountain Enterprises asserts (Tr. 29, 34, 55), it was inadequate to comply with 30 CFR 715.14 (b) (1), which provides in part:

The requirements of this paragraph may be modified by the regulatory authority where the mining is re-affecting previously mined lands that have not been restored to the standards of this section and sufficient spoil is not available to return to the slope determined according to paragraph (a) (1). Where such modifications are approved, *the permittee shall, as a minimum, be required to—*

* * * * *

(ii) Backfill and grade to *the most moderate slope possible* to eliminate the highwall which does not exceed the angle of repose or such lesser slopes as is necessary to assure stability. [Italics supplied.]

Spreading material on the bench as it was done in this case does not constitute backfilling "to the most moderate slope possible." As we have consistently held since *Cedar*, 1 IBSMA at 153, 86 I.D. at 255, compliance with a state mining permit requirement does not change obligations under Federal law and does not excuse noncompliance with the initial performance standards.⁵

⁵ 30 CFR 720.11 provides:

"Enforcement authority.

"Nothing in the Act or these regulations shall be interpreted to preclude a State from

The evidence in the instant case indicates that appellant failed to meet the minimum Federal requirements contained in 715.14(b)(1), and, therefore, the notice was properly issued.

[3] Appellant argues that because OSM did not object to the issuance of the permit or inform it or any other operator that it disavowed the implication in the Virginia memorandum that it approved the state policy concerning reclamation after mining preexisting highwalls it should be estopped from the enforcement action it took. We have stated standards for demonstrating that OSM might be estopped.⁶ We are not, however, persuaded that they have been met. The Virginia memorandum did not say any more than that DMLR had "consulted" OSM personnel; their names or apparent authority were not specified nor did the memorandum say that the OSM personnel

agreed with the statements.⁷ There is no evidence that OSM intended that Mountain Enterprises or anybody else rely on the policy statements it contained. Nor does OSM's failure to disavow them or object to the issuance of the permit constitute action that would reasonably give Mountain Enterprises the right to believe that OSM did intend they be acted on. This is particularly so given the fact that OSM's involvement with Virginia's surface mining activities was effectively precluded for several months until shortly before the time of issuance of the permit because of the Federal district court's injunction that prevented OSM from enforcing the Act in that state.⁸ Even apart from that, OSM is not obligated to discover or repudiate every inaccurate statement about applicable Federal law that a state might make. A permittee is obligated to comply with the initial Federal program regulations, as published. 30 CFR 710.11(a)(3). A state is obligated to issue permits whose terms comply with the perform-

exercising its authority to enforce State law, regulations, and permit conditions, unless compliance with the State law, regulations, or permit condition will preclude compliance with these regulations."

See also, 30 CFR 710.4(b): "The States are responsible for issuing permits and inspection and enforcement on lands on which operations are regulated by a State to insure compliance with the initial performance standards in Parts 715 through 718 of this chapter."

⁶ See *Daniel Brothers Coal Co.*, 2 IBAMA 45, 52, 87 I.D. 138, 141 (1980):

"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. [*United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970).]"

See also *United States v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978).

⁷ The only testimony at the hearing concerning whether OSM agreed with the DMLR policy statements was the report of Doug Stone, OSM District Supervisor, that Regional Director Beasley had told him "there had been no agreement on that issue at that time in December" (Tr. 142).

⁸ From February to August 1979 Virginia kept copies of all permits it issued and held them for OSM until this litigation was settled (Tr. 143, 144). They were given to OSM when it came back into the state in August (Tr. 146). Because OSM's first priority was to inspect all active surface mines in the state, it did not begin to review permits until November (Tr. 147). That review indicated that Mountain Enterprises' permit was among those with terms inconsistent with the provisions of the initial program.

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ance standards in those regulations. *Id.* and 30 CFR 710.4(b).

For the foregoing reasons, the Aug. 28, 1980, decision of the Administrative Law Judge upholding Notice of Violation No. 80-I-47-23, is affirmed as modified by this decision.

WILL A. IRWIN

Chief Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

NEWTON FRISHBERG

Administrative Judge

**PIERCE COAL AND CONSTRUCTION,
INC.**

3 IBSMA 350

Decided September 25, 1981

Appeal by Pierce Coal and Construction, Inc., for review of the Dec. 24, 1980, decision of Administrative Law Judge Sheldon L. Shepherd, Docket No. CH 1-57-R, denying appellant's application for temporary relief from Notice of Violation No. 80-I-61-26 and Cessation Order No. 80-I-61-3 (based, in pertinent parts, on an alleged failure by appellant to restore in a timely manner the areas disturbed by its coal mining operations to conditions capable of supporting the uses they were capable of supporting before mining).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

During the initial regulatory program the person named in the state permit for a surface coal mining operation is the permittee with respect to that operation and, as such, a proper person to be issued a notice of violation concerning the operation.

APPEARANCES: Frederick P. Grill, Esq., Clarksburg, West Virginia, for Pierce Coal and Construction, Inc.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, Glenda R. Hudson, Esq., and Marcus P. McGraw, Assistant Solicitor, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

**OPINION BY THE INTERIOR
BOARD OF SURFACE MIN-
ING AND RECLAMATION
APPEALS**

This appeal was brought by Pierce Coal and Construction, Inc. (Pierce), for review of the decision of the Hearings Division denying Pierce temporary relief from enforcement action by the Office of Surface Mining Reclamation and Enforcement (OSM) taken as the result of Pierce's alleged failure to comply with the requirement of 30 CFR 715.13(a) for timely restoration of all areas disturbed by mining to conditions capable of supporting the uses they were capable of supporting prior to mining. Pierce contends that it is not responsible for the mining and reclamation activities that resulted in OSM's enforcement action. We affirm the denial of temporary relief.

*Factual and Procedural
Background*

The State of West Virginia issued to Pierce mine permit 16-78 on Jan. 24, 1978, authorizing mining operations near Hacker Creek in Upshur County, West Virginia (Applicant's Exh. B). Surface mining and reclamation operations under this permit have been performed by MLM Corporation (MLM) (Tr. 23-25, 50). Mining operations were discontinued in November 1979 except for limited, experimental mining performed in April 1980 (Tr. 50).

In May 1980 Richard N. White, president of MLM, and Ernest B. Pierce, president of Pierce, signed a document entitled "APPLICATION FOR OPERATOR RE-ASSIGNMENT" concerning permit 16-78 (Applicant's Exh. B; Tr. 100-01). This application was for the purpose of transferring the mining rights under the permit from Pierce to MLM; however, it is not indicated on the face of the document whether it was approved by the State of West Virginia.

OSM inspected the Hacker Creek mining operation on Sept. 4, 1980, and issued Notice of Violation No. 80-I-61-26 on September 5 (Exh. R 1). Three violations of the Department's regulations were alleged in the notice: (1) Failure to monitor ground water to determine the effects of surface coal mining on the recharge capacity of reclaimed lands, in violation of 30 CFR 715.17 (h) (3); (2) failure to restore in a

timely manner all areas disturbed to conditions that are capable of the uses they were capable of supporting prior to mining, in violation of 30 CFR 715.13(a); and (3) failure to pass all surface drainage from the disturbed area through a sediment pond or series of sediment ponds, in violation of 30 CFR 715.17. The first and third alleged violations were terminated by OSM on Oct. 9, 1980 (Motion for Temporary Relief, dated Dec. 8, 1981, at Exh. C). On the basis of Pierce's alleged failure to abate violation 2 of the notice, OSM issued Cessation Order No. 80-I-61-3 on Dec. 8, 1980 (Application for Review of CO 80-1-61-3, dated Dec. 12, 1980, at Exh. A).

A hearing on Pierce's motion for temporary relief from violation 2 of the notice of violation was held on Dec. 11, 1980. The Administrative Law Judge denied temporary relief in a ruling from the bench. After this ruling Pierce requested temporary relief from the cessation order, based on the record of the December 11 hearing. In a written decision issued on Dec. 24, 1980, the Administrative Law Judge confirmed his oral denial of temporary relief from the notice of violation and denied temporary relief from the cessation order, explaining that Pierce did not show a substantial likelihood that a decision on its applications for review of the notice of violation and cessation order would be favorable to the company. Pierce appealed the decision; both parties filed briefs.

Discussions and Conclusions

Pierce's primary contention in support of its appeal is that it should not be held responsible for the actions of MLM which resulted in OSM's issuance of a notice of violation and cessation order. For the reasons set forth below we reject this contention.

[1] The Board has held that during the initial regulatory program the person named in the state permit for a surface coal mining operation is the "permittee" with respect to that operation and, as such, a proper person to be issued a notice of violation concerning the operation. *Wilson Farms Coal Co.*, 2 IBSMA 118, 87 I.D. 245 (1980).¹ It is Pierce, not MLM, that is named in the West Virginia permit for the Hacker Creek mining operation (Applicant's Exh. B). The application for operator reassignment (Applicant's Exh. B) signed on behalf of Pierce and MLM contains the recital by the president of Pierce: "I further understand that this application transfers the mining rights only and that this permit

is non-transferable." Consequently, even assuming that the application was duly approved, on the basis of the evidence now before it the Board must conclude that Pierce remains the holder of the state permit and was a proper company to be served with the notice of violation and related cessation order.²

There remains the question of the merits of the violations alleged in the notice of violation and cessation order. In the former Pierce was charged, in pertinent part, with a failure to restore in a timely manner the areas disturbed by its mining to a condition capable of supporting the uses they could support prior to mining; in violation of 30

² Cf. *Marco, Inc.*, 3 IBSMA 128, 88 I.D. 500 (1981) (in which the Board held that a company which had relinquished its state permit to mine on property on which it had never conducted mining operations was thereby relieved of its "permittee" status).

¹ As was noted in the Board's *Wilson Farms* decision, the responsibility of a permittee for operations on the permit area is explained in the preamble to the initial regulations at 42 FR 62671 (Dec. 13, 1977):

"17. Comments were received suggesting that the attribution to the permittee of the actions of all persons working on the mine site was improper. They were rejected. The Act, and indeed State laws, makes the permittee liable for the conduct of the mining and compliance with the law. Anyone working on the mine is there for the benefit of or at sufferance of the permittee. To excuse the permittee from violations resulting from activity of such people would undermine the permittee's motivation to exercise his control to protect against violations."

The authorities cited by Pierce in support of the contention that MLM should be held solely responsible for any violations discovered at the permit 16-78 area are not persuasive. The cases cited by Pierce relate to the Coal Mine Health and Safety Act and address the question whether independent construction contractors at a mine, rather than the owner or lessee of the mine, may be liable for violations of this Act. Both the Fourth Circuit and the U.S. Court of Appeals for the District of Columbia have answered this question affirmatively. *Republic Steel Corp. v. Interior Board of Mine Operations Appeals*, 581 F.2d 868 (D.C. Cir. 1978); *Association of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 853 (D.C. Cir. 1978); *Bituminous Coal Operators' Association, Inc. v. Secretary of the Interior*, 547 F.2d 240 (4th Cir. 1977). In so ruling, however, the Fourth Circuit further held that the owner or lessee of a mine may be liable for actions of a construction company, *Bituminous Coal*, 547 F.2d at 246-47, and this holding was cited approvingly in dictum contained in *Republic Steel*, 581 F.2d at 870 n.5. Thus, these decisions do not support Pierce's contention that only MLM should be held liable under enforcement actions by OSM with respect to permit 16-78.

CFR 715.13(a) (Exh. R 1); in the latter, Pierce was charged with a failure to abate this alleged violation within the period prescribed by OSM for abatement in the notice (Application for Review of Cessation Order No. 80-1-61-3, dated Dec. 12, 1980, at Exh. A).

The Administrative Law Judge made only cursory reference to the evidence concerning the violations alleged in the notice and order (Decision of Dec. 24, 1980, at Exh. 1); Pierce has not addressed the merits of the alleged violations on appeal. Nonetheless, because there may be further review of the notice and order we will comment that the record now before us shows that little or no reclamation work was performed on Pierce's permit area between the conclusion of active mining in November 1979 and OSM's inspection on Sept. 4, 1980. Under these circumstances we cannot conclude that there is a substantial likelihood that Pierce will be able to demonstrate that OSM's enforcement action was invalid. *See Old Home Manor, Inc.*, 3 IBSMA 241, 88 I.D. 737 (1981).

Because of our agreement with the Administrative Law Judge's holding that Pierce did not show a substantial likelihood of prevailing under the application for review of the notice of violation and cessation order, we need not address the requirement of 43 CFR 4.1263(c) that an applicant for temporary relief must show that "the relief sought will not adversely affect the health or safety of the public or cause

significant, imminent environmental harm to land, air, or water resources."

For the foregoing reasons the decision of the Administrative Law Judge denying Pierce Coal and Construction, Inc., temporary relief from Notice of Violation No. 80-I-61-26 and Cessation Order No. 80-I-61-3 is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

R. HUGO C. COTTER

58 IBLA 145

Decided September 25, 1981

Appeal from the decision of the New Mexico State Office, Bureau of Land Management, dismissing protest against simultaneous oil and gas lease application NM 44535.

Affirmed.

1. Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents

Under 43 CFR 3102.2-1, a simultaneous oil and gas lease applicant may file for reference the statement of qualifications of his agent required by 43 CFR 3102.2-6 in any Bureau of Land Management office. Upon acceptance of the filing by BLM and assignment of a serial number, the applicant may properly reference the serial number on future oil and gas applications filed with any BLM office in lieu of resubmitting the statement.

**2. Oil and Gas Leases: Applications:
Attorneys-in-Fact or Agents**

Pursuant to 43 CFR 3112.2-1(b), a simultaneous oil and gas lease application must be manually signed in ink either by the applicant or someone authorized to sign on behalf of the applicant. Where applicant's agent has typed the applicant's name and manually signed as agent, the application conforms to the regulations.

APPEARANCES: R. Hugo C. Cotter, pro se.

*OPINION BY
ADMINISTRATIVE
JUDGE HENRIQUES*

*INTERIOR BOARD OF
LAND APPEALS*

R. Hugo C. Cotter has appealed from the decision of the New Mexico State Office, Bureau of Land Management (BLM), dated July 20, 1981, dismissing his protest as the number two drawee for lease offer NM 44535 against issuance of the lease to the number one drawee, Hampton P. Stewart.

On Mar. 31, 1981, appellant protested that Stewart had failed to file an agency statement as required by 43 CFR 3102.2-6(a) and had failed to complete the application form. He argued that Stewart's simultaneous oil and gas lease application was signed by one John C. Saunders as "attorney-in-fact" and therefore Stewart was required to submit a personally signed statement setting forth his arrangement with Saunders with his lease application. Appellant indicated that

his examination of the case file and inquiry at the BLM office on Mar. 30, 1981, revealed no such statement.

Appellant also asserted that

not only did the applicant Hampton P. Stewart not sign the application, but the printed word "Signature" above his typed name was stricken out and the word "NAME" substituted. Therefore, the only "undersigned" as to this application is John C. Saunders. Section 3102.2-2 of the regulation permits an agent to certify as to age, citizenship, and compliance with acreage limitations, so paragraphs (a), (b), and (c) above the Saunders' signature may be effective. This is not true of (e) and (f). Here Saunders certifies that he, not the applicant, is not bound by any collateral agreements as to outside interests in the application, and further that he, not the applicant, does not have any interest in other applications on the same parcel.

After examining a statement of qualifications previously filed by Stewart in the Colorado State Office, BLM, under serial No. C-30669, appellant supplemented his protest on May 21, 1981, arguing that the power-of-attorney authorizing John C. Saunders to sign simultaneous oil and gas applications on Stewart's behalf envisioned that Saunders would sign Stewart's name manually and, only if he did so, would the certifications expressed by questions (e), (f), and (g) on the application be valid for Stewart.

On Apr. 10, 1981, BLM required Stewart to provide additional information as to his qualifications to hold a lease and the circumstances surrounding the execution of his

application. Stewart reported that he did not submit the statement required by 43 CFR 3102.2-6(a) with lease application NM 44535 because he had previously filed the necessary statement for reference with the Colorado State Office and under the regulations only had to reference the filing on his application which he had done. He indicated that his file, C-30669, contains his agreement with Bryan Bell to recommend parcels for leasing and to provide clerical assistance and a power-of-attorney authorizing Saunders to sign lease applications for him.

BLM dismissed appellant's protest stating that information obtained from the Colorado State Office indicated that Stewart was qualified to hold a lease and that he filed the lease application in accordance with the regulations.

In his statement of reasons, appellant argues nevertheless that, under 43 CFR 3102.2-6, the agreement had to be submitted with the application and, since it was not, the application is fatally defective. He urges that the reference filing of the agreement between Bell and Stewart in the Colorado State Office does not satisfy 43 CFR 3102.2-1(c) because it is not a "statement of qualifications" of Stewart's agent. He construes "statement of qualifications" to mean a statement certifying to compliance with age, citizenship, and acreage requirements. *See* 43 CFR 3102.2-2. Appellant also reiterates that the manner in which Saunders executed Stewart's application does not meet the requirement that Stew-

art certify that he is a sole-party-interest and that no multiple filing has occurred.

[1] The term "statement of qualifications" as used in 43 CFR 3102.2-1(c) is broader than the definition advocated by appellant. The regulation reads as follows:

(c) *Filing statements for reference.* A statement of the qualifications of a trust or guardianship (§ 3102.2-3), association (§ 3102.2-4), corporation (§ 3102.2-5), agent, if the duration of the authority to act is less than 2 years and is specifically set out (§ 3102.2-6) or municipality (§ 3102.2-9) may be placed on file with a Bureau of Land Management office described in § 1821.2-1 of this title. The office receiving the statement shall indicate its acceptance of the qualifications by assigning a serial number to the statement. Reference to this serial number may be made to any Bureau of Land Management office in lieu of resubmitting the statement. Such a reference shall constitute certification that the statement complies with paragraph (b) of this section. Amendments to a statement of qualifications shall be filed promptly and the serial number shall not be used if the statement on file is not current.

As the text of the regulation suggests, it must be read in conjunction with 43 CFR 3102.2-6 for the purpose of the appeal herein and with the other cited regulations as appropriate. The regulations referenced in 43 CFR 3102.2-1(c) direct an oil and gas lease applicant to the particular requirements for a statement of qualifications in the case of certain kinds of applicants or certain circumstances. These special requirements are in addition to the certification required of all applicants, offerors, and agents by 43 CFR 3102.2-2. An applicant certi-

fies to the requirements specified in 43 CFR 3102.2-2 on the applicaiton form itself not in the statement of qualifications addressed in 43 CFR 3102.2-1(c). Thus, in the case before us, where Stewart was going to use an agent for executing simultaneous oil and gas lease applications, he had to comply with 43 CFR 3102.2-6. In lieu of resubmitting the appropriate statement of qualifications with every application filed, however, under 43 CFR 3102.2-1(c) Stewart could submit the appropriate statement to BLM to be kept on file for reference and thereafter refer to the file serial number on applications so long as the statement contained therein remained current.

[2] The regulation governing the signing of a simultaneous oil and gas lease application, 43 CFR 3112.2-1(b), reads:

(b) The application shall be holographically (manually) signed in ink by the applicant or holographically (manually) signed in ink by anyone authorized to sign on behalf of the applicant. *Applications signed by anyone other than the applicant shall be rendered in a manner to reveal the name of the applicant, the name of the signatory and their relationship.* (Example: Smith, agent for Jones; or Jones, principal, by Smith, agent.) Machine or rubber stamped signatures shall not be used. [Italics added.]

The regulation requires that at least one manual signature appear on the application, either that of the applicant or the applicant's agent. *See Betty J. Thomas*, 56 IBLA 323 (1981). Where an agent executes the application, the name of the ap-

plicant must be revealed in some manner; there is no requirement that the name be manually applied. The signature of an authorized agent is sufficient to constitute certification by the applicant to the statement on the application. Nevertheless, even assuming *arguendo* that appellant is correct that the agent, as the undersigned, is the only one certifying to the statements on the application, Stewart has affirmed his qualifications to hold a lease by complying with 43 CFR 3102.2-6 and by filing the additional evidence required by BLM's Apr. 10, 1981, request which sought the same information.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is affirmed.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

BERNARD V. PARLETTE
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

H. S. RADEMACHER

58 IBLA 152

Decided September 25, 1981

Appeal from decision of the Oregon State Office, Bureau of Land Management, declaring mining claims aban-

doned and void. (OR MC 28368 through OR MC 28387).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining Claims: Abandonment

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Evidence: Presumptions—Evidence: Sufficiency—Mining Claims: Assessment Work

The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file.

APPEARANCES: H. S. Rademacher, President, Kettle River Consolidated Mines, Inc.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

H. S. Rademacher, President, Kettle River Consolidated Mines, Inc., appeals from a decision of the Oregon State Office, Bureau of

Land Management (BLM), dated Aug. 18, 1980, declaring mining claims OR MC 28368 through 28387, as listed in the appendix, located prior to Oct. 21, 1976, in Stevens County, Washington, and recorded with BLM on Oct. 17, 1979, abandoned and void for failure to file evidence of assessment work or notice of intention to hold the claims on or before Oct. 22, 1979, as required by statute. Federal Land Policy and Management Act of 1976 (FLPMA), sec. 314, 43 U.S.C. § 1744 (1976); 43 CFR 3833.2-1(a). The BLM decision stated that although the instruments and fees required for recordation (of notices of location) of appellant's claims had been received at the BLM office prior to Oct. 22, 1979, the filings were not accompanied by an affidavit of assessment work or notice of intention to hold the claims. BLM further noted that a search of thousands of filings did not reveal that an affidavit or notice had been separately filed with the BLM office by Oct. 22, 1979.

In his statement of reasons, appellant alleges that he enclosed the required notices of location and fees, along with two recorded proofs of labor covering the 20 claims, in a large envelope and sent it by certified mail to the proper BLM office on Oct. 15, 1975. Appellant asserts that it is BLM's responsibility to produce these recordings. Appellant tendered with his notice of appeal copies of proof of labor recorded with the county recorder's office on Aug. 13, 1979.

In response to appellant's assertion that the required evidence of assessment work had been filed with BLM together with the notice of location of the subject claims, this Board on May 1, 1981, requested BLM to recheck and verify whether or not any proof of labor with respect to the subject claims had been filed but inadvertently omitted from the case files. The BLM reply indicated that the mining claim records were again checked and no evidence of assessment work filed with BLM during 1979 was found.

[1] Under sec. 314 of FLPMA, 43 U.S.C. § 1744 (1976), the owner of a mining claim located before Oct. 21, 1976, must file notice of intention to hold the claim, or evidence of the performance of annual assessment work on the claim, in the proper BLM office on or before Oct. 22, 1979, and prior to December 31 of each year thereafter. This requirement is mandatory, not discretionary, and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner, and renders the claim void. *Lynn Keith*, 53 IBLA 192, 196, 88 I.L.D. 369, 371 (1981).

[2] Although appellant asserts that the required evidence of assessment work was mailed to BLM with the notices of location, the record does not show that BLM received the documents. There is a legal presumption of regularity which attends the official acts of public officers in the proper discharge of their official duties. *Legille v. Dann*, 544 F.2d 1 (D.C. Cir. 1976); *Lawrence*

E. Dye, 57 IBLA 360, 363 (1981); *John Walter Starks*, 55 IBLA 266, 270 (1981); *Bruce L. Baker*, 55 IBLA 55, 57 (1981); *L. E. Garrison*, 52 IBLA 131, 133 (1981). It is presumed that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents submitted for filing. *John Walter Starks*, *supra* at 270. This Board has recognized that this presumption may be rebutted by probative evidence to the contrary. *Bruce L. Baker*, *supra* at 57; *L. E. Garrison*, *supra* at 133.

The effect of a rebuttable presumption of law is to invoke a rule of law compelling the trier of fact to reach a conclusion in the absence of evidence to the contrary, but the presumption disappears if evidence to the contrary is submitted and the case is then in the fact-finders hands free from any rule. *Legille v. Dann*, *supra* at 5-6 (citing 9 J. Wigmore, Evidence § 2491, at 289 (3d ed. 1940)). The evidence submitted by appellant in the form of an affidavit that the proofs of labor for the claims were transmitted in the same envelope with the notices of location precludes resolution of the case solely on the basis of the presumption that the documents would have been placed in the file if actually tendered. However, this does not preclude consideration of evidence that the documents were not found in the files and that BLM follows regular procedures to insure that submitted materials are not mis-

handled. *See Legille v. Dann, supra* at 8-9.

The issue of what kind of evidence is sufficient to establish the filing of a document despite the absence from the appropriate file of such a document is one which has troubled this Board previously. *See David F. Owen*, 31 IBLA 24 (1977) (with dissenting opinion). This Board has found the inference of nonfiling drawn from the absence of the document from the case file to be effectively rebutted by a preponderance of the evidence in those cases where appellant's assertion that the document was timely filed is supported by substantial corroborating evidence. *Bruce L. Baker, supra*; *L. E. Garrison, supra*. In *Bruce L. Baker, supra*, the assertion that the document in issue was actually filed was supported by an affidavit setting forth in detailed chronological sequence the events surrounding the filing which affidavit in turn was corroborated by the dates of notarial seals and filing with the county recorder's office. In the *L. E. Garrison* case, *supra*, claimant's assertion that the document in issue had been filed with BLM was corroborated by an affidavit of a subsequent telephone conversation with a BLM employee who opened the mailing and acknowledged timely receipt of the required document. The phone conversation was in turn documented by a long-distance telephone bill reflecting the call. On the other hand, the Board has held that uncorroborated statements, even where

placed in affidavit form, to the effect that a document was filed are not sufficient to overcome the inference of nonfiling drawn from the absence of the document from the file and the practice of BLM officials to handle properly filings of legally operative documents. *See Lawrence E. Dye, supra* at 364; *John Walter Starks, supra*; *Metro Energy, Inc.*, 52 IBLA 369, 371 (1981); *Charles J. Babington*, 36 IBLA 107 (1978).

In the case before us, the cover letter submitted by appellant with the notices of location filed with BLM on Oct. 17, 1979, makes no mention of the proof of labor and refers only to the service fee enclosed for recording the notices of location for 20 claims. Although there is little doubt that assessment work was performed for the subject claims and that proof of labor was filed with the county recorder's office, the evidence in this case does not establish that the proof of labor was filed for record with BLM on or before Oct. 22, 1979.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. RANDALL GRANT, Jr.

Administrative Judge

WE CONCUR:

ANNE POINDEXTER LEWIS

Administrative Judge

BRUCE R. HARRIS

Administrative Judge

APPENDIX

Name of claim	Date of location	BLM serial No.
Guam.....	Nov. 22, 1946.....	OR MC 28368
Eckert #1.....	Apr. 9, 1951.....	OR MC 28369
Eckert #2.....	May 18, 1951.....	OR MC 28370
Tuck.....	July 1, 1931.....	OR MC 28371
White Star.....	Mar. 7, 1934.....	OR MC 28372
Prince Albert.....	July 1, 1927.....	OR MC 28373
Nip.....	July 1, 1931.....	OR MC 28374
Monday Morning.....	Mar. 12, 1934.....	OR MC 28375
Side Show.....	Sept. 9, 1933.....	OR MC 28376
Boundry.....	Apr. 12, 1937.....	OR MC 28377
Minneapolis.....	June 27, 1916.....	OR MC 28378
Bisbee Fraction.....	Apr. 9, 1918.....	OR MC 28379
Bisbee.....	May 5, 1915.....	OR MC 28380
St. Paul.....	June 27, 1916.....	OR MC 28381
Green Frog.....	Jan. 1, 1919.....	OR MC 28382
First Chance.....	June 30, 1937.....	OR MC 28383
Golden Pheasant.....	Apr. 7, 1934.....	OR MC 28384
Roundup.....	Jan. 1, 1918.....	OR MC 28385
Green Frog Fraction.....	Aug. 1, 1915.....	OR MC 28386
Highland Copper.....	Sept. 24, 1945.....	OR MC 28387

APPEAL OF IRT CORP.

IBCA-1347-4-80

Decided September 25, 1981

Contract No. H0188094, Bureau of
Mines.

Sustained.

1. Contracts: Construction and Opera-
tion: Allowable Costs

Under a cost-plus-fixed-fee contract wherein the Government has agreed to reimburse the contractor for its allowable costs not exceeding a ceiling amount for reimbursement, the Board finds the disallowance of costs alleged to have resulted from an unauthorized change to have been improper because the otherwise allowable costs exceeded the contract ceiling amount by more than the disallowance.

APPEARANCES: Walter D. Bowne, Manager, Contracts, IRT Corp., San Diego, California, for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY
ADMINISTRATIVE
JUDGE LYNCH

INTERIOR BOARD OF
CONTRACT APPEALS

This is a timely appeal from the contracting officer's decision to disallow \$4,111.51 of the costs claimed by appellant under a cost-plus-fixed-fee contract. The contract required the development of an ion implementation system for surface alloying, and the Government con-

tends that the disallowed costs were incurred in adding a neutral beam trap representing a change in scope of the contract not approved by the contracting officer. Appellant contends that the addition of the neutral beam trap was within the scope of the contract, that the work was done at the direction of the technical project officer and, that the completed addition was delivered to the Government as a part of the material furnished under the contract. Appellant also claims that the disallowance is not proper because it expended \$18,761 over the contract ceiling amount for reimbursement, which costs were allocable and otherwise allowable if the ceiling amount were raised. The appeal has been submitted to the Board on the record.

A note from the contract specialist dated Sept. 15, 1978, indicates that prior to signing the contract on Sept. 25, 1978, the contract language was modified to require a neutral beam trap "if deemed necessary by the technical project officer." By memorandum dated Mar. 5, 1980, the technical project officer advises that he did not direct appellant to initiate the task, but only to investigate making the change to include the neutral beam trap. The addition to the contract regarding the neutral beam trap prior to its execution clearly indicates that both parties contemplated that a neutral beam trap would be added to the system if it were deemed necessary by the technical project officer. The contract language dele-

gates to the technical project officer the decision as to the necessity of the neutral beam trap. Therefore, the decision to disallow the costs of the trap because of the lack of approval of the contracting officer is not proper because the decision authority had been delegated to the technical project officer. The question of whether the technical officer's direction to investigate changing the design to include the trap was sufficient authority to authorize the completion of the task is not necessary in order to dispose of this appeal.

The audit report on the contract is dated Feb. 25, 1981. The report concludes that the ceiling cost amounts of \$137,735 were incurred as allowable costs under the contract and are therefore allowable. The audit report also finds that \$18,761 in additional allocable and allowable costs were incurred in excess of the contract ceiling amount, but were not claimed because these costs exceeded the contract ceiling amount for reimbursement. By letter dated Mar. 30, 1981, appellant claims that the ceiling amount of \$137,735 should be allowed regardless of whether the cost of the neutral beam trap (\$4,111.51) is allowed, because the audit discloses otherwise allowable costs exceeding the contract amount by \$18,761. The Government did not respond to this contention by appellant.

The Board can only assume that the Government's position is that the costs for including the neutral beam trap could be segregated from

all other costs and disallowed from the ceiling amount. We find to the contrary. Under the cost-plus-fixed-fee contract with a ceiling for reimbursement, the Government agrees to reimburse the appellant for its allowable costs up to the ceiling amount. The unchallenged audit report shows that appellant incurred allowable costs in excess of the ceiling amount by \$18,761. Therefore, the Government's audit of appellant's costs shows that appellant is entitled to recover the ceiling amount of \$137,735.

Conclusion

We find that the disallowance of \$4,111.51 of the contract costs was improper because the costs found to be allowable in the Government audit report exceeded the ceiling amount for reimbursement in excess of that amount. The appeal is sustained.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

TEXAS OIL & GAS CORP.

58 IBLA 175

Decided September 28, 1981.

Appeal from a finding by the New Mexico State Office, Bureau of Land

Management, that oil and gas lease NM-A 37903 (OK) had terminated for nonpayment of rental pursuant to 30 U.S.C. § 188 (1976), and that no petition for reinstatement had been filed by the lessee.

Reversed.

1. Administrative Procedure: Administrative Review—Appeals—Rules of Practice: Appeals: Generally

A finding by BLM that some statutory mechanism has been triggered which automatically divests a right does not and cannot mean that the adversely affected party is denied recourse to the appellate process. The Board of Land Appeals is the exclusive arbiter of its jurisdiction, and neither employees of BLM nor attorneys of the Office of the Solicitor may create or deny the right of appeal to the Board.

2. Oil and Gas Leases: Competitive Leases—Oil and Gas Leases: Future and Fractional Interest Leases—Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

Where a competitive, fractional interest, oil and gas lease is issued with conflicting and confusing rental provisions recited in the lease terms and in an attachment to the lease, a deficient rental payment by the lessee in reasonable reliance on the section providing for rental based upon the pro rata fractional interest of the United States will be considered justified so as to qualify the terminated lease for reinstatement.

APPEARANCES: Joseph R. Binford, Esq., Dallas, Texas, for appellant; Gayle E. Manges, Esq., Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF
LAND APPEALS

An exposition of the background of this case will be conducive to an understanding of the issues raised and our disposition of the appeal.

In July 1979 a competitive oil and gas lease sale was conducted by the New Mexico State Office of the Bureau of Land Management (BLM). That sale included parcel 18, the subject tract of acquired land, embracing 90.39 acres in Oklahoma, in which the United States held a fractional mineral interest amounting to 50 percent.¹ The high bidder was Hoover H. Wright. His bid was accepted by BLM's decision of Aug. 21, 1979, which called upon him to submit the first year's advance rental in the amount of \$182, calculated on the basis of \$2 for each acre or fraction thereof. Wright paid this rental amount and complied with the other requirements, and was issued the lease effective Oct. 1, 1979.

Wright had assigned the entire lease to Texas Oil & Gas Corp. prior to its effective date, and BLM approved the assignment, also with an effective date of Oct. 1, 1979.

On Sept. 24, 1980, Texas Oil & Gas Corp. paid the annual advance rental (due no later than October

1) in the amount of \$91. A receipt for this amount issued on October 9 with the following statement printed thereon, "Under payment [*sic*] of \$91.00 unless other action is pending or the balance due is paid by the due date this lease may be terminated."²

Texas Oil & Gas Corp. then tendered a second payment in the amount of \$91, which was received by BLM on Oct. 14, 1980. BLM apparently made no response until Feb. 6, 1981, when it wrote a letter to the lessee, stating that the lease had terminated on Oct. 1, 1980, that the annual rental was \$182, and that the partial payment of \$91 would be refunded. No right of appeal was referred to.

Texas Oil & Gas Corp. responded with a letter, dated Feb. 20, 1981, addressed to the Chief, Oil and Gas Section, New Mexico State Office. Although this letter is captioned "Notice of Appeal," it does not appear that it was intended to invoke the jurisdiction of this Board. Rather, it "requests your reconsideration of the letter of February 6, 1981, and that this lease be treated as in full force and effect. Should it be necessary that this matter be submitted to the Interior Board of Land Appeals and further filings need to be made by Texas Oil & Gas Corp., please advise." The letter was an attempt to persuade the Chief, Oil and Gas Section, that the lease rental had been paid timely and in full, and had not terminated.

¹ T. 8 N., R. 22 E., Indian meridian, Oklahoma. Sec. 6, S., 16.07 acres of lot 4, lots 5, 6, NW 1/4 SE 1/4 NW 1/4 containing 90.39 acres, Haskell County.

² Of course, by the time this notice was issued the "due date" had passed.

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The basis of this contention was stated in the letter as follows:

The lease provides that it is "subject to the terms and provisions of the Act of August 7, 1947 (61 Stat. 913), herein-after referred to as the Act, and to all applicable regulations thereunder *now* or hereafter in force *when not inconsistent with any express and specific provisions of this lease*, which are made a part hereof" (italics added). The lease provides specifically in section 4 "Undivided fractional interest—Where the interest of the United States in the oil and gas underlying any of the lands described in Section 1 is an undivided fractional interest, the following terms and conditions shall apply: (a) Rentals and royalties payable on account of each such tract shall be in the same proportion to the rentals and royalties provided for herein as the undivided fractional interest of the United States in oil and gas underlying such tract is to the full fee simple interest". We are aware of the September 30, 1976 amendment to section 3130.2 of title 43 which predates the subject lease. However, when this lease was issued, as noted in the language quoted above, it became subject only to existing regulations *not inconsistent* with the *express and specific provisions* of the lease; and as I have quoted above, the lease specifically and expressly provides for proportionate reduction of the rentals. Thus, by execution of this lease with the proportionate reduction provision specifically set forth, the lease provision prevails over the 1976 amendment. It is on this basis that rentals were tendered in the amount of \$91.00. Had it been intended that the lease be subject to the amended provisions of section 3103, then the provisions set forth in section 4(a) of the lease should have been struck.

Instead of considering and replying to this letter, BLM was guided by its caption ("Notice of Appeal"), and referred it, with the

lease file, to the Field Solicitor with an inquiry concerning whether "an appeal from Texas Oil & Gas Corporation is warranted so we can transmit the case file to IBLA." Apparently the Field Solicitor replied in the affirmative, as the case was sent to this Board together with the Field Solicitor's entry of his appearance and his response to Texas Oil & Gas Corporation's "Statement of Reasons," which he treated the letter of Feb. 20, 1981, as representing.

[1] The response by the Field Solicitor includes a motion for dismissal of the appeal, asserting first that this Board has no jurisdiction, because termination of an oil and gas lease for nonpayment of rental occurs automatically by operation of law without any administrative action by the Bureau to terminate the lease. "For this reason," the Field Solicitor says, "Appellant was not granted a right to appeal to the Board. The Board has no jurisdiction. It is a statutory matter."

We will dispose of this motion for dismissal before taking up the substantive issues. Neither BLM nor attorneys of the Office of the Solicitor may create or deny the right of appeal to this Board, and BLM's initial attitude that no appeal was "warranted" was clearly erroneous. The fact that BLM finds that some statutory mechanism has been triggered which automatically divests a right does not, and cannot, mean that the affected party is denied recourse to the appellate process to as-

sert that BLM's finding is wrong! This applies not only in cases of oil and gas lease terminations, but across the spectrum of statutory divestitures, including reverters of title under the Recreation and Public Purposes Act, conclusively deemed abandonments of mining claims under the recordation provisions of the Federal Land Policy and Management Act, the invalidation of land scrip pursuant to the Scrip Recordation Act, and the loss of forest lieu selection rights pursuant to the "Sisk Act." This Board is the exclusive arbiter of its jurisdiction. Under 43 CFR 4.410, any party who is adversely affected by a decision of BLM shall have a right of appeal to this Board. Denial of such right would contravene the Congressional policy enacted in sec. 102(a)(5) of FLPMA, 43 U.S.C. § 1701(a)(5) (1976), providing for an "objective administrative review of initial decisions" of BLM. *See Suzanne A. Halliday*, 34 IBLA 219 (1978); *United Park City Mines, Co.*, 33 IBLA 358 (1978); *Francher Brothers*, 33 IBLA 262 (1978).

Moreover, it is specious to assert that BLM made no "decision" in this case. BLM is asserting that the rental for this lease is \$182, and that because that amount was not paid on or before the anniversary date, the lease automatically terminated. Appellant disputes this, contending that the correct lease rental in this case is \$91, which was fully and timely paid, so that no termination could have occurred under the statute. This certainly gives rise to

a justiciable issue, which is indisputably within the jurisdiction of this Board.

The motion to dismiss is denied.

[2] Appellant is correct in its assertion that the lease provides that it is "subject to the terms and provisions of * * * all applicable regulations now or hereafter in force *when not inconsistent with any express and specific provisions of this lease*, which are made a part hereof," and that there is an "express and specific provision" in the lease form to the effect that the lease rental for fractional, undivided Federal interests in oil and gas shall be prorated in proportion to the full, fee simple interest in the tract. *Lease Terms*, sec. 4(a). Therefore, absent any other consideration, if the rental for a full 100 percent competitive lease is \$2 per acre, the rental on a lease in which the United States owned a 50 percent undivided interest in the oil and gas would be \$1 per acre, notwithstanding any regulation to the contrary in effect when the lease issued.

There *was* a contrary regulation in effect at that time. As noted by appellant, 43 CFR 3130.2 was amended on Sept. 30, 1976, in 41 FR 43149, to read as follows:

Rental shall not be prorated for any lands in which the United States owns an undivided fractional interest but shall be payable at the same rate as provided in Subpart 3103 of this chapter for the full acreage in such lands.

Significantly, the lease form, which contains the express provi-

sion for prorated rentals regardless of the existence of any regulation inconsistent with that provision, was published by the Department in August 1977, nearly a year after the regulation was amended. This, in itself, is a sufficient basis to entitle a lessee to assume that the rental described in the text of the lease was knowingly and deliberately included by the Department, and represented its intention. There is, after all, a presumption of regularity which supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); see 2 Am. Jur. 2d, *Administrative Law* § 748 (1962). In this same context, appellant's observation that if prorated rental was not intended, the provision should have been stricken is also germane, especially in view of the fact that in this same lease a portion of sec. 12 (pertaining to stipulations) was deleted as inapplicable, thereby demonstrating that BLM had reviewed the lease terms and acted to strike whatever was not intended to apply. This certainly would tend to reinforce the lessee's belief that the remaining lease provisions were deliberately unaltered and intended to control.

Moreover, it is a basic rule of contract law that a written contract is construed most strongly against its author, in this case the

Department.³ 4 *Williston On Contracts* § 621 (3rd ed.).

Counsel for BLM, in his reply to appellant's statement of reasons, argues that various records in the case file indicated that the proper rental was \$182, not \$91. These records are (1) the BLM decision of Aug. 21, 1979, addressed to Hoover H. Wright and informing him that his high bid had been accepted, and calling upon him to remit \$182 as the first year's rental; (2) Form 1370-41, "Receipt and Accounting Advice," indicating that Wright had paid \$182 as rental for this lease; and (3) Form 3120-9 (February 1965), "Rentals and Royalties For Oil And Gas Leases," which is appended to the lease form and which provides under "Schedule 'B'—Competitive":

RENTALS. To pay the lessor in advance on or before the first day of the month in which the lease issued and for each lease year thereafter prior to a discovery of oil or gas on the leased lands, an annual rental of \$2 per acre or fraction thereof.

We regard only the latter document as significant to this adjudication. With respect to the first two documents, even if appellant had actual knowledge that BLM had demanded \$182 of Wright and had

³ There is an exception to this rule to the effect that grants of franchises and contracts or agreements affecting the public interest are to be construed liberally in favor of the public. However, we do not regard it as applicable in this instance because, "To the extent that there is no general public interest to be safeguarded, contracts and agreements between a public body and a private person or corporation are interpreted in the same way as those between individuals." 4 *Williston on Contracts* § 626 (3rd ed.).

been paid this amount by him, appellant would still be justified in relying on the "express and specific provisions of this lease," which state clearly and without the slightest ambiguity that the rental shall be in the proportion that "the undivided fractional interest of the United States * * * is to the full fee simple interest."

However, a distinct ambiguity was created by the appendage of the separate schedule and rentals and royalties to the basic lease form, which were not consistent with sec. 4(a). Nevertheless, even the effect of this form is diminished upon analysis. It addresses itself only to competitive leases generally, and makes no reference whatever to competitive leases of undivided fractional interests, which sec. 4(a) of the lease does specifically. Moreover, when this appended form was adopted and published by the Department in February 1965 it was totally inapplicable to leases of fractional interests and not intended for use in connection with such leases. It was not until 11 years after the adoption of the form, in 1976, when the amendment of the regulation altered the method of calculating rentals for fractional-interest leases that the language of the form coincided with the provisions of the regulation. And, as we have noted, it was nearly a year after the regulatory change that the lease instrument was published by the Department with its "express and specific provision" of the proportion of rental. Thus, notwithstanding the appendage of Form

3120.9, anyone examining the lease might still reasonably conclude that the \$91 prorated rental was correct, and the Form 3120-9 was attached through error.

This raises the question of whether, under this particular lease, \$91 is the correct rental, or if \$182 is.⁴ If a \$91 rental is correct, no lease termination occurred. If \$182 is the legally imposed rental amount, the lease terminated automatically by operation of law, and we must consider the subsidiary questions of whether reinstatement is authorized, and if so, whether it is warranted in these circumstances.

We find that the lawful rental is \$2 per acre or fraction thereof, or \$182 per annum. We base this finding on the fact that the appendage and incorporation of Form 3120-9 ("Rentals and Royalties For Oil And Gas Leases"), notwithstanding its general application and ancient origin, was an accurate expression of the correct rental and, when read in conjunction with 43 CFR 3130.2, was sufficient to establish the rental at \$182 for this lease. Accordingly, we hold that lease NM-A 37903 (OK) terminated as a matter of law on Oct. 1, 1980.

Counsel for BLM acknowledges that appellant paid the past-due balance within the statutory 20 days after the lease anniversary date, and that appellant's letter of Feb. 20, 1981, was received within

⁴ This case is distinguished from *Thomas F. Keating*, 53 IBLA 349 (1981), wherein BLM rejected a lease offer because it was accompanied only by an advance rental prorated on the basis of the Federal fractional interest, rather than by the rental fixed by the regulations.

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15 days of BLM's notice of termination. However, BLM takes the position that this document did not purport to be a petition for reinstatement (presumably because it was captioned "Notice of Appeal"), although BLM concedes that, "It did request that the lease be placed in full force and effect." As we have already noted, it requested the Chief, Oil and Gas Section in BLM's State Office, to reconsider his conclusion that the lease had terminated, and offered a full explanation of appellant's reasons for its actions. Moreover, it referred in future terms to the possible necessity of involving the Board of Land Appeals. Under the circumstances, we think BLM should have regarded appellant's letter of Feb. 20, 1980, as a petition for reinstatement.

On appeal, however, BLM contends that even if that letter is considered a petition for reinstatement, it should be denied because, "an erroneous calculation of rentals based upon erroneous advice is no showing that could be satisfactory to the Secretary as required by 43 CFR 3108.2-1(c)," and also because, "The business practices of appellant which may have led to the wrong rental payment are no justification for reinstatement."

We reject both of these arguments. There is nothing in the record to suggest that any "business practice" peculiar to appellant's conduct of its affairs resulted in the underpayment. *Cf. Melbourne Concept Profit Sharing Trust*, 46 IBLA 87 (1980); *Fuel Resources Devel-*

opment Co., 43 IBLA 19 (1979); *Shell Oil Co.*, 30 IBLA 290 (1977); *Phillips Petroleum Co.*, 29 IBLA 114 (1977); *Mono Power Co.*, 28 IBLA 289 (1976). An effort by a lessee to pay rental in compliance with the express terms of his lease cannot be characterized as a "business practice" peculiar to him. Moreover, BLM is simply wrong in its argument that erroneous advice cannot serve to justify an erroneous payment. Erroneous advice by an officer of BLM can provide excellent justification for an erroneous rental payment. In fact, the statute itself provides that where a payment is deficient because it was calculated in accordance with the acreage figure stated in the lease, or in any decision affecting the lease, or made in accordance with an erroneous bill or decision, "such lease shall not automatically terminate * * *." 30 U.S.C. § 188(b) (1976). We might even hold properly that the issuance of this lease without the deletion of sec. 4(a) was sufficient to bring the case within the ambit of this statutory provision, so that no termination occurred. However, we would still be obliged to hold that the initial rental payment was deficient and that the correct rental is \$182, and in view of our reinstatement of the lease, *infra*, such a holding would amount to a distinction without a difference.

We conclude that the lease instrument issued by BLM created a sufficient ambiguity by its conflicting provisions to justify appellant's payment of the deficient amount;

that its remittance of the balance was within the statutory time; that the letter of Feb. 20, 1980, should have been considered appellant's petition for reinstatement; and that it was timely filed.

Oil and gas lease NM-A 37903 (OK) is hereby reinstated at an annual rental of \$182 per annum.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

DOYON, LTD.

6 ANCAB 95

Decided September 28, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-22740, F-22750, F-22751 and F-22757.

Affirmed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Alaska Native Claims Settlement Act: Administrative Procedure: Generally

In the absence of allegation of error in the decision itself, an allegation that an internal unpublished agency practice regarding predecision procedure was vio-

lated does not provide a basis for appeal to this Board.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication—Alaska Native Claims Settlement Act: Administrative Procedure: Generally

The general language of 43 CFR 2650.0-2 and § 2(b) of the Alaska Native Claims Settlement Act that the settlement of claims of Alaska Natives be accomplished with maximum participation by Natives in decisions affecting their rights and property does not establish an appealable right to predecision notice of Departmental intent to reject a selection.

3. Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally

"Public lands" as defined by § 3(e) of the Alaska Native Claims Settlement Act do not include lands identified for selection by the State of Alaska prior to Jan. 17, 1969.

4. Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

Only unreserved and unappropriated public lands are available for selection under § 14(h)(1) of the Alaska Native Claims Settlement Act.

5. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally—Regulations: Interpretation

Departmental regulations at 43 CFR 2653.5, insofar as they prescribe a specified course of action including publication, referral, investigation, conferring, reporting, etc., by the Department with regard to selections of public lands made

pursuant to § 14(h)(1) of the Alaska Native Claims Settlement Act, cannot apply when the selected lands are not public lands and the selection applications must be rejected at the outset.

APPEARANCES: Elizabeth S. Ingraham, Esq., and James Q. Mery, Esq., for Doyon, Limited; G. Kevin Jones, Esq., and Elizabeth J. Barry, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

**OPINION BY ALASKA
NATIVE CLAIMS
APPEAL BOARD**

Summary of Appeal

On Apr. 15, 1980, the Bureau of Land Management rejected several of Doyon, Limited's § 14(h)(1) applications for cemetery and historical sites because the subject lands had been selected by the State of Alaska prior to Jan. 17, 1969, and were thus neither unappropriated nor public lands at the time of Doyon's selection. Doyon appealed the decision on the grounds that the Bureau of Land Management (1) erred in not issuing and serving Doyon with a draft decision rejecting the corporation's selection applications, and (2) failed to follow Departmental regulations at 43 CFR 2653.5(h) through 43 CFR 2653.5(k).

The Board holds that the Bureau of Land Management did not, as a matter of law, err in not issuing and serving upon Doyon, Limited a pre-decision draft rejecting the corporation's § 14(h)(1) selection applications. Further, Departmental regulations at 43 CFR 2653.5(h) through 43 CFR 2653.5(k), insofar

as they prescribe a specified course of Departmental action including publication, referral, investigation, conference, reporting, etc., cannot apply when the lands selected pursuant to § 14(h)(1) are unavailable and the selection must be rejected at the outset.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Sept. 29, 1960, the State of Alaska (State), pursuant to §§ 6(b) and 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), filed selection application F-026809 for all available lands in T. 1 N., R. 7 W., Fairbanks meridian, Alaska. On June 16, 1972, the State amended its application to include all unpatented lands.

On June 29, 1976, pursuant to § 14(h)(1) of ANCSA, Doyon, Limited (Doyon) filed selection applications F-22740, F-22750, F-22751, and F-22757 for "[c]ertain available public lands as defined by Section 3(e) * * * of the Alaska Native Claims Settlement Act." The lands were in each application specified to be unoccupied cemetery and/or historical sites in T. 1 N.,

R. 7 W., Fairbanks meridian, Alaska.

On Apr. 15, 1980, the Bureau of Land Management (BLM) rejected Doyon's above-designated applications in their entirety except as to one small parcel of land within the scope of Doyon's application F-22750. The rejection was based on two factors:

(1) Departmental regulation 43 CFR 2627.4(b) provides that "[l]ands desired by the State * * * will be segregated from all appropriations based upon application or settlement and location * * * when the state files its application for selection in the proper office properly describing the lands * * *." Therefore, BLM declared in its decision that "the State of Alaska's selection application is an appropriation of lands filed prior to Doyon's selections * * *."

(2) For the purposes of ANCSA, section 3(e) of ANCSA defines "public lands" as "all Federal lands and interests therein located in Alaska except * * * (2) land selections of the State of Alaska which have been * * * identified for selection by the State prior to January 17, 1969." Due to State selection F-026809, BLM found that "[e]xcept as to U.S [sic] Survey No. 5096, the lands selected by Doyon in applications F-22750, F-22740, F-22751, and F-22757 do not meet the definition of public lands available for Native selection."

Sec. 14(h)(1) of ANCSA authorizes conveyance only of "unreserved and unappropriated public lands." The BLM determined that, except as to U.S. Survey No. 5096, the lands selected by Doyon in the subject applications were neither "unappropriated" nor "public lands."

On May 13, 1980, Doyon appealed the above-referenced decision of the BLM. Doyon's appeal raised two issues:

(1) whether BLM erred in not issuing and serving Doyon with a draft decision rejecting Doyon's selection applications, and

(2) whether BLM failed to follow the applicable regulations.

Doyon declared that it is BLM policy to serve Doyon a draft copy of BLM decisions rejecting the corporation's selection applications for Doyon's review and comments. Doyon alleged that the BLM's failure to implement such policy in the present case denied Doyon the opportunity to review the decision prior to publication and prevented Doyon from exercising "its right to relinquish its selection applications in lieu of rejection." Doyon cited the requirements of 43 CFR 2650.0-2 and § 2 of ANCSA that the settlement be accomplished with maximum participation by Natives in decisions affecting their rights and property.

Doyon also declared that BLM failed to follow the Departmental regulations at 43 CFR 2653.5(h) through 43 CFR 2653.5(k) pertaining to the processing of selection applications for cemetery and historical sites. Said regulations provide for (1) publication by the BLM of notice of filing of the application, including "the date by which any protest of the application must be filed"; (2) forwarding of the application to the Bureau of Indian Affairs (BIA) "for investigation, report, and certification"; (3) BIA's identification on a map and marking on the ground of "the location and size of the site or place with sufficient clarity to enable the [BLM] to locate on the ground said site or place"; (4) BIA's certifica-

tion "as to the existence of the site or place and that it meets the criteria in this subpart"; (5) BIA's notice to the applicant, the BLM, and other affected Federal agencies, of any error in the application as to the location of the site, after receipt of which notice the applicant shall have 60 days in which to file an amendment to its application with respect to the location of the site, (6) BIA's submission of its report and certification to BLM; and (7) with minor exceptions, if the selected land is available, issuance by the BLM of a decision to convey. Doyon declared that none of the procedures itemized were accomplished, and that the unavailability of the land does not excuse the BLM from performance.

In its Answer, BLM declared that it is not required, nor is it Departmental policy, to issue and serve a regional corporation with a draft decision rejecting selection applications. BLM maintained that it has never had a practice of circulating copies of draft selection rejections for review.

BLM argued that the regulations at 43 CFR 2653.5, describing the steps the Department takes to evaluate lands selected under § 14(h) (1) of ANCSA, do not apply when the selected lands are unavailable and the selection applications must be rejected at the outset. BLM stated that the regulations are silent as to what is required in the event that the selected lands are unavailable from the start, but asserted that where the Secretary has no discretion under ANCSA to

convey the selected lands, no purpose would be served by requiring the Department to conduct the investigations described in 43 CFR 2635.5. BLM declared that regulations, like statutes, should not be construed to reach unreasonable, useless, or absurd results.

Doyon replied that evaluation of the historic characteristics of an identified site is required under a number of laws besides ANCSA and is also necessary to properly adjudicate the State selection. Doyon argued:

If such an evaluation shows that the land is not vacant nor unappropriated then the State selection must be rejected, and, in fact, the land is then available for Doyon selection since regional corporations are the only entities which have statutory authority to select such cultural sites.

Doyon's Reply at 2.

Doyon asserted:

BLM's contention that Doyon's selection had to be "rejected at the outset" is not factual. There must be a field investigation before it can be determined that the State selection is valid and did, in fact, segregate the lands from selection by Doyon.

Doyon's Reply at 3.

With regard to the matter of notice, Doyon declared that it has, in fact, apparently been the policy of the Department to serve Doyon with notice of its intent to reject selection applications, particularly § 14(h)(1) cemetery and historic site selections. Doyon contended that it has been the long-standing practice of the Department to do so, and attached as Appendix I to its Reply copies of three recent BLM

notices of intent to reject Doyon § 14 (h) (1) selections and requests for relinquishment of the selections. Doyon asserted that there are sound reasons for the Department to inform Doyon prior to rejection of § 14(h) (1) selections:

(1) opportunity for Doyon to correct, where necessary, the legal descriptions of selected sites;

(2) opportunity for Doyon to file, where appropriate, a relinquishment of the selection; and

(3) satisfaction of the requirement of maximum participation by Natives in decisions affecting their rights and property.

In reply, BLM reasserted that it has not had a policy of circulating copies of draft selection rejections. BLM distinguished the notices filed by Doyon as involving § 14(h) (1) selections of lands included in other Native selections rather than of lands which were unavailable for § 14(h) (1) selections due to prior State selections. BLM reiterated its position that it is not required to give Doyon advance notice of rejections of § 14(h) (1) selections of State-selected lands, and that BLM's failure to issue such notice does not preclude protection of preservation of cultural sites.

Decision

BLM's decisionmaking process must follow applicable published Departmental regulations and policies. Doyon does not allege the existence of any published Departmental regulation or policy requiring notice of intent to reject prior to the publication of a final decision pursuant to 43 CFR 2650.7(d). Doyon has alleged that the BLM, as

a matter of consistent practice, issues notice of intent to reject § 14 (h) (1) selections of lands previously selected by the State.

[1] Even if an internal agency policy or practice such as that asserted by Doyon in fact exists, Doyon has failed to show how violation thereof creates error in the appealed decision of the BLM. In the absence of allegation of error in the decision itself, an allegation that an internal unpublished agency practice regarding predecision procedure was violated does not provide a basis for appeal to this Board.

Citing 43 CFR 2650.0-2 and § 2 of ANCSA, Doyon argues that BLM's failure to serve Doyon with a draft copy of the subject BLM decision denied Doyon the opportunity for maximum participation in the decisionmaking process.

[2] The Board recognizes the importance of the policy established by § 2 of ANCSA. Nonetheless, in this appeal Doyon's reliance on § 2 is misplaced. The general language of 43 CFR 2650.0-2 and § 2(b) of ANCSA that the settlement of claims of Alaska Natives be accomplished with maximum participation by the Natives in decisions affecting their rights and property does not establish an appealable right to predecision notice of Departmental intent to reject a selection.

BLM asserts that State selection of the lands prior to Jan. 17, 1969, excluded the lands from the definition of public lands in § 3(e) of ANCSA, thus making them unavailable for selection under § 14 (h) (1). The Board agrees. Doyon

did not appeal the BLM's finding that the selected lands (except U.S. Survey No. 5096) were not public lands, but did argue that the lands were not necessarily unavailable for § 14(h) (1) selection.

[3, 4] "Public lands" as defined by § 3(e) of ANCSA do not include lands identified for selection by the State prior to Jan. 17, 1969. Further, only unreserved and unappropriated public lands are available for selection under § 14(h) (1) of ANCSA. Since the subject lands, because of their selection by the State on Sept. 29, 1960, were not public lands, they are unavailable for § 14(h) (1) selection, and Doyon's selections thereof must be rejected.

Doyon argues that regardless of the land's availability for § 14(h) (1) selection, the Department is required to follow the course of procedure described in 43 CFR 2653.5 (h) through 43 CFR 2653.5(k).

The Board disagrees. These regulations establish a standard procedure for agency review of § 14(h) (1) selections of unreserved and unappropriated public lands. The BLM determined, and the Board has here affirmed, that the lands selected by Doyon were not public lands within the scope of ANCSA. Since the Secretary of the Interior has no discretion to convey nonpublic lands, the agency procedure described in the regulations cannot affect the decision to reject the selection. It would be a meaningless act with no legal consequence to apply regulations governing the validity of a selection of public

lands to a selection of nonpublic lands.

[5] The Board finds that Departmental regulations at 43 CFR 2653.5, insofar as they prescribe a specified course of action including publication, referral, investigation, conferring, reporting, etc., by the Department with regard to selections of public lands made pursuant to § 14(h) (1) of ANCSA, cannot apply when the selected lands are not public lands and the selection applications must be rejected at the outset.

Doyon claims that evaluation of historic characteristics of an identified site is required under laws besides ANCSA, and that transfer of such sites to the State without field examination violates the Act of Aug. 31, 1979 (P.L. 96-95), the Act of Aug. 21, 1935, and Executive Order No. 11593.

The decision here appealed only rejects certain of Doyon's § 14(h) (1) selections, and in no manner approves conveyance of the subject lands to the State. Furthermore, potential violation of the acts and executive order cited by Doyon are immaterial to rejection of Doyon's § 14(h) (1) selections. Thus, Doyon's concerns regarding such violations are not properly a portion of an appeal of the BLM decision herein appealed. This appeal must be dismissed as to those issues.

Based on the above findings and conclusions, the Board hereby affirms the above-designated decision of the Bureau of Land Management.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

KING QUARRIES, INC.

3 IBSMA 357

Decided *September 29, 1981*

Appeal by King Quarries, Inc., for review of the Feb. 6, 1981, decision of Administrative Law Judge Sheldon L. Shepherd, Docket No. IN 1-15-R, denying temporary relief from Notice of Violation No. 80-3-13-83 in which the Office of Surface Mining Reclamation and Enforcement charged a violation of 30 CFR 715.15(a) (requirements for the disposal of excess spoil).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Excess spoil." When the evidence does not support a finding that spoil is being used to achieve the approximate original contour of the mined area, temporary relief will not be granted from an alleged violation of the requirements for the handling of excess spoil set forth in 30 CFR 715.15(a).

APPEARANCES: Neal S. Tostenson, Esq., Cambridge, Ohio, for King Quarries, Inc.; Myra Spicker, Esq., Office of the Field Solicitor, Indianapolis,

Indiana, Susan A. Shands, Esq., and Marcus P. McGraw, Assistant Solicitor, Division of Surface Mining, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by King Quarries, Inc. (King Quarries), for review of the decision from the Hearings Division denying the company temporary relief from violation 3 of Notice of Violation No. 80-3-13-83, in which the Office of Surface Mining Reclamation and Enforcement (OSM) charged a violation of the general requirements of 30 CFR 715.15(a) for the disposal of excess spoil. For the reasons set forth below we affirm the denial of temporary relief.

Factual and Procedural Background

King Quarries conducts surface coal mining and reclamation operations pursuant to Ohio strip mine permit C-1233 in Muskingum County, Ohio. At this site the company is engaged in a type of mining called "daylighting," by which the crown of a hill is removed to expose an underlying seam of coal (Tr. 69).

When an OSM inspector visited King Quarries' permit area on Dec. 18 and 19, 1980, he observed that the company had pushed spoil from a portion of the hill being mined into two hollows (referred to as

hollows 3 and 5) at the base of the hill, below the elevation of the coal seam (Tr. 18-20, 27-35; Respondent's Exhs. 3-11). In both hollows the spoil had disrupted the natural drainage course (Tr. 27-35; Respondent's Exhs. 4-11). On the basis of these observations the inspector charged King Quarries with violating the general requirements of 30 CFR 715.15(a) concerning the disposal of excess spoil (Respondent's Exh. 1).

King Quarries explains its placement of spoil in hollows 3 and 5 as part of its plan to return the mined area to its approximate original contour (Tr. 65-66, 69). The company intends to recreate the hill being mined by moving the overburden from each new exposure of coal to the preceding area of coal excavation (*id.*). In this process the overburden first removed from the hill will be graded out into hollows 3 and 5 where it will form part of the base of the reformed hill (Tr. 65-66, 75-76, 97-98; Respondent's Exh. 12; Applicant's Exh. 2).

The mining plan concerning hollows 3 and 5 that King Quarries first submitted to the Ohio Department of Natural Resources included a provision for the construction of valley fills in the hollows, pursuant to State regulations (Tr. 69-70; Respondent's Exh. 12). Informed by State officials that the proposed valley fill structures would not be necessary, the company abandoned its original mining plan in this regard (Tr. 76-77; *see* Tr. 40, 44, 51, 62).

Following OSM's issuance of the notice of violation to King Quar-

ries, the company sought temporary relief from the alleged violation of 30 CFR 715.15(a). In support of its application King Quarries attempted to show that the spoil placed in hollows 3 and 5 would be used to return the mined area to its approximate original contour and, thus, that it is not "excess spoil" that must be handled in accordance with 30 CFR 715.15(a). A hearing on the application was held on Jan. 29, 1981; the Administrative Law Judge issued a written decision denying temporary relief on Feb. 6, 1981. The basis of this decision was set forth as follows:

I do not believe that it is a question of excess spoil versus spoil necessary to return to the approximate original contour. The crux of the problem after hearing the testimony and reviewing the evidence was stated in Comment No. 11 of 42 FR 62648 (December 13, 1977) regarding 30 CFR 715.15. The commenters stated as follows: "The intent of the regulation is to require that all fills that encroach upon or obstruct any natural stream channel, other than those channels on highland areas such as natural rills and gullies, meet the requirements of § 715.15(b)." The purpose of those detailed requirements is to attempt to prevent the erosion of the spoil. If the spoil is merely shoved in the hollow, graded and reseeded, it would be very susceptible to erosion. The requirements of rock underdrains, depositing in lifts and compacting may be expensive. So would the results or erosion of the spoil which is disposed in an uncontrolled manner such as in this case.

In my judgment that is the situation at hand, and I believe that the spoil material, whether or not it is excess spoil or whether or not it is necessary to return to the approximate original contour when it is disposed of in a valley such as the one in question, must be disposed of in a certain manner set forth in 715.15(b).

The requirements are generally those required in the remedial action portion of Violation No. 3 of the above notice of violation.

I, therefore, conclude that the applicant has not shown that there is a substantial likelihood that the findings of the Secretary will be favorable to it as required for granting temporary relief under Section 525 of the Act.

(Decision of Feb. 6, 1981, Docket No. IN 1-15-R, at 3).

Discussion and Conclusion

Because of the basis for the Administrative Law Judge's holding against it, King Quarries reasserts on appeal that the spoil placed in hollows 3 and 5 is not "excess spoil" and, thus, that it has not violated the provisions of 30 CFR 715.15(a) for the placement of excess spoil. On the basis of the record before us, we conclude that the spoil appears to be "excess" and, therefore, we affirm the decision on appeal as so modified.

Excess spoil is described in 30 CFR 715.15(a) as "[s]poil not required to achieve the approximate original contour within the area where overburden has been removed." The term "approximate original contour" is defined to mean "that surface configuration achieved by backfilling and grading of the *mined area* so that the reclaimed area * * * closely resembles the general surface configuration of the land prior to mining *and blends into and complements the drainage pattern of the surrounding terrain.*" 30 CFR 710.5 (italics added).

[1] The record before us shows that hollows 3 and 5 are below the

elevation of the coal seam that King Quarries intends to mine; therefore, they will not be part of the "mined area." Thus, in accordance with the provisions above, the placing of spoil into these hollows can only be considered as a part of returning the mined area to its approximate original contour if the spoil does not interfere with drainage through the hollows. OSM's evidence tends to show that drainage through the course of the hollows has been impeded by the spoil graded into them; therefore, we cannot conclude at this stage in the proceedings that the spoil is being used to achieve the approximate original contour of the mined area.¹

Perhaps upon further review King Quarries will be able to show that after final grading the drainage pattern of the area surrounding the mined area will be essentially the same as before mining.² The company has not shown this in the record of the proceedings on its application for temporary relief;

¹ The posture of the Ohio regulatory authority in this regard cannot relieve King Quarries of its obligations under the Department's regulations. *E.g.*, *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).

² There may also be considered the possibility that the spoil that has been placed in hollows 3 and 5 might be needed elsewhere within the permit area to return the mined area to its approximate original contour, assuming that King Quarries does not show upon further review that spoil may be placed in these hollows to achieve the approximate original contour of the mined area. *See generally Tennessee Consolidated Coal Co., Inc.*, 3 IBSMA 145, 88 I.D. 508 (1981) (evidence held not to support OSM's contention that spoil material temporarily placed on working bench would not be necessary to achieve approximate original contour). Neither King Quarries nor OSM has presented evidence to this effect thus far in the proceedings.

therefore, it has not shown a substantial likelihood that it will receive a favorable decision on its application for review.

Because of our holding that King Quarries has not shown a substantial likelihood of prevailing under its application for review of the notice of violation, we need not address the requirement of 30 U.S.C. § 1275(c) (1976) and 43 CFR 4.1263(c) that an applicant for temporary relief must state and show that such relief "will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources."

For the foregoing reasons the decision of the Hearings Division denying King Quarries, Inc., temporary relief from Notice of Violation No. 80-3-13-83 is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

APPEAL OF SELDO CO., INC.,
D.B.A. DESERT MATERIALS CO.
IBCA-1194-5-78

Decided September 30, 1981

Contract No. YA-511-CT6-138 and
Contract No. YA-511-CT6-184, Bureau of Land Management.

Sustained in part.

1. Contracts: Disputes and Remedies: Equitable Adjustments

Where the Government admits liability and the quantum evidence adduced by the parties is not satisfactory, the Board will determine the amount of equitable adjustment by utilizing the jury verdict approach.

2. Contracts: Construction and Operation: General Rules of Construction

The Board rejected the argument of the contractor that the language of the Work Stoppage Clause, providing that the contractor will not be entitled to additional compensation for stop work orders of reasonable duration, should be interpreted to allow a claim to be compensable where the total duration of a series of stop work orders was over 50 percent of the total performance time of the contract. The Board found that no single stop work order in a series of five issued was of unreasonable duration and held that the subject language was intended to apply to only one stop work order at a time, and since the parties stipulated that each stop work order was reasonably and properly issued, the claim was not compensable.

3. Contracts: Construction and Operation: Drawings and Specifications

Where the Board found that the Government withheld information from the contractor pertaining to test results showing the plasticity index of an alternate borrow pit, it was held that the contractor was entitled to an equitable adjustment for resulting additional costs on the basis of defective specifications.

APPEARANCES: Joseph J. Ford, Hudson, Creyke, Koehler, Tacke & Bixler, Attorneys at Law, Washington, D.C. for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY
ADMINISTRATIVE
JUDGE DOANE

INTERIOR BOARD OF
CONTRACT APPEALS

Background

This is an appeal from the contracting officer's final decision involving three claims under two contracts numbered YA-511-CT6-138 and YA-511-CT6-184 (hereinafter, #138 and #184). The first contract #138 was entered into between Seldo Co., Inc., d.b.a. Desert Materials Co. (Seldo), and the Bureau of Land Management (BLM or Government) for the repair of a dam break and other related work at the Upper Centennial Detention Dam in Yuma County, Arizona. The contract price was \$33,484. The second contract, #184, between the same parties, was for the construction of a reinforced concrete retaining wall and other related work, also at Yuma County, Arizona. The contract price for the second contract was \$13,520.

The first claim arose out of the failure of the Government to furnish an anchor chain as required by the specifications. The contracting officer allowed Seldo \$10,985.62 as an equitable adjustment, but Seldo claims \$14,536.25 plus \$1,084.92 profit. Since the Government admits liability, the remaining issue pertains to quantum only. The second claim stems from a series of "stop work" and "resume work" orders issued by the Government during the project. The parties agree that the issue here is not one of fact but strictly a question

of law, that is, whether the claim is compensable. The third claim presents a question of fact—that is, whether Seldo was given certain information pertaining to the soil condition in an alternate borrow area. The legal basis of this claim is alleged to be a differing site (or changed) condition. The parties have agreed that on claims 2 and 3, only the question of entitlement is at issue and that should Seldo prevail on either or both claims, the question of quantum should be remanded for negotiation.

A 1-day hearing was held with respect to this appeal at Phoenix, Arizona, and both parties submitted posthearing briefs.

*Claim No. 1—The Anchor Chain
Claim*

Discussion

Seldo argues that it is entitled to the amount supported by the Government audit with respect to this claim, since the Government had admitted liability (AB-2).¹ The Government contends (GB-2, 3) that: The audit did not find anything due the contractor but is an expression of Seldo's total costs for the two contracts; that the only analysis of the claim appears in the contracting officer's findings (AF-21, Contract #138); that appellant has submitted no evidence to establish that such analysis is wrong; that some of the days of delay were

¹ References to the record throughout this opinion will be typically abbreviated as follows: Appeal File, Item 2—(AF-2); Appellant's Exhibit 8—(AX-8); Government Exhibit 3—(GX-3); Transcript, page 24—(Tr. 24); Appellant's Brief, page 16—(AB-16); Government's Brief, page 10—(GB-10).

due to rain, as shown by the inspector's logs (GX-8); and that the audit report provided no credit to the Government for those days, while the equitable adjustment determined by the contracting officer did.

The contracting officer was not produced as a witness to explain his analysis nor was any auditor called as a witness to show what factors were considered or excluded in making the audit report. The audit (AF-11, Contract #138), the contracting officer's findings and decision (AF-21, Contract #138), and the inspector's logs (GX-8), constitute the only evidence of record referred to by the parties as supporting their respective positions.

These three documents, by themselves, are inconclusive toward furnishing a reliable basis for our determination of this quantum question. The audit report contains different terminology with respect to cost items from that used by the contracting officer in his decision so that a rational comparison appears impossible. Seldo had the burden of proof and relied entirely on the audit report to support its claim, but as pointed out by the Government counsel, the report does not purport to analyze any technical or engineering factors that may be involved. On the other hand, the contracting officer has made no attempt in his finding and decision to justify his variances with the audit report.

Decision

Therefore, not being satisfied with the quantum evidence adduced

by either party, we are compelled to resort to a jury verdict approach and find that appellant is entitled to an additional equitable adjustment of \$2,320, approximately half the difference between the allowance made by the contracting officer and the total costs plus profit as verified by the audit report.

Claim No. 2—The Flooding Conditions

Discussion

The parties stipulated that five stop work and resume work orders were issued by the Government on the following dates:

Stop work	Resume work	Total days
1. Aug. 13, 1976..	Aug. 23, 1976	11
2. Sept. 5, 1976---	Sept. 15, 1976	11
3. Sept. 23, 1976--	Oct. 6, 1976	14
4. Oct. 23, 1976--	Nov. 16, 1976	25
5. Dec. 31, 1976--	Jan. 10, 1977	11
Total-----		72

The parties also stipulated that the Government acted reasonably and properly in issuing these stop work and resume work orders when they did. Government fault is not the issue. It is undisputed that the subject orders were issued under Clause 13 of the Additional General Provisions contained in both contracts. That clause reads as follows:

13. WORK STOPPAGE BY THE GOVERNMENT—The Contracting Officer, by issuance of a stop work order, may direct the Contractor to shut down any work that may be subject to damage be-

cause of weather conditions, fire danger, or because it is impracticable to work during the winter season. The Contractor will be given a resume work order, which will document the date the work stoppage ends. The Contractor will not be entitled to additional compensation for such stoppages which are of reasonable duration. The Contractor will be given a time extension equal to the period of fire danger or winter shutdown, but will not be granted a time extension because of reasonable stoppage for weather conditions unless the delay, caused by such stoppage, is excusable within the meaning of Clause 5(d) of SF-23A or Clause 2(b) of SF-19, whichever form is part of this contract.

Appellant makes two arguments with respect to the second claim:

(1) That the total of 72 days of delay compared with the total performance time of both contracts, 140 days, suggests that the stoppages were of unreasonable duration, and therefore, by implied construction of the third sentence of Clause 13, *supra*, the contractor is entitled to additional compensation; and (2) that Clause 13 "is much akin to the Suspension of Work Clause" (Clause 23 of the General Provisions contained in the subject contracts) and, based upon the reasoning of the Court of Claims, applied in *Fruehauf Corp. v. United States*, 587 F. 2d 486 (1978), citing *Merritt-Chapman & Scott Corp. v. United States*, 192 Ct. Cl. 848, 429 F. 2d 431 (1970), Seldo should not have to bear the burden of a drastic increase in its time and cost of performance resulting from delays of an unreasonable duration.

We reject Seldo's first argument concerning the construction of the third sentence of Clause 13. The language of that sentence does not

in any way purport to deal with the total duration of a number or series of stop work orders. It is our view that such language, of necessity, pertains to only one stop work order at a time, since under any particular contract, there is no way of pre-determining whether none, one, or several stop work orders may be required because of fire danger or adverse weather conditions. As pointed out in the Government's brief, the inspector's logs (GX 6, 7, and 8) show that the stop work orders were issued because of rainfall; that they were in effect only so long as the conditions at the site were unsuitable for work; and that the resume work orders coincide with Seldo's own suggestions as to when it would be able to resume work. In these circumstances, we find that no stop work order continued for an unreasonable duration.

Appellant's second argument, likewise, is without merit. It is true that Clause 13 and the standard suspension of Work Clause are alike in that they both deal with work stoppages. However, their "kinship" stops there. The two clauses have different functions. The Suspension of Work Clause reads as follows:

23. SUSPENSION OF WORK

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this con-

tract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

It is apparent that Clause 13 pertains to work stoppages which may be issued by the contracting officer because of fire danger or adverse weather conditions, while Clause 23 allows the contracting officer to issue stop work orders for other reasons as may be appropriate for the convenience of the Government. Since it is undisputed that the stop work orders here were properly issued under Clause 13 because of rainfall, it follows that the *Fruehauf* and *Merritt-Chapman* cases, *supra*, cited by Seldo are not in point. In those cases, stop work orders were issued under Clause 23.

Furthermore, the limitation of the second sentence of Clause 23(b), under the facts of this case, prevents the equitable adjustment sought by Seldo.

Decision

Therefore, having failed to sustain its burden of proof in support of entitlement, Seldo's claim No. 2 is hereby denied.

Claim No. 3—The Soils Condition Claim

Discussion

The question here is whether appellant is entitled to an equitable adjustment for extra costs resulting from the Government's failure to furnish information pertaining to the plasticity of soils in the alternate borrow area to be used to repair the breach in the dam.

It is undisputed that the contract drawings showed a plasticity index of 4 for the principal borrow area but did not show the plasticity index for the materials in the alternate borrow area; that a general note on drawing No. AZ-02-9172-2 stated, "materials from the principal and alternate borrow pits will be blended at the most optimum mix to obtain desirable properties of the borrow materials in the compacted earthfill embankment and core trench" (AF-2); that in April of 1976, Mr. Kenneth F. Hansen, an engineer for BLM, and the engineer who prepared the plans and specifications of the breach work, determined that the plasticity test results for the principal borrow

area were too low in that the soils were too sandy or permeable to achieve the desired compaction; that the plasticity index of 4 was indicated on the contract drawings for the primary area, but because of the cutoff date for submission of the contract document in order to have the contract awarded by the end of the fiscal year, Mr. Hansen designated only the location of the alternate borrow pit on the plans leaving out the plasticity index information for that pit; that the cutoff date was April 15 and that the test results showing the plasticity of the soils in the alternate pit were not received until after May 10, 1976; that the plasticity index for that alternate pit was 12 as shown by Government Exhibit 4, dated May 10, 1976; and that such information was never incorporated into the contract documents, but Mr. Hansen requested that the District Office for BLM make the information available to all the bidders.

The Government contends (1) that Mr. Paul E. McCollum, the project engineer for appellant, should have known from the general note on the drawings that since the plasticity index of 4 was indicated for the primary pit and a blending of the two pits was required, the plasticity index for the alternate pit would have to be higher in order to repair the breach; (2) that Mr. McCollum had previous experience for 30 years in that part of Arizona where the project was located and was therefore chargeable with knowledge of local condi-

tions; (3) that during the prebid site inspection, Mr. McCollum declined to make a closeup inspection of the alternate borrow area, and that since Mr. Wilson, the District Engineer for the Government, testified (Tr. 78) that he showed all the prospective bidders the test results for the alternate borrow area (GX-4), and since it is standing policy in the District Office to make available to bidders all the information it has about a project, "there is no reason to believe Mr. Wilson did not make Government Exhibit 4 available to the contractor."

There is a direct conflict of testimony whether Government Exhibit 4 was actually shown to Mr. McCollum by Mr. Wilson.

Mr. McCollum testified that he made an appointment with Mr. Wilson to meet at the Lower Centennial Dam site early in June 1976 for a prebid site inspection; that he had bummed a ride with another contractor, Mr. Jack W. Taylor, who had no interest in the subject contracts, but who was making a trip to the general area in connection with bidding on other projects (Tr. 14, 15); that Mr. Wilson did not show up at the appointed time of 10:30 a.m. on the appointed day, but did show up at the town of Salome that day where McCollum and Taylor were having lunch; that after lunch the three of them went back to the Lower Centennial Dam site, the location of the retaining wall project, but did *not* visit the Upper Centennial site; and that he, McCollum, was *not* given any information, either written or oral,

concerning the nature of borrow pits at the Upper Centennial site, where the breach repair project was located (Tr. 16).

On the other hand, John L. Wilson, then the District Engineer for BLM, testified that he escorted the prospective bidders for the subject contracts at the prebid onsite inspection, and that he did go with McCollum and Taylor on the tour of the Lower Centennial Dam site as related by McCollum (Tr. 77). When asked how many people were in the party, Mr. Wilson testified as follows: "I don't know for sure. It seemed like there were quite a few when we went to the Centennial Narrows. And then I showed them the water spreader system below Centennial Narrows *and at that point most of the contractors left*" (Tr. 77 (*italics supplied*)).

Mr. Wilson also testified that his recollection coincided with the testimony of Mr. McCollum and Mr. Taylor except that he did take them to the Upper Centennial Dam site and when on top of the dam pointed out the alternate borrow area and asked them if they would like to go down and see it and they said they did not want to; and that upon returning to the vehicles, he showed Mr. McCollum Government Exhibit 4, the test results (Tr. 78), but gave him no copies and did not have a signature acknowledging that Mr. McCollum had examined the document (Tr. 79).

The testimony of Mr. McCollum regarding the onsite inspection at the Lower Centennial Dam was corroborated by the testimony of Mr.

Jack W. Taylor. He verified that the Government representative did *not* take them to the Upper Centennial Dam and that no written information was given either to Mr. McCollum or himself related to the Upper Centennial (Tr. 41-44). Mr. McCollum also testified (Tr. 26-33) that Seldo had great difficulty in achieving the correct blend of materials in the two borrow pits and in getting water to permeate the alternate borrow pit material so that proper compaction could be accomplished and that it was not until late December of 1976, after incurring considerable extra costs, when he requested the Government inspector, Mr. Martin Fuller, to see if the BLM Office had any further information on the alternate borrow pit material. The inspector's log for December 22 (GX-7), verifies that the inspector did obtain the information contained in Government Exhibit 4 by radio and that upon giving the information to Mr. McCollum, Mr. McCollum said that the information had been withheld from him when he bid the job and that he intended to make a claim for a changed condition.

There was no corroboration of Mr. Wilson's testimony that he gave the information to McCollum at the onsite inspection. The corroboration of McCollum's testimony by both the testimony of Mr. Jack Taylor and the entry in the inspector's log of Dec. 22, 1976, together with the unlikelihood of Seldo going to all the extra work and expense of trying properly to blend the soils in the two borrow pits if the plasticity

index information had been given Seldo, compels our finding that the conflict of testimony, by a preponderance of the evidence, must be resolved in favor of appellant. We do not believe that Mr. Wilson deliberately misrepresented the facts but, more than likely, having escorted numerous bidders to the project sites on prebid inspections, simply confused McCollum and Taylor with other contractors and believed he had actually shown them the contents of Government Exhibit 4.

The theory of appellant's claim to entitlement is on the basis of a differing site (or changed) condition. We do not believe that theory is applicable here since there was no change, the plasticity index of the alternate borrow area was, through inadvertence, neglect, or whatever reason, simply withheld by the Government from the contractor. However, in *Buck Brown Contracting Co., Inc.*, IBCA-1119-7-76 (Aug. 1, 1978), 78-2 BCA par. 13,360, this Board held a road surfacing contractor entitled to an equitable adjustment for costs incurred as a result of failure by the Government to inform him of the actual condition of an existing subgrade. But that holding was on the basis of a defect in specifications.

There was no satisfactory explanation made by the Government in this case why a change order or amendment to the contract drawings was not made to indicate the plasticity index of the alternate borrow pit, if not in the prebid documents, at least soon after the contract award. We hold, therefore, as

we did in the *Brown* case, that appellant has made out a case for entitlement to an equitable adjustment, not on a theory of a differing site condition, but rather on a theory of defective specifications.

It has been a longstanding rule of this Board that we may decide a claim on a theory not advanced by the parties if consistent with the facts of record or legitimate inferences therefrom. *Paul C. Helmick Co.*, IBCA-39 (Oct. 31, 1956), 63 I.D. 363, 365-66, 56-2 BCA par. 1096 at 2777-78; *Singleton Contracting Corp.*, IBCA-1413-12-80 (Aug. 12, 1981), 88 I.D. 722, 81-2 BCA par. ____.

Decision

Wherefore, appellant's claim No. 3 for entitlement to an equitable adjustment is sustained and the matter of quantum is remanded to the contracting officer for negotiation pursuant to stipulation of the parties.

Summary

By way of recapitulation, the Board has decided the three claims involved in this appeal as follows:

Claim No. 1—Sustained in the amount of \$2,320.

Claim No. 2—Denied.

Claim No. 3—Sustained as to entitlement and remanded for negotiation as to quantum.

DAVID DOANE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

**CUMULATIVE IMPACTS UNDER
SECTION 7 OF THE ENDAN-
GERED SPECIES ACT***

M-36905 (Supp.)

August 26, 1981

**Endangered Species Act of 1973:
Section 7: Consultation**

The July 19, 1978, Solicitor's Opinion 85 I.D. 275 (1978) relating to analysis of cumulative effects during consultation pursuant to sec. 7 of the Endangered Species Act, and the July 24, 1978, memorandum, which was a supplement to that opinion, are withdrawn. Any further legal advice on the matter will be provided by the Associate Solicitor for Conservation and Wildlife.

*OPINION BY OFFICE
OF THE SOLICITOR*

MEMORANDUM

**TO: DIRECTOR, FISH AND WILDLIFE
SERVICE**

FROM: SOLICITOR

**SUBJECT: WITHDRAWAL OF PRIOR
SOLICITOR'S OPINIONS ON CUMULA-
TIVE EFFECTS ANALYSIS UNDER SEC-
TION 7 OF THE ENDANGERED SPECIES
ACT**

I have reviewed the July 19, 1978, Solicitor's Opinion (85 Interior Dec. 275) on the above referenced subject and am withdrawing that Opinion and the July 24, 1978, Solicitor's Opinion which supplemented it. Any further guidance in this area may be provided by the Associate Solicitor for Conservation and Wildlife.

WILLIAM H. COLDIRON

Solicitor

*Not in chronological order.

**CUMULATIVE IMPACTS UNDER
SECTION 7 OF THE ENDAN-
GERED SPECIES ACT***

M-36938

August 27, 1981

**Endangered Species Act of 1973:
Section 7: Consultation**

Earlier Solicitor's Opinions on cumulative impact analysis have been withdrawn. Solicitor's Opinion M-36905 (Supp.), 88 I.D. 903 (1981). Sec. 7 consultation under the Endangered Species Act must consider past and present impacts of all projects and human activities, whether private, state or federal. Consultation must also consider the cumulative impacts of other proposed future federal projects in the vicinity which have undergone sec. 7 consultation and received favorable biological opinions. Finally, consideration should also be given to the impacts of proposed state or private actions whose completion prior to the completion of the federal project subject to consultation is reasonably certain.

*OPINION BY OFFICE
OF THE SOLICITOR*

**TO: DIRECTOR, FISH AND WILDLIFE
SERVICE**

**FROM: ASSOCIATE SOLICITOR, CON-
SERVATION AND WILDLIFE**

**SUBJECT: CUMULATIVE EFFECTS TO
BE CONSIDERED UNDER SECTION 7 OF
THE ENDANGERED SPECIES ACT**

This memorandum sets forth the legal requirements for consideration by federal agencies of the "cumulative effects" of other projects and impacts in determining whether a particular proposed action complies with sec. 7(a) of the

*Not in chronological order.

Endangered Special Act (ESA or Act), 16 U.S.C. § 1536(a). The Solicitor has now withdrawn all prior legal opinions¹ on cumulative impacts and sec. 7. This memorandum shall control the scope of consultation and cumulative impact analysis under the Endangered Species Act.

Sec. 7 requires all federal agencies, in consultation with the Fish and Wildlife Service (FWS or Service), to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species, or adversely modify their critical habitats. The Service consults with federal agencies and renders a biological opinion on the effects of agency action upon listed species, pursuant to sec. 7(b), 16 U.S.C. 1536(b).

Consideration of the legal requirements for cumulative effects analysis arose in 1978, as the result of sec. 7 consultations for two water development projects on the North and South Platte Rivers: the Grayrocks Dam and the Narrows Project. As proposed, both projects would affect downstream flows in the Big Bend area of the Platte River in Nebraska, an area designated as critical habitat for the whooping crane. During these consultations, the Service requested a Solicitor's Opinion on whether sec. 7 requires consideration of the effects of other water projects in the area which were then in the plan-

ning or construction phases, would affect the crane's habitat, and would have impacts which might be cumulative to those of the proposal at hand.

An opinion issued on July 19, 1978, concluded that federal agencies must consider the cumulative effects of other projects, whether federal, state or private, during consultations under sec. 7. Although the July 19 opinion did not expressly define the term "cumulative effects", a July 24, 1978, opinion stated that for any ecosystem upon which an endangered or threatened species depends, all pending project impacts must be considered if those impacts can reasonably be anticipated to occur either before or after the completion of the project which is the subject of consultation.

For the reasons that follow, the definition of cumulative effects used in these prior opinions is inappropriate when applied to sec. 7.

Consideration of Cumulative Effects Under Sec. 7

The previous Solicitor's Opinions used concepts developed in NEPA law² which should not be applied, without modification, to sec. 7 con-

¹ 85 I.D. 275 (July 19, 1978) (supplemented July 24, 1978). See Appendix A. An earlier Deputy Solicitor's opinion issued on May 25, 1978, was withdrawn on June 5, 1978.

² The Council on Environmental Quality regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (2)(C), define the term "cumulative impact" as—

"the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."

40 CFR 1508.7 (1980).

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sultations. The first reason is that the *substantive* consequences of requiring such cumulative effects to be considered under sec. 7 differ from the *procedural* consequences of environmental planning statutes such as NEPA. Sec. 7 is a substantive statute which provides:

Each federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

16 U.S.C. 1536(a)(2). The Supreme Court, in interpreting a slightly different, earlier version of sec. 7, has noted the difference from NEPA:

NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive *inquiry* as to the effect of federal actions on the environment; by way of contrast, [section 7 of] the 1973 Act is substantive in effect, designed to *prevent* the loss of any endangered species, regardless of the cost.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 188 n.34 (1978) (Italics in original).

A wholesale adoption of the cumulative effects approach under NEPA is thus inappropriate because prerequisite authority for a proposed action subject to consultation could be denied because of the effects of other speculative and un-

related future actions which might be likely to jeopardize a listed species. This substantive result is quite different from that under planning statutes such as NEPA, where an analysis of the cumulative effects of other unrelated future actions means only that such effects be *considered* before proceeding with the proposed action undergoing environmental review. See, *Natural Resources Defense Council v. Calloway*, 524 F.2d 79 (2d Cir. 1979).

The second reason for not adopting NEPA's approach to cumulative effects analysis under sec. 7 is that all other *future federal* actions will themselves be subject to the restraints of sec. 7 at some later date. It is, therefore, more appropriate to consider the effects of future federal actions in a given area at the time consultation under sec. 7 is initiated for those actions. That is, the impact of future federal projects should be addressed sequentially, rather than collectively, since each must be capable at some point of individually satisfying the standards of sec. 7. Thus for federal projects, sec. 7 provides a "first-in-time, first-in-right" process whereby the authorization of federal projects may proceed until it is determined that further actions are likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. Environmental planning statutes such as NEPA do not impose such substantive limitations on future federal conduct, and so it is more

appropriate for them to require the collective consideration of reasonably foreseeable, future federal activities. The substantive nature of sec. 7, however, suggests that a project-by-project sequential review of federal actions is a more appropriate approach for endangered species consultation.

A recent case which considered NEPA and the ESA side by side in a given factual situation implicitly recognized different approaches for cumulative impact analysis under NEPA and the ESA, requiring broad agency consideration of cumulative impacts under NEPA while focusing on a more limited analysis of impacts under sec. 7.

In *North Slope Borough v. Andrus*, 486 F. Supp. 332 (D.D.C. 1980), *rev'd. on other grounds*, 642 F.2d 589 (D.C. Cir. 1980), the court considered NEPA and ESA compliance for offshore oil and gas leasing. Both the district and appeals courts held that the cumulative effects of "other significant Federal and state energy development projects * * * in progress and planned for the North Slope Region," had to be considered in the EIS. 486 F. Supp. at 347; 642 F.2d at 600. The cumulative effects of these other actions, however, were not mentioned by either court in their discussion of the proper scope of agency review under sec. 7. Instead, for sec. 7 purposes, the courts only focused on the impacts of the lease sale itself. 486 F. Supp. at 350-51; 642 F.2d at 608-609. Thus, though both courts required consideration of the cumulative effects of unrelated future state

and federal actions for purposes of NEPA, each implicitly endorsed a more limited review of the leasing proposal under sec. 7.

Sec. 7 Consultation Process

Having concluded that limited analysis of cumulative effects is required under sec. 7, we will now discuss how that analysis should occur.

Obviously the first task in consultation is to define the scope of the project under review. In the case of construction activities, a "project" is both the proposed activity itself and any "connected" activity as well. Connected activities are those which are related to (interrelated) or dependent upon (interdependent) a proposed project. Interdependent actions are those which have no independent utility apart from the proposed project. Interrelated actions are those which are part of a larger project and cannot proceed unless other actions are taken previously or simultaneously.³ Thus, in the case of a reservoir project with a proposed lattice work of irrigation canals, in all likelihood the canals would be considered part of the "project" for purposes of sec.

³ See *Sierra Club v. Calloway*, 499 F.2d 982 (5th Cir. 1974); *Friends of the Earth v. Coleman*, 518 F.2d 323 (9th Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Sierra Club v. Stamm*, 507 F.2d 788 (8th Cir. 1974); *Sierra Club v. Froehke*, 392 F. Supp. 130 (D. Mo. 1975); *aff'd* 534 F.2d 1289 (5th Cir. 1975); *Environmental Defense Fund v. Armstrong*, 356 F. Supp. 131 (N.D. Cal. 1973), *aff'd* 487 F.2d 814 (9th Cir. 1974); 40 CFR 1508.25(a).

See also *Atchison, Topka and Santa Fe R.R. v. Callaway*, 382 F. Supp. 610 (D.D.C. 1974); *City of Rochester v. U.S. Post Office*, 541 F.2d 967 (2d Cir. 1976).

7 consultation because it is unlikely that they would have any independent utility *but for* the impoundment.

Once the "project" has been defined, the consultation team should then focus on analyzing the environment baseline in the affected area. This is necessary for determining what the environmental "status quo" is going to be at the time of consultation on the proposed project. The impacts of the project under review should then be measured against this environmental baseline.

In determining the environmental baseline, the consultation team should consider the *past* and *present* impacts of *all* projects and human activities in the area, regardless of whether they are federal, state or private in nature. This is logical since the actual impacts of these projects and activities are not dependent upon the origin of their sponsorship; rather, they all are contributing influences which mold the present environmental status quo of any given area.

Furthermore, the consultation team should consider as part of the environmental baseline the anticipated impacts of all *proposed* federal projects in the affected area which have previously been the subject of sec. 7 consultation and received a favorable biological opinion. This is consistent with the "first-in-time, first-in-right" approach discussed earlier, since a

project passing muster under sec. 7 is in effect allocated the right to consume (and is presumed to utilize) a certain portion of the remaining natural resources of the area. It is this "cushion" of remaining natural resources which is available for allocation to projects until the utilization is such that any future use may be likely to jeopardize a listed species or adversely modify or destroy its critical habitat.⁴ At this point, any additional federal activity in the area requiring a further consumption of resources would be precluded under sec. 7.

However, the consultation team should not consider as part of the environmental baseline the anticipated impacts of future federal projects which have *not* been previously reviewed under sec. 7. Those projects are not part of the environmental baseline and have not had their priority set under the first-in-time system. They would undergo separate review by the consultation team and could only be authorized if it was subsequently concluded that a sufficient "resource cushion" still remained, or if an exemption was granted by the Endangered Species Committee under subsec. 7 (h) of the ESA.

⁴ We recognize that a determination of the size of this so called "cushion" may be difficult to make in some instances and may escape enacting delineation and consist of merely a range of anticipated impacts and effects. Nevertheless, we conclude that the 1979 Amendments to the Act requires some sort of final biological analysis and recommendation to result from the consultation process. 125 Cong. Rec. 9650 (Oct. 24, 1979); H.R. Rep. No. 697, 96th Cong., 1st Sess. 12 (1979).

The impact of state or private actions which are contemporaneous with the consultation in process should also be factored into the environmental baseline for the project area.

Having thus established an environmental baseline, the consultation team must then determine what the *direct* and *indirect* effects of the project under review will be. Such effects must be analyzed as part of the consultation process. See *Tennessee Valley Authority v. Hill*, 439 U.S. 153 (1978); *National Wildlife Federation v. Coleman*, 529 F. 2d 1064 (5th Cir. 1976); See also *North Slope Borough v. Andrus*, 486 F. Supp. 332 (D.D.C.), *aff'd in part and rev'd in part*, 642 F. 2d 589 (D.C. Cir. 1980).

Finally, the consultation team should consider the "cumulative impacts, of *future* state or private sections where such actions are *reasonably certain* to occur prior to the completion of the federal project. A non-federal action is "reasonably certain" to occur if the action requires the approval of a state or local resource or land use control agency and such agencies have approved the action, and the project is ready to proceed. Other indicators which may also support such a determination include whether the project sponsors provide assurance that the action will proceed, whether contracting has been initiated, whether there is obligated venture capital, or whether State or local planning agencies indicate that grant of authority for the

action is imminent. These indicators must show more than the *possibility* that the non-federal project will occur; they must demonstrate with reasonable certainty that it *will occur*. The more that state or local administrative discretion remains to be exercised before a proposed state or private action can proceed, the less there is reasonable certainty that the project will be authorized. In summary, the consultation team should consider only those state or private projects which satisfy all major land use requirements and which appear to be economically viable.

J. ROY SPRADLEY, Jr.
Associate Solicitor,
Conservation & Wildlife

APPENDIX A

July 24, 1978

MEMORANDUM

TO: DIRECTOR, FISH AND WILDLIFE SERVICE

FROM: SOLICITOR

SUBJECT: CUMULATIVE IMPACTS—SECTION 7 OF THE ENDANGERED SPECIES ACT

On May 25, 1978 the Deputy Solicitor issued an opinion regarding the subject impacts as they relate to the proposed Narrows Project on the South Platte River in Colorado. On June 5, 1978, I withdrew that opinion pending my personal review of the subject.

In general, that opinion adopted the position that the "rule of reason" developed in NEPA case law should be applied in determining the scope of review and consultation for sec. 7 of the Endangered Species Act. I concur in that portion of the opinion.

On the last page of the opinion however, two limitations were placed upon

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the application of the "rule of reason," namely, that impacts need only be considered (1) which can reasonably be anticipated to occur prior to the completion of the project, or (2) which will definitely occur before or after completion of the project under consultation.

I am not persuaded that these limitations should be placed on the "rule of reason" test. If other activities (both private and governmental) can be reasonably anticipated to impact the endangered species or its critical habitat, those impacts should be included within the scope of the consultation. To exclude consideration of activities and projects which will occur after the completion of the project under consultation could result in our ignoring impacts which are likely to occur and otherwise cognizable under the "rule of reason." Likewise, projects and activities for which administrative discretion remains should also be considered. The degree of administrative discretion, and the likelihood of that discretion being exercised in a manner to diminish impact on the subject species, are matters which should be included under the "rule of reason" test.

In conclusion, the opinion of May 25, 1978 is reissued with the removal of the two limitations in the first full paragraph on the last page. The "rule of reason" test should be used to evaluate impacts which can reasonably be anticipated to occur from projects and activities before or after the completion of the project under consultation or on which administrative discretion remains. These projects and activities, along with their impacts, should be considered and given an appropriate weight in the application of the "rule of reason."

The reissued opinion, modified as indicated in this memorandum, is attached.

LEO M. KRULTZ

Solicitor

THE BUREAU OF LAND MANAGEMENT WILDERNESS REVIEW AND VALID EXISTING RIGHTS

M-36910 (Supp.)

October 5, 1981

Federal Land Policy and Management Act of 1976: Wilderness

Valid existing rights are limitations upon the Secretary's authority to manage activities occurring within wilderness study area under the nonimpairment standard. In general, the nonimpairment standard remains the management norm unless it would preclude enjoyment of the rights. When it is determined that the rights can be enjoyed only through activities that will permanently impair an area's suitability, the Secretary must manage the lands to prevent unnecessary and undue degradation and to afford environmental protection.

Solicitor's Opinion M-36910, 86 I.D. 89 (1979), modified.

OPINION BY OFFICE OF THE SOLICITOR

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: THE BLM WILDERNESS REVIEW AND VALID EXISTING RIGHTS

I. INTRODUCTION

On Sept. 5, 1978, the Solicitor issued opinion M-36910, 86 I.D. 89 (1979), interpreting sec. 603 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1782. In addition, two supplementary memoranda have been issued. The first, the memorandum of Aug.

7, 1979 ("Palmer Oil/Prairie Canyon"), reviewed the "grandfather clause" of sec. 603. The second, the memorandum of Feb. 12, 1980 ("Further Guidance on FLPMA's section 603"), discussed the Bureau of Land Management's Interim Management Plan and valid existing rights in the context of mining claims located pursuant to the general mining laws.

This opinion addresses the relationship between valid existing rights and the wilderness review requirements of sec. 603.¹ It modifies Solicitor's Opinion No. M-36910 and incorporates the memorandum of Feb. 12, 1980.

II. THE NONIMPAIRMENT STANDARD AND ITS EXCEPTIONS AND LIMITATIONS

Congress has delegated to the Secretary general and comprehensive authority to manage the public lands. As the Supreme Court has noted, the Secretary "has been granted plenary authority over the administration of public lands * * * and * * * has been given broad authority to issue regulations concerning them." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336

(1963). See also *Cameron v. United States*, 252 U.S. 450, 459-60 (1920); *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963). See generally 30 U.S.C. §§ 22, 189; 43 U.S.C. §§ 2, 1712. With the enactment of FLPMA, Congress has restricted the Secretary's discretion in managing the public lands by imposing two standards to guide management decisions. The first is a general standard applicable to all management activities: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary and undue degradation of the lands." 43 U.S.C. § 1732(b). The second and more stringent limitation is part of the wilderness review mandated by sec. 603 of FLPMA. 43 U.S.C. § 1782.

Under sec. 603 of FLPMA, the Secretary is directed to review the public lands and identify those areas that meet the wilderness criteria contained in sec. 2(c) of the Wilderness Act, 16 U.S.C. § 1131 (c). Those areas that have wilderness characteristics are then to be studied to determine their suitability for inclusion in the National Wilderness Preservation System. The Secretary is required to make recommendations on their suitability or nonsuitability to the President by Oct. 21, 1991. In turn, the President makes recommendations to the Congress which decides which areas will be designated wilderness.

Sec. 603(c) establishes a specific management standard, known as the "nonimpairment standard," appli-

¹ This opinion formalizes and is consistent with the position adopted by the Department on appeal from the decision of *Rocky Mountain Oil & Gas Association v. Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980), appeal docketed, No. 81-1040 (10th Cir. Jan. 5, 1981). Although consistent with the result reached by the court in regard to allowing activities on oil and gas leases issued prior to Oct. 21, 1976 (pre-FLPMA leases), this opinion does not adopt the court's rationale.

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cable only during this wilderness review:

During the period of review of such [wilderness study] areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: PROVIDED, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (italics added). See generally Solicitor's Opinion M-36910, 86 I.D. 89, 109-11 (1979).

There is, however, an exception to and a limitation on the nonimpairment standard. The exception is the section's grandfather clause which authorizes the continuance of existing mining, grazing, and mineral leasing uses, "in the manner and degree" in which they were occurring on Oct. 21, 1976, the date of enactment of FLPMA. This grandfather clause was analyzed in both the initial Solicitor's Opinion and the supplemental memorandum of Aug. 7, 1979.

The limitation on the nonimpairment standard, and the subject of this opinion, is the savings clause of sec. 701(h) of FLPMA. This section provides:

All actions by the Secretary concerned

under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701 note.

The clause limits the applicability of the nonimpairment standard by specifying that the standard cannot be applied in a manner that would prevent the exercise of any "valid existing rights."

III. VALID EXISTING RIGHTS

Although the legislative history is largely silent on the scope of this term,² it is not unique to FLPMA. The term has an extensive history both in the Department and the courts.

In defining "valid existing rights," the Department distinguishes three terms: "vested rights," "valid existing rights," and "applications" or "proposals."³ "Valid existing rights" are distinguished from "applications" because such rights are independent of any secretarial discretion. They are property interests rather than mere expectancies. Compare *Schraier v. Hickel*, 419 F.2d 663, 666-67 (D.C. Cir. 1969) and *George J. Propp*, 56 I.D. 347, 351 (1938) with *Udall v. Tallman*, 380 U.S. 1, 20 (1965), *United States ex rel. McLennan v.*

² See generally H.R. Rep. No. 1724, 94th Cong., 2d Sess. 65 (1976), reprinted in Senate Comm. on Energy & Natural Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Land Policy and Management Act of 1976* at 871, 935 (Comm. Print 1978).

³ Each of these terms applies only to third parties. They do not apply to interests of federal agencies, departments, or agents. See, e.g., *Townsite of Liberty*, 40 I.B.L.A. 317, 319 (1979).

Wilbur, 283 U.S. 414, 420 (1931), and *Albert A. Howe*, 26 I.B.L.A. 386, 387 (1976). "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied.⁴ Compare *Stockley v. United States*, 260 U.S. 532, 544 (1923) with *Wyoming v. United States*, 255 U.S. 489, 501-02 (1921) and *Wirth v. Branson*, 98 U.S. 118, 121 (1878). Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion.

Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant by the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. Second, a valid existing right may be created as a result of the exercise of secretarial discretion. For example, although

the Secretary is not required to approve an application for a right-of-way, if an application is approved the applicant has a valid existing right to the extent of the rights granted. Similarly, the Secretary has discretion to approve, deny, or suspend an application for an oil and gas lease. Once the lease is issued however, the applicant has valid existing rights in the lease.

Valid existing rights are not, however, absolute. The nature and extent of the rights are defined either by the statute creating the rights or by the manner in which the Secretary chose to exercise his discretion.⁵ See, e.g., *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Continental Oil Co. v. United States*, 184 F. 2d 802, 807 (9th Cir. 1950). Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application. Because of the importance of the individual approval and its stipulations, a review of each ap-

⁵ For example, there are interests less than leaseholds that are "valid existing rights." These include noncompetitive (preference right) coal lease applications that were preserved by the "valid existing rights" clause of sec. 4 of the Federal Coal Leasing Act Amendments of 1976, 90 Stat. 1085, amending 30 U.S.C. § 201(b) (1970). The Secretary does not have the discretion to reject these applications if the applicant can meet the statutory test for lease issuance. Nevertheless, the right to a lease does not accrue until that determination has been made. *NRDC v. Berkland*, 609 F.2d 553 (D.C. Cir. 1979); *Utah International, Inc. v. Andrus*, 488 F. Supp. 962, 969 (D. Utah 1979). The right preserved is to an adjudication and, if that adjudication is favorable, to a lease.

⁴ "Vested rights" has a narrower meaning within public land law terminology than in other areas of the law. In public land law, "vested rights" typically applies to legal or equitable rights to a fee title. See e.g., *Wyoming v. United States*, supra at 501-02. Oil and gas leases, which do not convey fee title, have not been couched in terms of the traditional "vested right" usage.

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proval document will be required to determine the precise scope of an applicant's valid existing rights where such rights are created by an act of Secretarial discretion.

IV. REGULATION OF VALID EXISTING RIGHTS UNDER SEC. 603 OF FLPMA

The determination that a particular interest is a "valid existing right" is a limitation on the congressionally mandated management standard applicable to activities occurring within wilderness study areas. Although the nonimpairment standard remains the norm, this standard cannot be enforced if to do so would preclude recognition of the right or, in the case of an issued lease, would preclude development under the right. In general, restrictions on the right designed to protect wilderness values may not be so onerous that they unreasonably interfere with enjoyment of the benefit of the right. In other words, regulations may not be "so prohibitively restrictive as to render the land incapable of full economic development." *Utah v. Andrus*, 486 F. Supp. 995, 1010 (D. Utah 1979).

The resolution of specific cases under these general guidelines is dependent upon an analysis of two variables. The first is the scope of developmental rights actually conveyed by the person's actions under the statute or by the Department's issuance of the lease or other docu-

ment. The second variable is the site-specific conditions confronting the right holder. In general, however, the nonimpairment standard governs activities unless this would unreasonably interfere with enjoyment of the valid existing rights. When the nonimpairment standard would unreasonably interfere with the use of the rights conveyed, the holder of the rights may exercise the rights although it impairs the area's suitability for preservation as wilderness. For example, under such circumstances a claimant with a valid mining claim under the Mining Law of 1872 may develop the claim even if this impairs the area's suitability for wilderness preservation. Similarly, the holder of an oil and gas lease or a right-of-way authorization issued prior to the enactment of FLPMA may develop the leasehold or right-of-way to the extent authorized by the issuance or approval document.

It is important to note the distinction between pre- and post-FLPMA leases and authorizations. With the enactment of FLPMA on Oct. 21, 1976, the Secretary was required to manage the public lands under wilderness review "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Thus applicants who received a lease or other use authorization after Oct. 21, 1976, for lands within an area under wilderness review did not receive an unlimited right to develop since after that date the Secretary had author-

ity only to issue those leases, permits, and licenses that would not impair an area's suitability for preservation as wilderness. *See generally Utah v. Andrus*, 486 F. Supp. 995, 1006 (D. Utah 1979).

The right to develop even if it impairs an area's suitability does not, however, mean that the right is unlimited. The Secretary remains under a statutory mandate to manage these areas and their resources: "in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c).⁶ By implication, this standard allows the Secretary to authorize uses or activities necessary to the purposes of the valid existing rights subject to reasonable mitigating measures to protect environmental values. The requirement that the Secretary regulate uses and activities to prevent unnecessary and undue degradation and to afford environmental protection is consistent with the power of the Federal Government to regulate property interests. Since the regulation extends at a minimum only to prohibiting activities that are not necessary or that are excessive or unwarranted, the taking issue is not implicated.⁷

⁶ See also 43 U.S.C. § 1732(b).

⁷ These management requirements are compatible with the concept of valid existing rights. First, such rights may constitutionally be regulated and their value diminished for a proper governmental purpose. *See, e.g., Andrus v. Allard*, 100 S.Ct. 318 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Goldblatt v. Hempstead*, 369

V. CONCLUSION

Valid existing rights may be created by operation of a statute or an act of secretarial discretion. A valid mining claim, an oil and gas lease, and a right-of-way authorization are examples of valid existing rights. If such rights were created prior to the enactment of FLPMA, they limit the congressionally imposed nonimpairment standard. Although the nonimpairment standard remains the norm, valid existing rights that include the right to develop may not be regulated to the point where the regulation unreasonably interferes with enjoyment of the benefit of the right. Resolution of specific cases will depend upon the nature of the rights conveyed and the physical situation within the area. When it is determined that the rights conveyed can be enjoyed only through activities that will permanently impair an area's suitability for preservation as wilderness, the activities are to be regulated to prevent unnecessary and undue degradation or to afford environmental protection. Nevertheless, even if such activities impair

U.S. 590 (1962). Since the management standard prohibits only "unnecessary and undue degradation," it does not raise constitutional issues. Second, the rights granted by the United States are often explicitly limited by the government's authority to regulate. For example, the 1872 Mining Law provides that "all valuable mineral deposits in lands belonging to the United States * * * shall remain free and open to exploration and purchase * * * under regulations prescribed by law." 30 U.S.C. § 22. *See generally* 30 U.S.C. § 189; *Boesche v. Udall*, 373 U.S. 472, 477-78 (1963); *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980).

the area's suitability, they must be allowed to proceed.

WILLIAM H. COLDIRON
Solicitor

CLYDE K. KOBBERMAN

58 IBLA 268

Decided *October 8, 1981*

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting simultaneous noncompetitive oil and gas lease application M 49009.

Affirmed.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents

An oil and gas lease application, Form 3112-1 (June 1980), is not completed in accordance with regulation 43 CFR 3112.2-1 or the instructions on the application itself where questions (d) through (f) are not answered by checking appropriate boxes in the application as the instructions require.

2. Administrative Authority: Laches—Estoppel—Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers.

APPEARANCES: Bruce A. Budner, Esq., Dallas, Texas, for appellant.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
PARRETTE*

**INTERIOR BOARD OF
LAND APPEALS**

Clyde K. Kobbeman filed a simultaneous noncompetitive oil and gas lease application for parcel MT 1 in the September 1980 drawing in the Montana State Office, Bureau of Land Management (BLM). This application was drawn with first priority and assigned serial number M 49009.

On Apr. 30, 1981, BLM issued a decision rejecting Kobbeman's application because questions (d), (e), and (f)¹ were not completed on the back of the application by checking appropriate boxes, which violates 43 CFR 3112.2-1(a) (1980). Kobbeman appealed this decision.

[1] We agree that appellant's application was not completed and that BLM therefore properly rejected it. A simultaneous noncompetitive oil and gas lease application must be *completed* (43 CFR 3112.2-1(a)) or it must be rejected as an improper filing. 43 CFR 3112.6-

¹ The portion of the application in question is as follows:

"UNDERSIGNED CERTIFIES AS FOLLOWS (check appropriate boxes) [emphasis in original]:

"(d) Does any party, other than the applicant and those identified herein as other parties in interest, own or hold any interest in this application, or the offer or lease which may result? Yes ☐ No ☐.

"(e) Does any agreement, understanding, or arrangement exist which requires the undersigned to assign, or by which the undersigned has assigned or agreed to assign, any interest in this application, or the offer or lease which may result, to anyone other than those identified herein as other parties in interest? Yes ☐ No ☐.

"(f) Does the undersigned have any interest in any other application filed for the same parcel as this application? Yes ☐ No ☐.

1(a). Thus, failure to complete items (d), (e), and (f) on the back of the application justifies its rejection. *Simon A. Rife*, 56 IBLA 378 (1981); *Edward Marcinko*, 56 IBLA 289 (1981); *Vincent M. D'Amico*, 55 IBLA 116 (1981) (appeal pending).

Appellant's application was filed on his behalf by the Federal Energy Corp. (FEC), an oil and gas lease filing service. Appellant's statement of reasons alleges that FEC attached to his application a copy of a document entitled "Addendum to Service Agreement with Federal Energy Corp.," executed on July 8, 1980, by applicant and his wife. A copy of this document accompanies the statement of reasons. However, the record contains no such attachment.

We have additional reason to doubt the allegation that an executed separate statement accompanied appellant's application. The present record, and records of other cases involving the applications of FEC's clients during the same period² reveal that FEC had adopted a procedure under which it filed a general information package concerning its clients' applications with BLM State offices in advance of the drawings. FEC apparently retained executed copies of the documents relating to each client in its files.

Specifically, the package included a blank copy of its standard service agreement with its clients, a

copy of its published brochure describing its services, a list of its clients, and a document entitled "Statements of Qualifications," which is otherwise identical with the "Addendum to Service Agreement" and which provides as follows:

"STATEMENT OF QUALIFICATIONS"

Undersigned certifies as follows:

(a) I hereby grant FEC the authority to sign all "Simultaneous Oil & Gas Lease Applications" (form 3112-1) being submitted on my behalf as if I had signed same.

(b) I am a citizen of the United States; an association of such citizens; a corporation organized under the laws of the United States, or any State or Territory thereof; or a municipality.

(c) I am at least 21 years of age.

(d) Applicant is in compliance with acreage limitations set forth in 43 CFR 3101.1-5 and 3101.2-4. (I do not hold more than 246,080 acres in any one state.)

(e) [?] Does any party, other than yourself and those identified herein as other parties in interest, own or hold any interest in any applications being submitted on your behalf by FEC, or any offer or lease which may result? — Yes — No

(f) Does any agreement, understanding, or arrangement exist which requires the undersigned to assign, or by which you have assigned or agreed to assign, any interest in any applications being submitted on your behalf by FEC, or the offer or lease which may result, to anyone other than those identified herein as other parties in interest? — Yes — No

(g) Are you filing applications or do you have any interest in other applica-

² We refer to the records in *Vincent M. D'Amico*, *supra* (IBLA 81-186, 81-190), and in *Janet A. Rodgers*, IBLA 81-792, issued with this decision.

³ Questions (e), (f), and (g) on the "Statements of Qualifications" correspond approximately to questions (d), (e), and (f) on the application.

October 8, 1981

tions being filed that may be in conflict with those being submitted on your behalf by FEC? — Yes — No

Since the executed "Addendum" which appellant alleges was filed with his application is, except for its title, the same as this "Statements of Qualifications," the "Addendum" may well have been taken from the file copy retained by FEC, but it was not filed with appellant's individual application.

Under 43 CFR 3102.2-6(b) an agency such as a filing service which has a uniform agreement with several applicants may file a single copy of the agreement with BLM in lieu of filing a personally signed copy of the agreement or a personally signed statement from each applicant, provided that it also files a list of its clients. Thus, FEC's filing of its service agreement and information brochure apparently conformed to the procedure established by this section.

However, neither this section, which is expressly limited to the question of how to file *agency* statements, nor any other provision of the regulations, authorizes a filing service to state the qualifications of its clients to apply for a particular parcel by executing general statements with them in advance of drawings and then filing a blank reference copy with BLM along with a list of its clients' names. Nothing in the regulations allows a filing service to invent its own method of application or otherwise to modify the prescribed procedure. BLM's application form expressly

directs an applicant to "*check appropriate boxes*" (italics in original) as part of his certification. BLM may properly insist that an applicant comply strictly with the instructions on its application to check the boxes on the application itself and may reject nonconforming applications. To hold otherwise would allow others to invent divergent ways to file applications. In view of the vast number of applications handled by BLM each month, the result of such indulgence could be chaos.

For example, 51,810 applications were filed with the Montana State Office, BLM, in September 1980 alone. In October 1980, the Wyoming State Office received 345,602 applications. When such numbers are involved, it is reasonable for the Department not to take extra steps to protect those who do not comply with its application instructions. *See Federal Energy Corp.*, 51 IBLA 144 (1980). The need to process applications efficiently at a minimum of taxpayer expense justifies BLM's insistence on strict compliance with its filing procedures.

Even if we accepted his allegation that he submitted it, appellant's use of a separate statement to answer these questions would not satisfy the requirement that the application be completed. Regulation 43 CFR 3102.2-7, on which appellant principally relies, does no more than to allow an applicant to list the names of other parties in interest on a separate sheet. It does not

authorize him to substitute an alternative document for the approved application form. Moreover, nothing in the regulations suggests that an applicant may use a separate sheet to certify that he has no interest in any other offer for the same parcel as he is required to do by question (f).

[2] The fact that other BLM state offices may improperly have accepted similar filings in the past does not alter the result here. BLM's right to insist on a completed application, in accordance with 43 CFR 3112.2-1(a) is not vitiated or lost through lack of enforcement or by the acquiescence of some of its officers or agents. *Vincent M. D'Amico, supra*; 43 CFR 1810.3(a).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

BERNARD V. PARRETTE
Chief Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

JAMES L. BURSKI
Administrative Judge

CONOCO, INC.

58 IBLA 390

Decided *October 21, 1981*

Appeal from the decision of the Wyoming State Office, Bureau of Land

Management, declaring an unpatented oil placer mining claim abandoned and void. W MC 142785.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining Claims: Abandonment—Mining Claims: Assessment Work—Mining Claims: Placer Claims—Mining Claims: Recordation

Oil placer mining claims located pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526, and preserved by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (Supp. II 1978), are subject to the recordation requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Recordation

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining Claims: Abandonment

The conclusive presumption of abandonment which attends the failure to file an

instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

4. Administrative Authority: Generally—Constitutional Law: Generally—Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim—Mining Claims: Recordation

Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

APPEARANCES: Clyde O. Martz, Esq., Stephen D. Alfors, Esq., and Janice K. Borgerson, Esq., Denver, Colorado, for appellant; Marla E. Mansfield, Esq., Office of Regional Solicitor, Denver, Colorado, for BLM.

**OPINION BY
ADMINISTRATIVE JUDGE
HENRIQUES**

**INTERIOR BOARD OF
LAND APPEALS**

Conoco, Inc., has appealed the decision of the Wyoming State Office, Bureau of Land Management (BLM), dated June 12, 1981, declaring the Black Bird #3 mining claim, W MC 142785, abandoned and void for failure to file evidence of assessment work or a notice of

intention to hold the claim during calendar year 1980 on or before December 30, as required by 43 CFR 3833.2-1(a).

The Black Bird #3 claim is an unpatented oil placer mining claim which was located on Aug. 31, 1915, in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 3, T. 33 N., R. 76 W., sixth principal meridian, Converse County, Wyoming, pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526. On Oct. 4, 1979, appellant timely filed the notice of location for the claim and evidence of assessment work for the 1978 assessment year in order to comply with sec. 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). On Oct. 18, 1979, appellant filed evidence of assessment work for the 1979 assessment year. BLM did not receive any filings from appellant in 1980.

In its statement of reasons, appellant argues that the Black Bird #3 claim is not subject to the recordation requirement of sec. 314 of FLPMA because it was a valid oil placer mining claim on the date of passage of the Mineral Leasing Act of 1920, 41 Stat. 437 (Feb. 25, 1920) (codified, *as amended*, at 30 U.S.C. §§ 181-287 (1976 and Supp. II 1978)), and is governed, therefore, by sec. 37 of that Act, 30 U.S.C. § 193 (Supp. II 1978).¹ The Miner-

¹ We note that, on Oct. 4, 1979, Conoco submitted to BLM a certified copy of the notice of location for the Black Bird #3 placer mining claim, as well as the ancillary information required by 43 CFR 3833.1-2, including an affidavit of assessment work for the

—Continued

al Leasing Act of 1920 removed various mineral substances, including oil, from mining location under the mining laws and permitted disposal of them only under lease from the United States. Sec. 37 preserved valid existing claims which would thereafter be maintained in compliance with the laws under which they were initiated and which could be perfected under such laws, including discovery.²

assessment year ending Sept. 1, 1978. The letter of transmittal stated: "We wish to comply with Section 314 of the Federal Land Policy and Management Act of 1976, requiring the recordation of unpatented mining claims located on public land with the Bureau of Land Management, and . . . 43 CFR 3833." An affidavit of assessment work for the assessment year ending Sept. 1, 1979, was filed with BLM Oct. 18, 1979. Subsequently, in a letter dated June 5, 1981, Conoco admitted that the 1980 affidavit of assessment work was not filed because of inadvertence. These actions by Conoco tend to undermine its protestations on appeal.

² The current version of section 37 reads:

"§ 193. Disposition of deposits of coal, and so forth

"The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided in this chapter, except as provided in section 1716 and 1719 of title 43, and except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

The most recent amendment to sec. 37 is the phrase "except as provided in section 1716 and 1719 of title 43," which refers to secs. 206 and 209 of FLPMA. Sec. 4, P.L. 95-554, 92 Stat. 2074 (1978). The amendment was passed after discovery that sec. 37 would appear to preclude disposition of lands containing the minerals identified in sec. 37 under secs. 206 and 209 of FLPMA to exchange and convey lands containing the minerals listed in sec. 37 which minerals by its terms are only subject to disposition under the Mineral Leasing Act. Appellant suggests that this amendment to sec. 37 is further indication that Congress did not intend that sec.

Appellant argues that sec. 37 provides that valid claims existing on Feb. 25, 1920, are subject to compliance only with the laws under which they were initiated, as those laws were administratively and judicially interpreted in 1920, because sec. 37 in effect repealed those laws. More specifically, appellant asserts that post-1920 standards and requirements governing mining claims cannot be imposed on its claims. Appellant urges that this view has been given judicial approbation by the Supreme Court in *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980). Appellant concludes that, since sec. 314 of FLPMA did not exist in 1920 and FLPMA did not purport to repeal sec. 37 of the Mineral Leasing Act, its claim is not subject to the requirements of FLPMA.

In addition appellant urges that sec. 314 of FLPMA violates the due process clause of the Fifth Amend-

314 of FLPMA apply to claims preserved by sec. 37. Appellant argues that if Congress had intended that the requirements of sec. 314 of FLPMA apply to claims such as its oil placer, Congress would have expressly done so when it was resolving the conflict between secs. 206 and 209 of FLPMA and sec. 37. This argument does not withstand scrutiny. The concern in amending sec. 37 focused solely on the language mandating that the listed substances be disposed of *only* under the Mineral Leasing Act, which language directly conflicted with the authority Congress had intended to impart to the Secretary of the Interior in secs. 206 and 209 of FLPMA. H.R. Rep. No. 95-1635, 95th Cong., 2d Sess. 14, reprinted in [1978] *U.S. Code Cong. & Ad. News* 4737, 4747-48. We conclude that it is purely speculative to connect this amendment with Congress intention with respect to the relationship of sec. 37 and sec. 314 of FLPMA. Clearly, it is more reasonable to suggest that Congress did not see *any* conflict between sec. 37 and sec. 314 and thus did not need to clarify the relationship.

ment of the United States Constitution because (1) it deprives appellant of an interest in property by erecting a conclusive presumption of abandonment of its claim, and (2) it denies appellant equal protection of the laws.

In response to appellant's statement of reasons, BLM argues generally that the recordation requirements of FLPMA apply to all unpatented mining claims on public lands and specifically that the unpatented Black Bird #3 oil placer claim is subject to the General Mining Law of 1872, *as amended*, 30 U.S.C. §§ 21-54 (1976) (hereinafter General Mining Law), by virtue of the language of the Petroleum and Mineral Oils Act. BLM urges that sec. 37 of the Mineral Leasing Act did not exempt mining claims located for Mineral Leasing Act minerals from the operation of the General Mining Law, rather, it preserved such claims so long as they were maintained in accordance with the General Mining Law. Further, BLM asserts that the General Mining Law is not static and that changes may be applied to any unpatented mining claim until all steps precedent to patent has been taken, and that *Andrus v. Shell*, *supra*, does not stand for the proposition that appellant asserts. Finally, BLM urges that the application of the recordation requirements of FLPMA to mining claims located for Mineral Leasing Act minerals is consistent with the purpose of the requirement to identify existing mining claims on public

lands and to clear the books of any claims no longer being maintained as required by law.

The issue in this case is whether the requirements of sec. 314 of FLPMA apply to appellant's unpatented oil placer claim. We find that they do.

[1] The recordation requirements of sec. 314 of FLPMA are imposed on the owner of any "unpatented lode or placer mining claim." The statute does not define or limit the term "mining claim." Departmental regulations implementing sec. 314, however, define "unpatented mining claim" to mean "a lode mining claim or a placer mining claim located under the General Mining Law of 1872, as amended (30 U.S.C. 21-54) for which a patent under 30 U.S.C. 29 and [43] CFR Part 3860 has not been issued." 43 CFR 3833.0-5(b).

Appellant seemingly argues that because the Black Bird #3 claim was located pursuant to the Petroleum and Mineral Oil Act of 1897 it was not "located under the General Mining Law of 1872." Further, appellant asserts that if Congress had wanted the claims protected by sec. 37 to be maintained under the General Mining Law, it would have so specified.

The Petroleum and Mineral Oils Act encompassed a broader body of law than mere reference to the statute suggests. The Act stated:

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or

other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: [italics added] *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

Thus Congress authorized the location of mining claims for oil under the provisions of the general laws relating to placer mining claims. The laws referred to were, at that time, Revised Statutes, secs. 2329-2333, and are now codified at 30 U.S.C. §§ 35-38 (1976). These provisions are part of the General Mining Law. *Chrisman v. Miller*, 197 U.S. 313, 320 (1905). The Petroleum and Mineral Oils Act, when enacted, was simply an affirmation of the principle that lands containing petroleum and other mineral oils were subject to mining location under the mining laws of the United States. *Union Oil Co. (On Review)*, 25 L.D. 351 (1897).³ Thus, appel-

lant's oil placer mining claim falls within the ambit of 43 CFR 3833.0-5(b). Further, in the case of the Black Bird #3 claim we conclude that the phrase "laws under which [the claim was] initiated" in sec. 37 must include the General Mining Law. We also find that sec. 37 must be read to include judicial interpretation of the applicable mining statutes because of the reference in sec. 37 to "discovery," which is a principle of mining law not defined by a particular statute but by judicial declaration. *Chrisman v. Miller*, *supra* at 321.

to such an extent that many titles to lands patented as mineral because of the valuable oil deposits contained therein, are now dependent upon it. * * *

* * * * *

"It is proper, in this connection, to refer to the act of February 11, 1897, *supra*, passed soon after the decision under review was rendered. * * *

* * * * *

"The language of the act clearly indicates, and the debates of Congress, as well as the report of the Public Lands Committee of the House on the bill, unmistakably show, that it was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the decision under review. In the House Committee's report reference was made to that decision in connection with some of the earlier rulings on the subject, as hereinbefore set out, and *inter alia*, it was said:

"Public lands containing petroleum and other mineral oils have been held and patented under the placer mining acts of the United States for many years past. * * * The bill simply provides by legislation for procedure in the entry and patenting of those lands along the lines that have been pursued in the past under the decisions of the General Land Office; so that there is no departure whatever from the procedure in the past for the development and acquirement of such properties."

"This legislative action, so promptly taken after the departure from the earlier rulings and the long established practice thereunder, is significant, and can hardly be considered as less than a disapproval by Congress of the changed ruling."

³ The cited decision reviewed in the case of *Union Oil Co.*, 23 L.D. 222 (1896), wherein Union's oil mining claim was situated on land selected as indemnity by a railroad, and the Department found that only lands containing metallic minerals were within the contemplation of Congress in the enactment of the mining statutes and in making an exception of all mineral lands from a grant to a railroad company. The decision in *Union Oil Co. (On Review)*, *supra* at 355-56, which was issued Nov. 6, 1897, following passage of the Petroleum and Mineral Oils Act discussed the meaning of its passage as follows:

"Sufficient has been said to show that ever since the circular of July 15, 1873, until the date of the decision under review, the practice of the Land Department has uniformly been to allow entries under the mining laws of the lands containing valuable deposits of petroleum, and that this view has obtained

Further examination of sec. 37 of the Mineral Leasing Act and the Petroleum and Mineral Oils Act, *supra*, leads us to conclude as well that appellant's assertion that sec. 37 mandates that the law governing appellant's oil placer claim remain fixed as of Feb. 25, 1920, is incorrect. We do not find that Congress intended to so limit its power to regulate such unpatented mining claims; rather, by sec. 37 Congress preserved a claimant's opportunity to bring an existing claim to patent under the General Mining Law even though the Mineral Leasing Act removed the mineral from operation of the General Mining Law.

As we have observed, the Petroleum and Mineral Oils Act *only* reasserted authority for the location of placer mining claims for petroleum and other mineral oils under the General Mining Law governing all placer mining claims. The Act did *not* specify any requirements peculiar to placer claims located under the Act.⁴ Congress did not by sec. 37 repeal the General Mining Law, as to existing mining claims for Mineral Leasing Act minerals, and we find no basis for asserting

that Congress intended that unpatented oil placer claims located under the Petroleum and Mineral Oils Act would not be subject to changes in the mining laws governing unpatented placer claims. While Congress did single out claims such as the Black Bird #3 oil placer claim in order to preserve valid existing rights to such claims, it did not intend that such claims would receive special treatment as against other placer mining claims; and the Petroleum and Mineral Oils Act provides no basis for distinguishing appellant's claims. Furthermore, the purpose of sec. 314 of FLPMA is to provide a record of continuing activity on unpatented mining claims on public domain lands so that the Federal Government will know which claims are being maintained and which have been abandoned. *See Topaz Beryllium Co. v. United States*, 479 F. Supp. 309, 311-12 (D. Utah 1979), *aff'd*, 649 F.2d 775 (10th Cir. 1981). Arguably, these requirements are particularly apropos to claims as old as the one at issue herein.

We do not agree that the Supreme Court's opinion in *Andrus v. Shell Oil Co.*, *supra*, supports appellant's argument. In that case, the Court affirmed for pre-1920 oil shale mining claims an exception to the general principles for determining whether there has been a discovery of a valuable mineral deposit under the mining laws. *Frederick H. Larson v. Utah*, 50 IBLA 382 (1980). The Court ruled that the Department of the Interior could

⁴ Where the statute, under which a claim protected by sec. 37 was initiated, does contain specific requirements, those requirements are applicable and would control as to other conflicting requirements imposed on the mining claims. For example, in *John B. Forrester*, 48 L.D. 188 (1921), cited by appellant, the Department held that the question of whether the appellant had a preexisting coal entry under sec. 37 did not have to be reached because appellant had not maintained the entry pursuant to the law under which it was initiated. Appellant had not complied with a regulation implementing the notice requirement imposed by the law governing coal entries.

not impose the present marketability test, approved by the Court in *United States v. Coleman*, 390 U.S. 599 (1968), as a complement to the prudent man test, on oil shale placer claims as of 1920. The Court was making an exception to the application of the General Mining Law based on both the history of the Mineral Leasing Act and the post-1920 treatment of oil shale claims by the Department of the Interior, rather than finding that sec. 37 required the application of pre-1920 standards. *Andrus v. Shell Oil Co.*, *supra* at 673. The Court focused particularly on the Department's decision captioned *Freeman v. Summers*, 52 L.D. 201 (1927), wherein the Department had ruled that present marketability was not a prerequisite to patenting oil shale claims.⁵ This Board had overturned *Freeman v. Summers*, *supra*, on the basis of *United States v. Coleman*, *supra*. The Court reflected that Congress had recognized oil shale as valuable by preserving oil shale claims in sec. 37 even though oil shale was not a marketable commodity in 1920 and that therefore the imposition of a marketability test as of 1920 by the Board was inappropriate. The situation of oil shale claims was unique, and the Court expressly stated that this exception applies only to oil shale claims. *Andrus v. Shell Oil Co.*, *supra* at n.11. We find no basis for construing the opinion to limit the applicability of the General Mining

Law to other placer claims preserved by sec. 37.⁶

[2] Having found that sec. 314 of FLPMA is applicable to appellant's oil placer claim, we now find that BLM properly declared the claim abandoned and void. Under sec. 314 of FLPMA the owner of an unpatented placer mining claim located before Oct. 21, 1976, must file evidence of annual assessment work or notice of intention to hold the claims in the proper BLM office on or before Oct. 22, 1979, and prior to December 31 of each calendar year thereafter. This requirement is mandatory, and failure to comply conclusively constitutes abandonment of the claim by the owner and renders the claim void. *Lynn Keith*, 53 IBLA 192, 88 I.D. 369 (1981); *James V. Brady*, 51 IBLA 361 (1980).

[3] With respect to appellant's remaining arguments, we note that the conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. As a matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting sec. 314 of FLPMA Congress did not invest the Secretary of the Interior with authority to waive or

⁵ *Freeman v. Summers*, *supra*, did not discuss sec. 37. It focused entirely on the principles of discovery as applied to oil shale mining claims.

⁶ We note as well that part of the Court's discussion of sec. 37 claims detracts from appellant's argument. The Court discusses the viability of a 1956 statute which amended the mining laws to eliminate a requirement imposed on locators seeking patents for mining claims preserved by sec. 37. *Andrus v. Shell Oil Co.*, *supra* at 671. Presumably if Congress was not restricted from changing the requirements applicable to such claims in 1956, it was also not restricted from doing so in 1976.

excuse noncompliance with the statute, or to afford appellant any relief from the statutory consequences. *Lynn Keith, supra*.

[4] Appellant's argument that the recordation requirements are unconstitutional may not be considered by this Board. The Department of the Interior as an agency of the executive branch of the Federal Government is not the proper forum to consider the constitutionality of the recordation provisions of FLPMA. *Hugh A. Johnson*, 54 IBLA 144 (1981); *Lynn Keith, supra*. However, we note that to the extent that Departmental regulations implementing FLPMA, which mirror the statute, have been considered by the courts, they have been upheld. *Topaz Beryllium Co. v. United States, supra*; *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981); *Northeast Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management*, Civ. No. 78-46M (D. Mont. June 19, 1979).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

GAIL M. FRAZIER
Administrative Judge

UNITED STATES

v.

RICHARD P. HASKINS

59 IBLA 1

Decided October 21, 1981

Appeal from a decision of Administrative Law Judge Michael L. Morehouse declaring the Haskins Quarries placer mining claim valid and recommending issuance of patent. CA-2755.

Appeal reviewed de novo; decision below reversed; claim held null and void.

1. Mining Claims: Lode Claims

To constitute discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place, bearing gold or some other mineral deposit in such quality and quantity which would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Placer Claims

A placer mining claim has been defined as ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state.

3. Mining Claims: Placer Claims—Act of August 4, 1892

Under provisions of the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1976), known as the Building Stone Act, land chiefly valuable for building stone can only be entered by mining claims in the placer form, regardless of the actual mode of occurrence of the deposit.

excuse noncompliance with the statute, or to afford appellant any relief from the statutory consequences. *Lynn Keith, supra*.

[4] Appellant's argument that the recordation requirements are unconstitutional may not be considered by this Board. The Department of the Interior as an agency of the executive branch of the Federal Government is not the proper forum to consider the constitutionality of the recordation provisions of FLPMA. *Hugh A. Johnson*, 54 IBLA 144 (1981); *Lynn Keith, supra*. However, we note that to the extent that Departmental regulations implementing FLPMA, which mirror the statute, have been considered by the courts, they have been upheld. *Topaz Beryllium Co. v. United States, supra*; *Western Mining Council v. Watt*, 643 F.2d 618 (9th Cir. 1981); *Northeast Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management*, Civ. No. 78-46M (D. Mont. June 19, 1979).

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Appeal reviewed de novo; decision below reversed; claim held null and void.

1. Mining Claims: Lode Claims

To constitute discovery upon a lode mining claim, there must be exposed within the limits of the claim a vein or lode of quartz or other rock in place, bearing gold or some other mineral deposit in such quality and quantity which would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a valuable mine.

2. Mining Claims: Placer Claims

A placer mining claim has been defined as ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state.

3. Mining Claims: Placer Claims—Act of August 4, 1892

Under provisions of the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1976), known as the Building Stone Act, land chiefly valuable for building stone can only be entered by mining claims in the placer form, regardless of the actual mode of occurrence of the deposit.

4. Mining Claims: Location—Mining Claims: Lode Claims—Mining Claims: Placer Claims—Act of August 4, 1892

While deposits of limestone chiefly valuable for building stone were subject to location only as placer claims, deposits of limestone valuable for their chemical or metallurgical properties are properly located according to the form of their deposition.

5. Mining Claims: Possessory Right

Under the provisions of 30 U.S.C. § 38 (1976), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. This provision does not, however, alter other requirements of the mining laws, such as the necessity of a discovery or limitations on acreage which may be taken up in a claim.

6. Mining Claims: Possessory Right

The requirements of 30 U.S.C. § 38 (1976), relating to "holding" and "working" a claim may be met where the assessment work requirements have been met *and* where there is actual possession or occupancy of the claim.

7. Mining Claims: Discovery: Marketability—Act of August 4, 1892

Land may be considered "chiefly valuable for building stone" where the building stone values of the mineral deposit sought are greater than any other mineral values or nonmineral values for which the land may be appropriated.

8. Mining Claims: Placer Claims—Mining Claims: Possessory Right

Nothing in 30 U.S.C. § 38 (1976) alters the requirement limiting each individual claimant to 20 acres per location. Thus, for a single possessory claim of 85 acres to be sustained, it must be shown that five individuals held and worked the claim for the requisite period of time.

9. Administrative Authority: Estoppel—Administrative Practice—Rules of Practice: Generally

Where a party, in the course of various proceedings before the Department, asserts facts that would, if proven, entitle him or her to obtain patent to land owned by the United States, and the litigation proceeds on the assumption that the facts are as stated, appellant will not be heard in a subsequent hearing to deny that those facts existed.

10. Mining Claims: Millsites—Mining Claims: Possessory Right

Since millsites may only be located on nonmineral land, a millsite claim is necessarily adverse to a mining claim. Thus, land embraced by a millsite claim is not open to the initiation of rights under 30 U.S.C. § 38 (1976).

11. Mining Claims: Location—Mining Claims: Placer Claims

All placer claims must conform "as near as practicable" with the system of rectangular public land surveys. Where a claim does not so conform and it is not possible to amend the claim so that it does, the entry must be canceled.

12. Mining Claims: Assessment Work—Mining Claims: Withdrawn Land

Failure to substantially comply with the requirements to annually perform assessment work on a claim which is located on withdrawn land results in a forfeiture of that claim to the United States.

13. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment—Mining Claims: Abandonment—Mining Claims: Possessory Right

The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), applies to claims which rely on the provision of 30 U.S.C. § 38 (1976) to

prove location and posting. Where such claims have not been duly recorded, they are a nullity.

APPEARANCES: Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, for the Government; Hale C. Tognoni, Esq., Phoenix, Arizona, for appellee.

*OPINION BY
ADMINISTRATIVE JUDGE
BURSKI*

*INTERIOR BOARD OF
LAND APPEALS*

Administrative Law Judge Michael L. Morehouse, by decision dated Dec. 30, 1977, found the Haskins Quarries placer mining claim to be supported by a discovery and recommended the issuance of a patent. The Government has appealed this finding to the Board.

The history of this claim is both long and convoluted, with Departmental adjudication already stretching over half of a century, intermittently punctuated by Federal Court review. A thorough knowledge of this history is, unfortunately, essential to both understanding and determining the present appeal. Accordingly, this history will be set out in detail.

The lands embraced within the confines of the Haskins Quarries patent application were originally subject to four lode and two millsite claims.¹ The four lode claims were

known as the Lone Jack, Lap Wing, Roger Williams, and Lady Helen while the two millsites were referred to as the Lap Wing and Lady Helen.

The Lone Jack was originally located on Jan. 10, 1894, by Frederick A. Lovell. On Feb. 28, 1907, Tessie Cooke-Haskins located the Lap Wing. This was followed by the location of the Roger Williams by Richard P. Haskins, husband of Tessie Cooke-Haskins, together with Frederick A. Lovell and Francis H. Clark on Jan. 2, 1909. The Lady Helen mining claim was also located on Jan. 2, 1908, by Frederick A. Lovell and Francis H. Clark. Later that year, on Nov. 14, 1908, Tessie Cooke-Haskins located the Lap Wing millsite, which was followed the next year by the location on Nov. 10, 1909, of the Lady Helen millsite by Richard P. Haskins.

The strike of the four mining claims was generally northwest by southeast. The Lap Wing was the southernmost claim. The Lone Jack abutted the Lap Wing on the north. The Lady Helen was adjacent to the west of the Lone Jack, with some area of the Lady Helen also abutting the west sideline of the Lap Wing, while the Roger Williams was adjacent to the west side of the Lady Helen. The Lap Wing millsite was in the shape of an irregular pentagon, with one side adjacent to the south portion of the east sideline of the Lap Wing mining claim. The Lady Helen millsite, in rectangular form, abutted the Lap Wing millsite along its northeastern boundary.

¹ The land involved, aggregating approximately 85.1 acres of land, is located in secs. 27 and 28, T. 3 N., R. 14 W., San Bernardino meridian, approximately 3 miles north of the Los Angeles city limits and is situated in the Angeles National Forest. Actually, not all of the original Roger Williams is included within the limits of the Haskins Quarries claim.

As noted above, Tessie Cooke-Haskins was the sole locator of both the Lap Wing mining claim and Lap Wing millsite, while Richard P. Haskins was the sole locator of the Lady Helen millsite. Full title to the Lone Jack mining claim was apparently acquired by Richard P. Haskins through quitclaim deeds in 1907 from Frederick A. Lovell and one Carrie L. Simmons.² On Jan. 15, 1981, Richard P. Haskins quitclaimed the Lone Jack mining claim to his wife. Richard P. Haskins acquired full title to the Roger Williams and Lady Helen lode mining claims from Francis H. Clark and Frederick A. Lovell in 1908.

In 1928, the area embraced by the claim was withdrawn from location and entry by sec. 1 or the Act of May 29, 1928, 45 Stat. 956, known as the Watershed Withdrawal Act. Sec. 2 of that Act provided that "this Act shall not defeat or affect any lawful right which has already attached under the mining laws and which is hereafter maintained in accordance with such laws."

Richard P. Haskins died the following year, and his wife, Tessie Cooke-Haskins, subsequently made application for patent of the Lone Jack and Lap Wing lode claims, together with the Lap Wing millsite.³ In her application, filed Aug.

15, 1929, Tessie Cooke-Haskins alleged a discovery of gold and vanadium. By letter of Jan. 6, 1930, the District Forester of the Angeles National Forest filed a protest with the Register of the land office requesting cancellation of the mining locations for lack of discovery and because the land thereby embraced was nonmineral in character, and also seeking invalidation of the millsite for nonuse for mining and milling purposes. On Jan. 9, 1930, the Department caused a complaint to issue against the patent application based on the grounds alleged by the District Forester. An answer was duly filed and a hearing was set before the Register.⁴

The hearing was held on Nov. 21, 1930. While the thrust of this hearing dealt with the question of the existence of gold, silver, and vanadium within the limits of the claims, there was testimony relating to dolomitic limestone deposits located both on these two claims and

discovery tunnel valued at \$720 and three cuts and tunnels with a total value of \$1,899. The improvements on the Lap Wing noted the existence of a discovery point with no value accorded it, and a tunnel with an assessed value of \$1,820. The total value of labor and improvements on the two mining claims was estimated to be \$4,439. The survey also recorded three cabins, a storehouse, and a blacksmith shop on the millsite.

⁴ Until *United v. O'Leary*, 63 I.D. 341 (1956), hearings in mining contests were held before the Register and, subsequently, the land office manager upon the abolition of the position of Register. In *O'Leary*, the Department decided that the strictures of the Administrative Procedure Act applied to mining claim contest hearings and that such hearings must therefore be before someone appointed under the provisions of 5 U.S.C. § 3105 (1976).

² The quitclaim deed given by Carrie L. Simmons granted Haskins all rights and privileges running from another claim, named the "Mammoth" claim, located on Oct. 5, 1906, which overlapped the Lone Jack claim.

³ The mineral survey, No. 5902 A and B, which accompanied the application for patent listed improvements on the Lone Jack as a

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on the adjacent Lady Helen claim.⁵ The Government mining engineer, William H. Friedhoff, noted that a lime kiln existed behind one of the houses on the millsite (1930 Tr. 10). The engineer testified that there was a "dolomitic lens in this just to the west of these claims that has apparently either folded into the gneiss with the gneiss or has faulted in here, this is on a claim west of the Lone Jack, I believe" (1930 Tr. 11-12). In response to a question relating to the existence of a cut in the lime rock, the engineer stated:

Fifty feet north west of the north west corner of the Lapwing there is a quarry face in impure dolomitic limestone thirty feet wide; extends about thirty feet north where it is cut off by granite and gneiss; probably lenticular; a fault is on the adjacent claim; dolomite was hauled from here and there is a large pile near the road.

(1930 Tr. 12).

While there was a clear agreement on the existence of the lime kiln, Tessie Cooke-Haskins testified that it was presently being used as a storage area (1930 Tr. 24, 35). She testified as to a number of sales of lime

rock. *See* 1930 Tr. 26-29. The following colloquy then ensued:

Q. Do you know the uses this lime rock is put to?

A. Yes.

Q. What are some of them?

A. The American Legion Building in Pasadena has floors made of it; it has been used for roofing paper; I understand for fluxing but I don't know much about that but I have sold quite a bit of it for that use for mining and golf courses; they used quite a lot for ornamental purposes.

Q. Do they use it for building activities?

A. Yes; plaster.

(1930 Tr. 29). In all, she testified that about 1,000 tons of lime rock had been sold from the claims at issue. In response to a question of where exactly the rock was removed she answered, "practically from the creek up the hill" (1930 Tr. 34).

Frederick A. Lovell, the original locator of the Lone Jack, also testified on behalf of Haskins. In reference to a request that he describe the formation which passed through the Lone Jack and Lap Wing claims the following discussion occurred:

Q. What is it?

A. Why the west walls; the west side of that ground is lime formation.

Q. What is the east side?

A. It would be granite.

Q. What would you call the intruded or the vein; the so called vein matter?

A. Well, highly mineralized roscolite [*sic*] schist.

Q. How wide is that vein matter?

A. Well possibly three or four hundred feet; probably six hundred; between the main granite walls and the lime; I would figure about that.

(1930 Tr. 43-44).

⁵ There are a total of four separate hearings involved in this case. One occurred in 1930 and another in 1933 relating to the Lone Jack, Lap Wing, and Lap Wing millsite. These are found in exhibit G-4. The third hearing arose as a contest of a verified statement filed pursuant to the provisions of sec. 5 of the Surface Resources Act, Act of July 23, 1955, 69 Stat. 367, 369, 30 U.S.C. § 613 (1976). The fourth hearing was held by Judge Morehouse in 1977, which hearing related to the instant placer claim. For convenience, citations to transcript will be by the year of the hearing followed by the page of that transcript. Thus, a citation to the initial hearing will be "1930 Tr. —."

Jesse A. Tiffany, who had purchased some of the lime rock and was a graduate chemist, also testified on behalf of Haskins. He stated that in 1922 he had approached Richard Haskins and taken a lease on the lime rock deposit.

A. There was the lime rock on the Lapwing at that time has not been opened up; previous work in the lime rock had been to pick up wash float in the canon that came from adjoining properties.

Q. Did you open up the lime rock deposit under this contract?

A. Yes, sir.

Q. Was there any lime rock removed?

A. Yes, sir; we removed quite a bit of lime rock from just above the tunnel on the present location of the Lapwing.

Q. What method was used in getting this rock out?

A. We removed the overburden on it; then blasted it out in places; broke it up and rolled it into the gulch below.

Q. It was a solid formation?

A. Yes; it was a very large body of crystallized lime rock.

Q. What disposition was made of that lime rock?

A. We brought it down to the plant on San Fernando Road and broke it up and ground part of it for grit; chicken grit; a great deal of it was broken into gravel for this mosaic terrazzo and sold to contractors that were using it for the construction of various buildings in the city.

(1930 Tr. 53-54).

Tiffany stated that he removed between 500 and 600 tons of rock at that time. While he stated that a reasonably prudent man would be justified in spending money on the claim, he noted that it would take a considerable investment, as a large plant would be necessary (1930 Tr. 55). When asked what he would develop he stated:

A. Gold; silver; platinum; vanadium.

Q. Is that all?

A. That is all.

* * * * *

Q. You would not figure anything on the lime that is on the claim?

A. I think most of it has been removed since that time.

Q. Most of the lime has been removed?

A. I believe so.

(1930 Tr. 55-56).

A number of miners also testified on behalf of the claimant. Jesse Barnes, a miner with 40 years experience, testified:

Q. Are you familiar with the formation of the Lapwing and Lone Jack lode claims?

A. I call it lime on one side and altered granite on the other side.

Q. On which side is lime?

A. On the west side.

Q. Does that lime extend for any great length?

A. Cuts right through the country there.

Q. And that lime is in place; is it?

A. Yes, sir, it goes right through there; you can trace it right through on the surface outcrops.

Q. What width is the vein between the altered granite and the lime?

A. In some places a couple of hundred feet thick where it crops out; I should judge.

(1930 Tr. 65).

Similarly, T. A. Hamilton, a miner with 30 years experience, stated:

I went over the formation there I would judge somewhere between one hundred and fifty and two hundred feet of mineral zone; on one side of the mineral zone on the west side carries the lime belt following through there; opens out; crops out every once in a while then goes in and comes out on top of the ridge.

(1930 Tr. 71). Hamilton noted that the lime was very good lime which he had used in fluxing, but indicated that he was primarily interested in it to the extent that it formed a wall for the porphyry⁶ (1930 Tr. 74).

The Register, in a decision dated Apr. 25, 1931, held for the claimant on the basis of a discovery of gold, silver, and vanadium. No value was accorded to the lime deposits about which a number of individuals had testified, as set forth, *infra*. An appeal was taken from this decision to the Commissioner of the General Land Office.

By decision of Feb. 5, 1932, the Commissioner reversed the decision of the Register. Of relevance herein, the Commissioner made the following statement:

As to the limestone there is no evidence in the record that the limestone said to occur on the Lap Wing claim is in vein or lode formation and one of contestee's witnesses testified that the supply was about exhausted. Contestee testified that the deposit of limestone was about 50 feet west of the tunnel on that claim. As the tunnel is only a short distance from the west line of the claim, even if any portion of the deposit remains, it must be largely outside the limits of the claims upon contestee's own testimony, whereas Friedhoff testified that the only limestone in the vicinity is west of the claim. When all of the facts are considered, it is not possible to hold that the Lap Wing claim is of potential value for its limestone content or that the lime-

stone, assuming its presence, is locatable as a vein or lode.

(Los Angeles 047535 "N" CRB at 11-12).

Tessie Cooke-Haskins thereupon appealed the decision of the Commissioner to the Secretary of the Interior. On appeal to the Secretary, Haskins directly argued that the limestone with in *vein* formation. See Brief and Argument, filed Apr. 4, 1932, at 2. With her brief and argument appellant submitted a report prepared by one Ralph S. Baverstock, relating to an examination of the two claims, as well as the Lady Helen, directed at analyzing the dolomitic limestone. The report noted that "footwall formation is feldspathic granite—hanging wall gneiss and granite."

In his decision of June 6, 1932, the Assistant Secretary noted that the evidence was conflicting as to whether a commercial lode deposit of limestone was disclosed on the two claims. Thus, the Assistant Secretary held that the Forest Service had not met its burden of showing no discovery.⁷ On the other hand, the Assistant Secretary, noting that a patent application had been filed, held that the claimant had failed to "affirmatively show" that within

⁷ It should be remembered that prior to *United States v. Strauss*, 59 I.D. 129 (1945), Government mining contests had generally proceeded with the United States bearing the ultimate burden of proof. In *Strauss*, however, the Department held that once the Government makes a prima facie case of no discovery, the burden then shifts to the claimant to overcome this showing. This procedure received judicial approval as being in accord with the Administrative Procedure Act in *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

⁶ We would note that Friedhoff, in rebuttal, denied that any porphyritic, iron-stained quartz was disclosed, declaring that the belt was granitic gneiss with schist indications. He further argued that there was no limestone within the limits of the two claims (1930 Tr. 81-82).

each claim there existed a limestone deposit such as probably could successfully be mined at a profit. Absent such showing no patent would issue. Accordingly, the case was remanded to the Register, to afford claimant the opportunity to establish her entitlement to patent.

A rehearing was subsequently held before the Register on Nov. 13, 1933. Unlike the 1930 hearing, this second hearing focused almost totally on the presence or absence of a commercial deposit of limestone. Claimant's first witness was Ralph S. Baverstock. Baverstock testified as to his onsite inspection of the Lone Jack and Lap Wing claims. He stated that he found an outcrop of lime rock approximately 25 feet in width and 150 feet in length, dipping to the east within the west line of the Lone Jack, which was the claim at the top of the mountain (1933 Tr. 2). He also stated he found an "outcrop" in the Lap Wing on the south side of the gulch at the foot of the hill.

Baverstock testified that he was sure that the outcroppings occurred within the limits of the two claims, and then addressed the question of form of deposition:

Q. Do these deposits exist as ledges or veins, or lenses, or how would you describe them?

A. I would describe them as lenticular deposits.

Q. And they are in place, or as distinguished from float?

A. They are most decidedly in place.

(1933 Tr. 5).

This testimony as to the nature of the deposit was corroborated by

a geologist, Ellis Mallery, who had extensive experience with limestone deposits. He stated that the deposits "are lenses or masses of the limestone in the surrounding rock under a common occurrence" (1933 Tr. 10). He noted that the deposit was also found on the Lady Helen claim to the west, noting "I am stressing the continuity of the vein from a geological standpoint, the vein was strong and a lot of limestone there" (1933 Tr. 16). He also noted that the deposit was high grade refractory (1933 Tr. 17).

Tessie Cooke-Haskins testified as to the quarrying and marketing of limestone from the claims. Because of the importance of this testimony we will set it out at some length. In response to a question relating to the removal and marketing of the lime rock, she stated:

A. [Tessie Cooke-Haskins] For a couple of months in the latter part of 1920 my husband was negotiating with several parties to try to work the lime-rock and they started a pit twenty feet from the west side line and two hundred feet from the north end line of the Lapwing and seventy five feet south of the Lapwing tunnel.

Q. Do you know how much material was removed from that pit or cut?

A. Eighteen hundred tons.

Q. On the Lapwing?

A. On the Lapwing, during several years.

Q. And that removal began about what time did you say?

A. 1921, they started work in 1920.

Q. How much of it has been removed, has there been any removed recently?

A. From the cut that is now open I would say about fifteen tons.

Mr. Dechant, Is that the same cut?

A. No sir.

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By Mr. Hintze,

Q. Now what happened to that cut that was originally on the Lapwing claim?

A. It was worked for several years and a cloud burst covered it up.

Q. Is there any evidence on the surface showing this cut at this time?

A. No sir.

Q. Now what was done with the lime-rock that was taken from the Lapwing claim at that time?

A. Part of it is in the floor of the American Legion building in Pasadena.

Q. To whom did you sell it?

A. To Mr. Packard of the California Rock Products Company.

Q. Did you sell it to anybody else?

A. To Mr. Mcpherson and Mr. Morris and Captain Tiffany.

Q. Do you remember what compensation you received from them for the Limerock.

A. All the way from twenty five cents to one dollar and one dollar and a quarter per ton, usually fifty cents.

Q. Would it average fifty cents a ton?

A. Yes.

By the Register.

Q. At what point?

A. On the Lapwing.

Q. Fifty cents F.O.B. at the mine.

A. Yes at the mine.

Q. F.O.B. in place or after it was taken out; that was fifty cents F.O.B. in place?

A. Yes.

Q. In other words the purchaser paid for the extracting?

A. Yes.

By Mr. Hintze,

Q. Did you ever go up to the limerock deposit on the Lone Jack?

A. Yes a long time ago.

Q. You know nothing about the conditions there at the present time?

A. Well, you could see the deposit, I have been half way up the hill, four years ago I was all over the property.

CROSS EXAMINATION,

By Mr. Dechant,

Q. You said fifteen tons were taken recently from a cut now open, am I correct in that?

A. Some of that had been mined from this original cut, the storm waters would come down and we had to protect it where they had mined and there was a pile of rock on high ground, I would say about ten tons taken from this cut that is there now.

* * * * *

Q. Now these fifteen tons you say were taken out recently, what was done with them?

A. Sold.

Q. To whom?

A. To Mr. Scheerer, Joseph Scheerer.

Q. Where is he located?

A. He is trying to get my lime deposit started in pretty good shape, he has sold more tonnage than that, there is eighty-five tons gone from the Lady Helen and Lapwing.

Q. From the Lapwing you say there is fifteen tons gone, what are they using that for?

A. Sound proofing in studios, stores.

Q. What other purpose?

A. Stucco.

(1933 Tr. 23-26).⁸

Bartholomew Haskins, son of Richard P. and Tessie Cooke-Haskins, also testified as to the existence of limestone outcrops within the limits of the claims. He noted that "since Mr. Baverstock made his inspection, I have opened it up quite a bit. I have put in several blasts of dynamite; quite a number of tons of rock we have got piled up; I have opened it up considerably since then" (1933 Tr. 32). He testified that the limestone was used for ter-

⁸ Various questions and answers concerning the exact situs of these cuts have been deleted. They were relevant in that hearing to determine the presence, *within each mining claim*, of a physical exposure of limestone. Inasmuch as the present claim is an aggregate of all three claims involved therein, the exact situs of each cut is not of particular importance.

razzo, stucco, chicken grit, sound proofing, as flux, in soda plants, the sugar industry, and in the manufacture of paint (1933 Tr. 34, 38).

Richard P. Haskins, Jr., another son of Richard P. and Tessie Cooke-Haskins, also testified. The following exchange occurred between him and counsel for the Government.

Q. What kind of a deposit is this limestone joining the Lady Helen, what kind of a deposit do you call it?

A. What do you mean, by chemical, content.

Q. No. What kind lode or placer?

A. Lode.

Q. Why lode?

A. It is in vein formation.

Q. In what shape does that vein formation occur?

A. What do you mean when you say shape in that way.

Q. What is the characteristic of the vein if there is any characteristic?

A. It runs in a northerly and southerly direction.

Q. Now you look at this lode formation. Is it a solid mass of lime all the way through?

A. Yes.

Q. You don't agree with some of these previous witnesses, it is a lenticular deposit?

A. Not being a technical man—

Q. You don't know what that means?

A. I am just describing what it looks to me.

(1933 Tr. 44-45).

The first witness for the Government was E. C. Galbraith, a mining engineer employed by the Department of the Interior, who had examined the claims. The thrust of his testimony was that while the lime was clearly in a lenticular vein deposition, the vast amounts of the product were more easily quarried from an area on the Lady Helen

claim (1933 Tr. 46-51). William H. Friedhoff's testimony was to the same effect at this hearing. *See generally* 1933 Tr. 56-64.

On Jan. 31, 1934, the Register issued his decision. After reviewing the evidence, the Register concluded:

I am of the opinion that the lands in question are not valuable as a mining proposition, it appearing that the deposit on the Lone Jack is inaccessible and not conducive to practical mining; and that the deposit on the Lap Wing, and the character of the mineral disclosed thereon would not warrant a prudent man in expending his time and money thereupon in the reasonable expectation of success in developing a paying mine.

(Decision at 9-10). Thus, he recommended rejection of the application for patent, but he did not declare the claims null and void.

Tessie Cooke-Haskins duly appealed this decision to the Commissioner of the General Land Office, who by decision dated Nov. 10, 1934, affirmed the Register for the reasons given in his decision. The Commissioner, however, in addition to rejecting the application, declared the claims null and void. This decision was then appealed to the Secretary. In her statement of reasons for appeal, Tessie Cooke-Haskins noted that it was contradicted that the deposit on the Lone Jack "exists in vein formation between well defined walls and dips to the east *under* said Lone Jack claim," and that, the total record showed "that lime rock exists on both claims in vein formation."⁹

⁹ Appeal from Commissioner's decision, filed Dec. 19, 1934, at 3, 6.

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The Acting Solicitor of the Department of Agriculture, in reply, contended that the most recent testimony showed "the limestone occurs in lenses and not in vein formation,"¹⁰ and criticized the profit estimates of appellant by noting that "counsel has overlooked the large lime deposit on the Lady Helen and other claims to the west as a source of revenue for the claimant at the theoretical profits disclosed on counsel's brief."

In a decision dated Apr. 22, 1935, the First Assistant Secretary generally affirmed the Commissioner. See *United States v. Tessie Cooke-Haskins*, A-18453. In his review of the evidence, he noted:

It is undisputed that on the [Lady] Helen claim and possibly others held by the claimant and lying adjacent to the lodes in question on the west there are considerable deposits of limestone which have been quarried and marketed; that there are certain lenses of limestone disclosed close to the west side line of the claims, running athwart the general trend of the gneissic formation and within the boundaries of the claims.

The evidence is conflicting, however, as to whether these limestone lenses within the claims are of sufficient extent or are of such quality or are in such a place as to be feasible to work them.

Upon a review of the evidence, the Assistant Secretary concluded that the claimant had not shown that the claims could be successfully mined and marketed. He also

noted "it is not beyond the bounds of possibility that by subsequent exploration and development such demonstration could be made." Accordingly, the Assistant Secretary held that "[u]nder all the circumstances disclosed, the fair and proper action seems to be to merely reject the patent application and leave the mineral claimant free to further pursue exploration under her location."¹¹

¹¹ This action by the Assistant Secretary was based on the doctrine demarcated by the *Clipper Mining Company* cases. Without digressing into the long history of that litigation, which includes a Supreme Court decision styled *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220 (1904), we would note that the rule was eventually enunciated that the Government rejection of a patent application merely determined that a discovery as a then present fact, such as would justify issuance of patent, had not been shown; it did not constitute a "definitive" finding that the land was nonmineral in character or that there was "a total absence" of discovery requisite to location. Thus, rejection of the patent application did not determine the validity or invalidity of the mining location. See generally *The Clipper Mining Co. v. The Eli Mining & Land Co.*, 33 L.D. 660 (1905).

The reason for this approach is more easily appreciated when it is remembered that until the decision in *United States v. Strauss*, *supra*, in 1945, the Government was deemed to have the burden of proof that the claim was invalid in mining claim contests. See n.7, *supra*. When the claimant sought a patent, however, the Department required the claimant to prove entitlement thereto. Thus, the *Clipper Mining* doctrine was a logical outgrowth of burden of proof analysis. If, in a given case, the evidence was inconclusive, whichever side bore the burden could be deemed to have failed to discharge the same. When a patent application was sought, the claimant would lose, and where a declaration of invalidity was sought, the Government would lose. Once the Department decided in *United States v. Strauss*, *supra*, however, that the mining claimant bore the burden of proof, regardless whether or not a patent application was the subject of the contest, the logical support of the *Clipper Mining* rationale collapsed. It is, therefore, not surprising that this doctrine was eventually expressly overruled in *United States v. Carlile*, 67 L.D. 417 (1960).

¹⁰ We are unable to explicate the distinction which the Acting Solicitor was apparently trying to draw though he may have been contending that the vein was intermittent, rather than continuous, in addition to being lenticular. Compare with *San Francisco Chemical Co. v. Duffield*, 201 F. 830 (8th Cir. 1912).

By letters of June 19, 1935, to President Roosevelt and Secretary Ickes, Tessie Cooke-Haskins objected to the Assistant Secretary's decision. This was treated as a petition for reconsideration. Upon notification of this fact, Haskins wrote to Secretary Ickes and noted that the demand for dolomitic limestone had increased markedly during the Depression. She contended that "the uptrend of the steel industry has made the present demand for dolomite as a fluxing stone increase tremendously. It is also used extensively as a pigment in the manufacture of paint."¹²

By decision of July 23, 1935, the Department granted the claimant a new hearing, conditioned upon the submission of an affidavit corroborated by two disinterested witnesses setting forth in detail the quantity of limestone quarried, shipped, and sold from the claims and all relevant factors surrounding such actions. Claimant subsequently filed a three-page affidavit, witnessed by her two sons. In transmitting the case files to the Register, the Commissioner of the General Land Office stated that while the affidavit submitted did not fully meet the Department's requirements, action on the rehearing would be stayed pending a further examination of the claims by the Forest Service.

The report of this examination, conducted by Friedhoff, was submitted Jan. 22, 1936. In essence, the report indicated that nothing had

changed over the past 2 years, and Friedhoff was not swayed from his view that claimant had not shown a discovery. In the course of his report, however, Friedhoff made the following observation:

There are from 5 to 10 acres of flat land on the Lap-Wing lode and Millsite, which being within 3 miles of the City limits of Los Angeles has considerable real estate value and accounts for the claimant's persistent efforts to patent this land while not being interested in patenting the claims on which the dolomite is located, *which later are unquestionably patentable.* [Italics supplied.]

The emphasized section of this quotation has been frequently alluded to in the subsequent history of these claims.

Here the matter apparently rested, until June 1, 1962, when Richard P. Haskins, Jr., the present contestee (Tessie Cooke-Haskins having died in 1954 and Bartholomew Haskins in 1962), filed a verified statement pursuant to the provisions of sec. 5 of the Surface Resources Act, 30 U.S.C. § 613 (1976). This statement covered all four claims and both millsites which occupied the land involved in this appeal.

On July 17, 1964, the Department of the Interior, at the request of the Forest Service, issued a contest complaint alleging that the lands embraced by the mining claims were nonmineral in character and that no discovery existed within the limits of any claim; that a residential building had been constructed upon the Lap Wing mining claim, and that the Lap Wing claim

¹² Exh. G-4, letter dated July 18, 1935.

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was being utilized for purposes other than mining; and that the two millsites were not being occupied or used for mining or milling purposes. The charges were duly denied and a hearing was held on Jan. 28, 1965, before Hearing Examiner Graydon E. Holt.

The Government's sole witness was Emmett B. Ball, a mining engineer. Ball testified that the limestone deposits were in pods or lenses, ranging from a few feet to 60 feet across, the 60-foot measurement being taken from an outcrop just inside the Lone Jack claim (1965 Tr. 32). He described various markets for limestone in the Los Angeles area, such as roofing rock, in foundries and steel mills and as asphalt filler (1965 Tr. 34).

Ball testified as to the assay results of three samples he had taken. The first sample was from the northwest corner of the Lone Jack, just across from the Lady Helen. The sample was assayed as 31.78 percent calcium oxide (CaO), 18.25 percent magnesium oxide (MgO), and 356 percent silica (SiO₂). Ball stated that while some foundries could utilize limestone with the high percentage of magnesium shown, the silica content was too high (1965 Tr. 42). The same would hold true for use in tile though Ball thought the dust could be used for filler in asphalt. Ball stated that, in view of the difficulty in obtaining access to the deposit, it could not be economically mined.

Ball also stated that he took two

other samples, both from the Lady Helen claim. These two samples assayed at 34.56 percent CaO, 14.77 percent MgO, 5.51 percent SiO₂, and 31.04 percent CaO, 19.78 percent MgO, 1.53 percent SiO₂, respectively. With regard to the first sample, Ball contended that, with the high silica content, the only use would be roof granules, but since white rock was adjacent to black this would not be feasible.¹³ While Ball noted that the second sample showed a significantly lower percentage of silica, he stated that the main market would still be for use in roofing granules and that this deposit suffered the same infirmities as far as color consistency, as did the other ore on the Lady Helen. *See generally* 1965 Tr. 45-50; Exhs. 10, 11.

At the conclusion of Ball's testimony the Government withdrew its charge relating to the utilization of the Lap Wing claim for purposes other than mining. Richard P. Haskins, Jr., then took the stand. Haskins described the strikes of the various deposits noting that they tended in a northwesterly direction (1965 Tr. 114-16). He estimated total tonnage on all four claims of 500,000 tons (1965 Tr. 118). With respect to the two millsites, Haskins noted that the Lap Wing had, in the past, been used for storage, though he intended at some future time to use it for crushing pur-

¹³ Ball subsequently testified on cross-examination that limestone for roofing granules had to be white, not gray, because that is what customers wanted (1965 Tr. 83-85).

poses.¹⁴ With respect to the Lady Helen millsite he stated that years ago it had a miner's cabin on it, and was used for living purposes.

Haskins testified as to certain past sales of dolomite from the claims. These were various sales to Hill Brothers between 1934 through 1936, which Haskins estimated ran 80 to 90 tons per month and which was crushed and used for additives and filter materials (1965 Tr. 126). Haskins also referred to sales to Kinney Iron Works, Washington Elger, which made bathroom fixtures, and Kennedy Minerals, all from 1934 to 1940 (1965 Tr. 125-28). He noted that the foundry specifications required that the product be uniform in size, and that most of the product shipped from the claims varied from 3 inches down to $\frac{3}{4}$ of an inch (1965 Tr. 130-31). He estimated a total of 18,000 tons had been removed during the period from 1934 to 1940 (1965 Tr. 145).

Norman Whitmore, a mining engineer with more than 40 years experience, also testified on behalf of the claimant. He estimated that, from the largest deposit located in the Lone Jack and Lady Helen claims, there existed in excess of 200,000 tons of dolomite and the probability of twice that (1965 Tr. 155-57). He noted that the "strike in this vein" was northwesterly with a dip of 70 degrees (1965 Tr. 178-79). Throughout his testimony

he was quite insistent upon the difference between dolomite and limestone. He stated that "real true dolomite is approximately half calcium and half magnesium" but noted that this theoretical dolomite was a very rare thing. A sample which showed 58 percent CaCO_3 and 41 percent MgCO_3 he considered to be a good grade of dolomite (1965 Tr. 187). With respect to his assays of various pieces of rock taken from the claims he stated:

A. They will run all the way from almost pure dolomite down to what we would call low dolomite, low magnesium content. We didn't get any of them below around about 10 per cent.

Q. Ten per cent of what?

A. Magnesium.

Q. Below 10 per cent of magnesium?

A. Yes. That's why we consider this a dolomite deposit, not a limestone deposit.

(1965 Tr. 189-90).¹⁵

Whitmore testified to chemical uses of dolomite:

They put it in the bottom of a furnace so it won't heat out. Then in refractory brick to line furnaces. In cements, like they build steps out of. Then, the sugar industry. Glass, plastics, like in manufacturing of rayon. Also for fertilizers, plant use and insecticides. They even put it in cow feed. Also in the rubber industry, fluxes. In the chemical industry, calcium carbide. Oil industry, tan-

¹⁵ Whitmore's insistence on the term "dolomite" is clearly shown in an exchange he had with Government's counsel:

"Q. Did you examine the point where quantities of limestone had been removed back in the 40's?

"A. Well, I thought this was a dolomitic property instead of limestone property.

"Q. Well, I don't mean to play on words. Whatever material was removed back in the '30's, '40's."

(1965 Tr. 180).

¹⁴ Haskins subsequently stated that he did have portable mining equipment presently on the lower portion of the Lap Wing (1965 Tr. 142-44).

ning. It can be used in the white of the paper.

(1965 Tr. 161). He stated that he thought the property was worth exploiting its present condition (1965 Tr. 166).

By decision of June 18, 1965, Hearing Examiner Holt declared the claims null and void. After recounting the history of the claims and the evidence adduced at the hearing, he concluded that the main deposit on the Lady Helen, from which "wages" might have been obtained in the 1930's, was now substantially depleted. The hearing examiner noted:

Dolomitic limestone is widespread throughout Southern California and the market is being supplied by presently operating companies. A new small scale dolomite operation in competition with the present quarries is likely to be successful only where it has distinct advantages such as accessibility, high quality material, nearness to a market, and conditions which permit very cheap quarrying. The contestee did not establish that his quarry had any of these advantages. Until he does there is no basis for believing that the further expenditure of labor and means on the claims would have a reasonable prospect of success or that there is a present market for the material.

(1965 Decision at 7). The decision of the hearing examiner was received by Haskins' counsel on June 24, 1965.

On July 9, 1965, counsel for Haskins filed a notice of appeal to the Office of Appeals and Hearings, Bureau of Land Management (BLM). Thus commenced a procedural wrangle that took the better

part of a decade to resolve. The hearing examiner acknowledged receipt of the notice of appeal, but noted that the Departmental appellate regulations required the submission of \$5 for each mining claim involved in an appeal. *See* CFR 1842.4(b) (1965).¹⁶ Appellant's check for \$30 was received July 21, 1965. Appellant's statement of reasons was filed with the Office of Appeals and Hearings on August 16, 1965.

By decision of Sept. 28, 1966, the appeal was dismissed by the Chief, Branch of Mineral Appeals, on the ground that the statement of reasons had not been filed within 30 days of the filing of the notice of appeal as required by the applicable regulation, 43 CFR 1842.5-1 (1965) (now 43 CFR 4.412). On Oct. 17, 1966, the claimant sought reconsideration of this decision. First, he pointed out that he had filed his statement of reasons within 30 days of perfecting his appeal, *i.e.*, the tendering of the \$30 filing fee on July 21, 1965. Second, he adverted to the 10-day grace period provided by 43 CFR 1840.0-8(b) (1965) (now 43 CFR 4.401(a)), and argued that his statement had been received within the grace period. Third, he argued that the regulations provided a total of 60 days in which one could file a statement

¹⁶ This filing fee requirement was abolished upon the establishment of the Office of Hearings and Appeals in 1970, at which time the Office of Appeals and Hearings, BLM, was merged with the appellate adjudicatory function of the Assistant Solicitor—Public Lands, in creating the Board of Land Appeals.

of reasons from the date of receipt of an adverse decision, and that this he had done.

These arguments were unavailing. By letter of Oct. 21, 1966, the request for reconsideration was denied. His appeal to the Secretary was denied by decision styled *United States v. Haskins*, A-30737 (Dec. 19, 1966). Haskins then sought judicial review of this ruling.

By decision of Apr. 15, 1968, styled *Haskins v. Udall*, No. 67-1815-CC, the District Court for the Central District of California dismissed the appeal and affirmed the action of the Department. An appeal was taken from this decision to the Ninth Circuit Court of Appeals. During the pendency of this appeal, the Ninth Circuit issued a decision in *Tagala v. Gorsuch*, 411 F.2d 589 (1969), holding that dismissal for failure to file timely a statement of reasons was not mandatory under the Department's regulations, but rather required the exercise of discretion.¹⁷ Accordingly, the parties stipulated that the Haskins' appeal be remanded to the Director, BLM, for the exercise of discretion, and this order was approved by the Court on Oct. 3, 1969.¹⁸

While the above matter was proceeding through the Federal Courts,

¹⁷ Prior to *Tagala v. Gorsuch*, *supra*, the Department had consistently interpreted the 30-day filing requirement for the statement of reasons as mandating the dismissal of all late filings, absent a showing that the 10-day grace period was applicable. Thus, though the two decisions issued by BLM and the Assistant Solicitor, respectively, did not indicate that dismissal was mandatory, there is no question that it was so perceived at that time.

¹⁸ Copies of the documents involved in the Court proceedings are found in Exhibit G-2.

however, Haskins filed an application for patent for a placer claim denominated as the Haskins' Quarries placer mining claim. This application was filed on May 27, 1968, and was based on the provisions of 30 U.S.C. § 38 (1976) and 30 U.S.C. § 161 (1976). While a mineral surveyor was subsequently selected, the State Director of the California State Office, by decision of May 29, 1969, suspended the survey until further notice.

Counsel for Haskins then moved the Department to stay action on the remand from the Ninth Circuit until a determination had been made as to the validity of the asserted placer claim. This request was denied in the decision of this Board, dated July 30, 1971, and styled *United States v. Haskins*, 3 IBLA 77 (1971). This decision also examined the circumstances behind the original late filing of the statement of reasons, but held that the record did not show a sufficient basis upon which to grant relief, and refused to waive the late filing. *Id.* at 83. With respect to the placer claim, the opinion noted "the propriety and validity of the asserted placer claim are not before this office for decision." *Id.* at 84 n.9. While Haskins subsequently argued that this statement meant that the placer claim should be surveyed, the California State Director, by letter of Sept. 3, 1971, canceled the mineral survey.

On Feb. 3, 1972, the United States filed in the U.S. District Court for the Central District of

California, a complaint in ejectment against Haskins, premised on the Department's 1971 decision, which in effect, had held the four lode claims and two millsites invalid. In addition, the suit sought rental for past use. On March 2, Haskins filed an answer and a counterclaim. Haskins' answer denied that the decision of the Secretary declaring the claims invalid was final, binding, and conclusive since a reasonable time had not expired from the date of that decision, and also adverted to the existence of the Haskins Quarries placer mining claim. In his counterclaim, Haskins alleged that he possessed a possessory right to the land based on an asserted placer location made under the provisions of 30 U.S.C. § 38 (1976), and prayed for a declaration that the Haskins Quarries placer claim was a valid existing claim. The United States subsequently filed a motion to dismiss the counterclaim.

On May 18, 1972, the District Court issued a memorandum opinion. See *United States v. Haskins*, No. 72-246-JWC (C.D. Cal. 1972). The Court noted:

In moving for a summary judgment of dismissal of defendant's counterclaim, the Government urges that since the land embraced within the lode claims was held to be without commercial value in the contest proceedings, the issue is res adjudicata in the patent application proceedings relating to the placer claim. But this is not necessarily so. There is after all a difference between a lode claim and a placer claim. The former relates to a vein of quartz or other rock in place,

whereas a placer claim covers all forms of deposit excepting a vein of quartz or other rock in place, and what might be an insufficient showing of commercial value in support of a lode claim, might well be sufficient to establish a valid placer mining claim. Both types of claims can, of course, be made upon the same property and can co-exist, even though in different ownership.

Although the Director might well believe, with the knowledge obtained from the contest proceedings, that defendant could not possibly make a showing of value sufficient to support a placer claim, the claimant is, nevertheless, entitled to try, and is further entitled to have any adverse ruling reviewed by this court.

(Memorandum Opinion at 3-4). The Court, however, declined to rule on the existence of a discovery within the limits of the claim, contending that this was properly subject to the initial jurisdiction of the Department of the Interior.

A motion for rehearing was filed by the Government and opposed by the claimant. On June 28, 1972, the District Court denied the motion, but, noting that there were controlling questions of law for which there were substantial ground for differences of opinion, authorized an immediate appeal as provided by 28 U.S.C. § 1292(b) (1976), with respect to three questions of law:

1. Can the defendant pursue his application for patent of the Haskins Placer Mining Claim pursuant to Title 30 U.S.C. § 38 where his lode claims under which he had previously worked the property have been declared invalid for lack of discovery?

2. Does defendant's possession of the property which antedates the effective date of the Watershed Withdrawal Act of 1928 by more than five years, entitle

him to proceed with his patent application notwithstanding the fact that his notice of intention to hold as a placer mining claim was not filed until subsequent to the effective date of the Water-shed Withdrawal Act?

3. If the defendant is entitled to proceed with his patent application and since the Government has chosen this Court as a forum, does this Court have jurisdiction over the patent application proceeding to the extent that it may make an order declaring the defendant entitled to a patent, or should these proceedings be remanded to the Department of the Interior to process defendant's application administratively?

The Department did pursue such an appeal. By decision of Oct. 25, 1974, reported as *United States v. Haskins*, 505 F.2d 246, the Ninth Circuit affirmed the District Court in all respects. In its decision, the Court adverted to an affidavit of E. Rowland Tragitt, a mineral engineer with nearly 30 years of experience in the Government, which had been filed in the District Court to support the claimant's motion for summary judgment. Thus, the Ninth Circuit noted that Tragitt had stated that:

[T]here is a minimum of 900,000 tons of dolomite on the claims and that the use of dolomite in the Los Angeles area included the following: Flux in iron and steel foundries, filler in paints, asphalt and rubber, the manufacture of glass, paper, refractories, insulation and fertilizer, and as a supplement in animal feed. Mr. Tragitt also stated: "That in addition to the dolomite, there are a minimum of 100,000 tons of decorative stone marketable for use as roofing granules, terrazzo chips, and decorative stone in walls, rock gardens, fire places, and patios."

505 F.2d at 248.

After briefly reviewing the history of the litigation surrounding the claim, the Ninth Circuit turned to the issues posed by the District Court. Concerning the applicability of 30 U.S.C. § 38 (1976), the Court noted that "[t]he evidence unequivocally shows that Haskins and predecessors have been in possession of the ground and have worked the claims for over half a century," and that sec. 38 permitted them to assert valid placer locations for the ground in question without proof of posting, recording notices of location, and the like. *Id.* at 250. The Court noted, however, that a discovery was necessary to acquire any rights under 30 U.S.C. § 38 (1976).

The Court then examined the question of the status of dolomite in lode form on the claims. The Court noted that "[t]he Interior Department has held that limestone deposited in lode formation is properly claimable as a lode claim and not as a placer claim. * * * That seems to be true of the dolomite and dolomite limestone deposits in the present case." *Id.* at 251. Referring to the prior adjudications of the lode claims the Court stated:

It may be that some of the dolomite is not in lode formation. To the extent that it is deposited as a zone or belt of mineralized rock lying within boundaries separating it from neighboring rock, Haskins cannot twice litigate the issue of the existence of this valuable mineral in the ground. He is precluded by the doctrine of *res judicata*. Consequently, whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone in lode formation. *Haskins cannot use the same*

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material that he relied on as discovery of valuable mineral under his lode locations to support his present placer applications. [Italics supplied.]

Id.

With respect to the validity of Haskin's "placer claims as building stone locations"¹⁹ under 30 U.S.C. § 161 (1976) the Court referred to Tragitt's affidavit as to the 100,000 tons of decorative stone for use as roofing granules, etc., and stated:

Our search of the record has disclosed no instance in which the validity of mining locations for this mineral on the ground in question has been decided, or even placed in issue. Further, it cannot be determined from the present record whether the placer location for building stone was thrown in as an afterthought and not in good faith. The difficulties inherent in proving up on a placer location for building stone are apparent to anyone familiar with the mining laws. * * * Nevertheless, in the language of the District Court, the "claimant is entitled to try." [Citations omitted.]

Id. at 252.

The Court also held that it was too late for Haskins to seek review of the Board's 1971 decisions. Rather, upon the filing by the Government of the complaint in ejectment it became Haskins' obligation to directly attack the Board's decision in a compulsory counterclaim. Having failed to so proceed, the Board's decision was no longer

open to assault. The Court also noted that, while there was some question as to the claimant's good faith in this placer claim assertion, in view of the record "the least that can be said is that there is a disputed issue of material fact which precludes summary judgment." *Id.* at 253. Finally, the Circuit Court agreed with the District Court that insofar as the question of discovery is concerned, "the expertise of the Department in the premises is appropriately invoked."

The case was remanded for further action consistent with the opinion. Accordingly, on Mar. 7, 1975, a complaint was issued, seeking to have the mineral entry canceled and the Haskins Quarries placer mining claim declared void.²⁰ An answer was timely filed, and the case came on for a hearing in 1977.

Before discussing the evidence adduced at this most recent hearing, it is helpful to examine the various legal principles involved in this controversy. All claims, be they in lode or placer form, and regardless of how they are initiated, are valid only if they are supported by a discovery of a valuable mineral deposit. In *Castle v. Womble*, 19 L.D. 455, 457 (1894), the Department laid down a test which has remained at the bedrock of mining claim adjudication to this day. A discovery exists, Secretary Smith stated, "where minerals have been found and the evidence is of such a character that a person of ordi-

¹⁹ The Court's use of the plural in this sentence is somewhat confusing. In contradistinction to the separate lode claims which appellant asserted in the three previous contests, there is, in actuality, only one placer claim asserted, which embraces all of the land sought under the four lode and two millsite claims. This is a matter of some importance to which we will return, *infra*.

²⁰ The exact grounds for this action are set forth in detail, *infra*.

nary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." The test soon won the approbation of the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313 (1905). Over a considerable period of time, this test was refined to require a showing of present marketability, that is, that the claimant has a reasonable expectation that the mineral can be extracted, removed, and marketed at a profit. See *United States v. Coleman*, 390 U.S. 599 (1968).

[1, 2] There are two basic methods of locating a mining claim, dependent upon the nature of the mineral deposition, i.e., lode and placer.²¹ Inasmuch as the difference between these two modes of location lies at the center of this case, we will examine both the historical genesis of these two types of claims and the subsequent application of the theoretical bases upon which these different types of location are premised.

The first congressional enactment relating to the general disposition

of mineral lands was the Act of July 26, 1866, 14 Stat. 251.²² Sec. 1 of the Act declared that

the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation * * * subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.^[23]

But, while mineral deposits, however found, were declared open to exploration and occupation, subsequent sections provided only for the acquisition of title to certain lode claims. Thus, secs. 2 and 3, which enacted various procedures for obtaining patent, applied only to a claim of "a vein or lode of quartz,

²² While, prior to this enactment, there had been a number of specific pieces of legislation relating to the sale of lands valuable for lead, copper, and coal, the Act of July 26, 1866, *supra*, was the first Federal legislation to deal with mining as a general proposition. See Act of Mar. 3, 1829, 4 Stat. 364; Act of July 11, 1846, 9 Stat. 37; Act of Mar. 1, 1847, 9 Stat. 146; Act of July 1, 1864, 13 Stat. 343; Act of Mar. 3, 1865, 13 Stat. 529.

²³ Even prior to this enactment, Courts had recognized the validity of rules, regulations, and customs established by mining districts as they related to a possessory right to a mining claim. Thus, in *Sparrow v. Strong*, 70 U.S. (3 Wall.) 97 (1865), Chief Justice Taney noted:

"We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." (Footnote omitted.)

Id. at 104.

²¹ In this regard, we would note that a tunnel site located under the Tunnel Site Act, § 4 of the Act of May 10, 1872, 17 Stat. 91, 92, 30 U.S.C. § 27 (1976), is not properly deemed a mining claim. *Credde & Cripple Creek Mining & Milling Co. v. Vinta Tunnel Mining & Transportation Co.*, 196 U.S. 337, 359 (1905). It is, indeed, only a means of exploration and discovery, in the nature of a right-of-way. *Id.* at 357-59; see also *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U.S. 499 (1901); *United States v. Livingston Silver, Inc.*, 43 IBLA 84 (1979). The status of a millsite as a mining claim was recently discussed in *Feldalite Corp. of America*, 56 IBLA 78, 88 I.D. 643 (1981).

or other rock in a place, bearing gold, silver, cinnabar, or copper.”²⁴

Four years later, Congress remedied its previous omission by adopting the Act of July 9, 1870, 16 Stat. 217, generally referred to as the Placer Act. That Act provided, in relevant part, “[t]hat claims, usually called ‘placers,’ including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.”

Two years subsequent, Congress adopted the Act of May 10, 1872, 17 Stat. 91. Together with various provisions of the 1866 and 1870 Acts, the general mining law of the United States was thereby established. *See generally* 30 U.S.C. §§ 21–47 (1976). For our purposes, it is important, at this point, to focus on two specific aspects. First, sec. 2 of the 1872 Act established new limitations on the length and width of lode deposits. In so doing, however, Congress also enlarged the ambit of the 1866 Act in relation to the nature of the lode claims that might go to patent. Sec. 2 referred to “mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits” in promulgating the new

limitations. (*Italics supplied.*) Second, sec. 10 of the 1872 Act provided that the various provisions of the Placer Act of 1870 “shall be and remain in full force” subject to certain specified changes.²⁵

Thus developed the essential statutory dichotomy which exists to this day. A lode claim is one located “upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits.” 30 U.S.C. § 23 (1976). A placer claim is essentially everything else. 30 U.S.C. § 35 (1976). Thus, in *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 679 (1888), a placer claim was defined as “ground that includes valuable deposits *not in place*, that is, not fixed in rock, but which are in a loose state.” (*Italics added.*)

While such a bifurcated approach would seem to minimize uncertainties as to the proper mode of location, in reality, such has not been the experience of mining claimants. However, before exploring the various judicial and Departmental interpretations relating to this question, we should note one other statute which is involved in this appeal, namely the Act of Aug. 4, 1892, 27 Stat. 348, 30 U.S.C. § 161 (1976).

[3] This Act, occasionally referred to as the Building Stone Act, was adopted by Congress in order

²⁴ Lindley suggests that the failure of Congress to provide for a means of patenting placer claims was occasioned by a decline in the once predominant placer mining activity in California, whereas lode mining was increasing. *See Lindley on Mines*, § 57 (1897).

²⁵ Among these changes was a requirement that no location “shall include more than twenty acres for each individual claimant.” Section 10 of the Act of May 10, 1872, 17 Stat. 91, 94. This is a point which will be examined, *infra*.

to clear up confusion which had been generated by various decisions of the Interior Department.²⁶ The Act provided, in relevant part, that:

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims. Lands reserved for the benefit of the public schools or donated

to any States shall not be subject to entry under this section.

30 U.S.C. § 161 (1976). Thus, by statute, lands chiefly valuable for building stone must be entered as placer claims.²⁷

Of crucial import in the distinction between lode and placer claims was the fact that "[a] placer discovery will not sustain a lode location nor a lode discovery a placer location." *Cole v. Ralph*, 252 U.S. 286, 295 (1920).²⁸ Thus, error in the

²⁶ Commissioner McFarland of the General Land Office had originally ruled that lands chiefly valuable for building stone might be entered as placer claims. *H. P. Bennet, Jr.*, 3 L.D. 116 (1884). This ruling, however, was brought into question by Assistant Secretary Chandler's decision in *Conlin v. Kelly*, 12 L.D. 1 (1891), wherein the Department held that a quarry of stone useful for general purposes was not subject to entry as a placer mining claim. The following year, Congress adopted the Act of Aug. 4, 1892, *supra*. Subsequently, Assistant Secretary Chandler, in a decision which involved a claim located prior to the 1892 Act, distinguished *Conlin v. Kelly*, *supra*: "In that case the stone was useful only for general building purposes, while in this case the stone is not only useful for those purposes, but also very valuable for the ornamentation of buildings, and for monuments and other commercial purposes." (Italics in original.) *McGlenn v. Wienbroer*, 15 L.D. 370, 374 (1892). In this case, the Department held that the land was properly located as a placer claim under the 1872 Mining Act.

This sequence of events had generally been interpreted as meaning that the Building Stone Act applied only to common varieties of building stone, with uncommon varieties (whatever they might be) subject to the location provisions of the general mining laws. Under this interpretation, the passage of sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1976), known as the Common Varieties Act, which removed common varieties of building stone from location under the mining laws, including the Building Stone Act, would have effectively repealed the Building Stone Act since it only applied to such types of building stone. See generally 1 *American Law of Mining* § 5.20 (1980). The Supreme Court decision in *United States v. Coleman*, *supra*, however, which expressly held that the Common Varieties Act left "30 U.S.C. § 161, the 1892 Act, entirely effective as to building stone that has 'some property giving it distinct and special value' (expressly excluded under § 611)," 390 U.S. at 605, must be seen as substantially undermining this analysis.

²⁷ We note that in *Bowen v. Sil-Flo Corp.*, 451 P.2d 626, 632-33 (Ariz. App. 1969), the Arizona Court of Appeals, in examining an argument that perlite was a building stone, and as such must be located as a placer, cited the statutory language of 30 U.S.C. § 161 (1976) and then stated: "By its very terms, this statute is permissive ('may'), and the appellant has cited no authority holding that, because a mineral deposit might be locatable under this section of the code, it necessarily could not be located as a lode." 451 P.2d at 634. With due deference to the Court, however, we must point out that it has misinterpreted the statutory usage of the word "may" in the context of the Building Stone Act.

As noted in our discussion in n.26, *supra*, the Building Stone Act was adopted to effectively overrule the Department's decision in *Conlin v. Kelly*, *supra*, which held that a stone quarry was not subject to entry under the mining laws. That decision had noted, however, that the land was available for entry under the Timber and Stone Act, Act of June 3, 1878, 20 Stat. 89. The use of the word "may" in the Building Stone Act referred not to the possibility that lands chiefly valuable for building stone might be entered as a lode as well as a placer, but rather to the fact that lands chiefly valuable for building stone were subject to location under the mining laws as a placer or subject to entry under the Timber and Stone Act. While there may be few cases on this point, the reason for this is that it has been universally assumed that lands chiefly valuable for building stone could be taken up only as placer claims. See, e.g., PLRC Report entitled *Legal Study of the Nonfuel Mineral Resources*, at 317; *Meklejohn v. F. A. Hyde & Co.*, 42 L.D. 144 (1913); *Henderson v. Fulton*, 35 L.D. 652 (1907).

²⁸ Among other important distinctions are the price paid per acre (\$5 for lode, but \$2.50 for placer, see 30 U.S.C. §§ 29 and 37 (1976)), and the fact that extralateral rights may appertain to lode locations, but do not apply to placer locations. 30 U.S.C. § 26 (1976).

mode of location could result in the invalidation of a claim.

Among the early definitions relating to lode deposits were those of Justice Field, sitting at circuit, in *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 8 F. Cas. 819 (C.C.D. Nev. 1881), *aff'd*, 103 U.S. 839, and Judge Hallett of the Colorado Circuit Court in *Stevens v. Williams*, 23 F. Cas. 44 (C.C.D. Colo. 1879), both of which achieved immediate currency. In *Eureka*, Justice Field wrote:

It is difficult to give any definition of the term as understood and used in the Acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the Acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rocks. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

8 F. Cas. at 823.

In *Stevens*, *supra*, Judge Hallett charged the jury:

[A]s to the word "vein" or "lode," it seems to me that these words may em-

brace any description of deposit which is so situated in the general mass of the country, whether it is described in any one way or another; that is to say, whether, in the language of the geologist, we say that it is a bed, or a segregated vein, or gash vein, or true fissure vein, or merely a deposit * * *. [W]henver a miner finds a valuable mineral deposit in the body of the earth * * * he calls that a lode, whatever its forms may be, and however it may be situated, and whatever its extent in the body of the earth.

23 F. Cas. at 45.

Both of these definitions were subsequently cited, with approval, by the United States Supreme Court in *Iron Silver Mining Co. v. Cheesman*, 116 U.S. 529, 533-34 (1886). See also *United States v. Iron Silver Mining Co.*, *supra* at 680; *Reynolds v. Iron Silver Mining Co.*, 116 U.S. 687, 695 (1886).

While these definitions sufficed to cover many types of mineral deposition, there were mineral deposits which were not easily classified as either lode or placer.²⁹ Because the instant appeal implicitly raises the question of the proper mode of location for limestone deposits, the subsequent analysis will relate only to such claims.

[4] Early cases involving limestone deposits, such as *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, *supra*, actually con-

²⁹ The questions have continued through the years, particularly as the types of minerals being located have changed. For a discussion on problems associated with uranium locations, see D. Sherwood and G. Greer, *Mining Law in a Nuclear Age: The Wyoming Example*, 3 Land and Water Law Review 1 (1968). See also *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 601 P.2d 1344, 1345 (Ariz. App.), *rev'd*, 601 P.2d 1339 (Ariz. 1979).

cerned limestone deposits which themselves were mineral bearing, *i.e.*, the claims were not located for the limestone, but rather were located for precious metals which were carried within the limestone structure. *See also Jupiter Mining Co. v. Bodie Consolidated Mining Co.*, 11 F. 666, 675 (C.C.D. Cal. 1881). Thus, while these claims were lode locations, this fact was not dispositive of the question of the proper form of location for limestone claims.

Limestone, itself, was held to be a mineral within the meaning of the mining laws as early as Secretary Teller's decision in *Maxwell v. Brierly*, 10 C.L.O. 50 (1883). Ten years later, in *Shepherd v. Bird*, 17 L.D. 82, 84-85 (1893), the Department expressly held that limestone suitable for making lime was subject to mineral entry under the placer form and not as lode location.³⁰ *See also Long v. Isaksen*, 23 L.D. 353 (1896). Later, in *Henderson v. Fulton*, 35 L.D. 652 (1907), the Acting Secretary held that marble could not be located as a lode claim because it did not "possess the elements of rock in place bearing one or more of the minerals specified in the statute, or some other mineral that would be embraced within the added words 'other valuable deposits.'" *Id.* at 663 (italics supplied). While this case expressly applied only to deposits of marble, its logic, of course, would apply to limestone. Under such analysis, no

deposit of limestone, regardless of the nature of its deposition, which was valuable for the limestone, could be located as a lode.

Approximately 5 months after the Department's decision in *Henderson v. Fulton*, *supra*, however, the Eighth Circuit Court of Appeals held that asphaltum was locatable as a lode claim in *Webb v. American Asphaltum Mining Co.*, 157 F. 203 (1907). The Court noted that:

The test which Congress provided by this legislation to be applied to determine how these deposits should be secured was the form and character of the deposits. If they are in veins or lodes in rock in place, they may be located and purchased under this legislation by means of lode mining claims; if they are not in fissures in rock in place but are loose or scattered on or through the land they may be located and bought by the use of placer mining claims.

Id. at 206. Inasmuch as asphaltum (also known as gilsonite) is the vein itself, this decision cast serious doubt on the correctness of the *Henderson* analysis. *See also San Francisco Chemical Co. v. Duffield*, *supra*.

Eventually in *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, 17 F.2d 351 (8th Cir. 1926), it was held that a limestone deposit which was useful in flux and in the making of cement was locatable as a lode. This decision rejected an argument that the deposit should have been located as a placer in conformity with the Building Stone Act, inferentially holding that such qualities as the deposit possessed did not make the

³⁰ The decision held that such a limestone deposit was also subject to purchase under the Timber and Stone Act, *supra*.

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land chiefly valuable for building stone.³¹

The import of such judicial pronouncements was not lost upon the Department. In *Big Pine Mining Corp.*, 53 I.D. 410, 412 (1931), the Department invalidated various placer locations of limestone on the grounds that there was no showing of marketability. The decision further noted that "it is undisputed that the deposit is in lode formation" and cited *Cole v. Ralph*, *supra*, for the proposition that a lode discovery would not sustain a placer location. A year later, in *Vivia Hemphill*, 54 I.D. 80 (1932), the Department expressly abandoned the rule enunciated in *Shepherd v. Bird*, *supra*, and *Henderson v. Fulton*, *supra*, and held that a deposit of limestone which existed in lode form with well defined walls and which was valuable for the burning of lime and the manufacture of portland cement was subject to location as a lode or vein.

³¹ *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, *supra*, involved the specific question whether lands within numbered school sections which were embraced by certain limestone lode claims were chiefly valuable for building stone. At the time of the Utah Enabling Act, known mineral lands were excluded from the grants to the State. See *United States v. Sweet*, 245 U.S. 563 (1918). This limitation was subsequently removed by the Act of Jan. 25, 1927, 44 Stat. 1026. Lands chiefly valuable for building stone, however, were, by the express terms of the Building Stone Act, subject to the grant to the State. Thus, had the land been chiefly valuable for building stone, the State's title would have attached in 1894 despite the prior appropriation of a mineral claimant. Because the Court held that the limestone was not chiefly valuable for building stone, the mineral claimant prevailed over the State's subsequent lessee.

While the Department has followed the ruling of *Vivia Hemphill* ever since its rendition,³² we must recognize that a certain anomaly exists with respect to the proper mode of location for limestone. If the lands embraced by a claim for limestone are chiefly valuable for building stone purposes that claim must, under the Building Stone Act, be located as a placer claim, *regardless* of the actual form of deposition. *United States v. Gardner*, 14 IBLA 276, 280, 81 I.D. 58, 60 (1974). On the other hand, if the limestone is chiefly valuable because of chemical or metallurgical properties, the proper mode of location is dependent upon the nature of the deposition. The relevancy of this distinction will be discussed, *infra*.

[5] Turning to the acts necessary for location, the only express Federal requirements for location relate to the necessity of making a discovery of a vein or lode within the limits of a lode claim (30 U.S.C. § 23 (1976)), and the marking of the boundaries of a lode claim on the ground (30 U.S.C. § 28 (1976)). See *Vevelstad v. Flynn*, 230 F.2d 695 (9th Cir. 1956). The contents of the actual notices of location and the manner of recordation were left to the local mining districts and the

³² While the argument is still occasionally made that the rock in place must be mineral-bearing rather than valuable in itself (see discussion, *infra*), in order for it to be locatable as a lode, this argument has been consistently rejected. See *Bowen v. Sil-Flo Corp.*, *supra*; *United States v. Bowen*, 38 IBLA 390, 399-400 (1979).

various states.³³ Nevertheless, failure to follow state requirements may result in the invalidation of a claim under the Federal laws. See *Roberts v. Morton*, 549 F.2d 158, 161-62 (10th Cir. 1977), *aff'g United States v. Zweifel*, 11 IBLA 53, 80 I.D. 323 (1973).³⁴

The patent provisions for both lode and placer claims, however, direct the claimant to show compliance with the various requirements of the General Mining Laws. See 30 U.S.C. §§ 29, 35 (1976). Thus, in the course of a patent application, the Department has consistently required a claimant to show a possessory right to the claim supported by a certificate or abstract of title. 43 CFR 3862.1-3(a), 3863.1-3(a). See *Kerr-McGee Nuclear Corp. (On Reconsideration)*, 43 IBLA

348 (1979); *Daniel Cameron* 4 L.D. 515 (1886). Situations, however, could arise in which such proofs were difficult, if not impossible, to obtain. Congress in the 1870 Placer Act had made provision for situations in which, due to this passage of time, it would become difficult to prove that the initial acts of location and recordation, as well as subsequent transfers, had occurred in compliance with the law. Sec. 38 of Title 30 provides:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim.

30 U.S.C.A. § 38 (West 1971).

The Supreme Court discussed this provision in *Cole v. Ralph*, *supra*. Therein, the Court noted that sec. 38 is a remedial provision and was designed "to make proof of holding and working for the prescribed period the legal equivalent of proofs of acts of location, recording and transfer." 286 U.S. at 305.³⁵ The Court, noting that the above statement had received approbation in numerous judicial and Depart-

³³ It should be noted, however, that certain posting requirements were established by sec. 1(a) of the Act of Aug. 12, 1953, 67 Stat. 539, 30 U.S.C. § 501(a) (1976); sec. 1(a) of the Multiple Mineral Development Act, Act of Aug. 13, 1954, 68 Stat. 708, 30 U.S.C. § 521(a) (1976); and sec. 2 of the Act of Aug. 11, 1955, 69 Stat. 679, 30 U.S.C. § 541(a) (1976). See also 43 CFR 3831.1. In addition to the above laws, various recording requirements also existed in sec. 2(b) of the Mining Claims Rights Restoration Act, Act of Aug. 11, 1955, 69 Stat. 682, 30 U.S.C. § 621(b) (1976). No general Federal recordation requirements existed until 1976, when Congress adopted sec. 8 of the Mining in the Parks Act, Act of Sept. 28, 1976, 90 Stat. 1342, 1343, 16 U.S.C. § 1907 (1976), and sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2769, 43 U.S.C. § 1744 (1976).

³⁴ While the Department had originally taken the position that compliance with state law requirements was not a matter of concern in mining claim contests within the Department (see *Reins v. Murray*, 22 L.D. 409 (1896)), the adoption of a regulation specifically requiring compliance with state laws, see 43 CFR 3831.1, was held by the Court in *Roberts v. Morton*, *supra*, to result in a Federal requirement that such laws be complied with.

³⁵ In *Humphreys v. Idaho Gold Mines Development Co.*, 120 P. 823, 827 (Idaho 1912), the Supreme Court of Idaho noted that "[t]he adverse possession referred to in the statute is intended to supply the place of an abstract of title and such proofs as are furnished by the county recorder."

mental rulings, proceeded to issue an important caveat:

But those rulings give no warrant for thinking that it disturbs or qualifies important provisions of the mineral land laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent, and the purchase price to be paid before the patent can be issued. Indeed, the rulings have been to the contrary.

Id. at 306. See also *Belk v. Meagher*, 104 U.S. 279, 287 (1881); *Capital No. 5 Placer Mining Claim*, 34 L.D. 462 (1906).

[6] It is important to note that the operative statutory phrase in 30 U.S.C. § 38 (1976), is "held and worked." Since the entire purpose of sec. 38 was to obviate the necessity of proving formal location and recording, which acts, of course, serve to notify the world of the claimant's appropriation of the land, it was obvious that there must be some method by which other parties would be put on notice that the land was under the claim of another. Thus, a claimant was required to prove that he had held or worked his claim *in addition to* such other showings as were required by law.

The early cases which examined the applicability of this provision (at that time commonly referred to as R.S. 2332) clearly recognized that it embraced two separate concepts. Thus, it was generally con-

ceded that performance of annual assessment work would fulfill the requirement that the claims be "worked." See, e.g., *Law v. Fowler*, 261 P. 667, 670 (Idaho 1927); *Newport Mining Co. v. Bead Lake Gold-Copper Mining Co.*, 188 P. 27, 28 (Wash. 1920). See also *United States v. Bowen*, *supra* at 402 (1979).³⁶ If, as occurred in a num-

³⁶ There is an implicit degree of interrelation among the provisions of 30 U.S.C. §§ 28, 38, and the concept of *pedis possessio*. Sec. 28, the assessment statute, is designed to assure diligent development of mining claims and to prevent thwarting of that purpose by the mere location of claims to tie up land and let it stay idle. *Powell v. Atlas Corp.*, 615 P.2d 1225 (Utah 1980); *Smith v. Union Oil Co.*, 135 P. 966 (Cal. 1913), *aff'd*, 249 U.S. 337 (1919); *James V. Joyce (On Reconsideration)*, 56 IBLA 327 (1981). Thus, a claim validly located and supported by a discovery is nevertheless open to relocation by another upon the failure of the claimant to perform annual assessment work, and may well be liable to forfeiture to the United States because of assessment work lapses if situated on withdrawn land. See *United States v. Bohme*, 48 IBLA 267, 87 L.D. 248 (1980).

Sec. 38 and the doctrine of *pedis possessio* have a more ameliorative focus. The doctrine of *pedis possessio*, as enunciated in *Union Oil Company of California v. Smith*, 249 U.S. 337 (1919), applies to pre-discovery claims and, in effect, provides that if a qualified person in good faith enters unappropriated public domain for the purpose of mineral exploration, such an individual will be protected against all intrusions so long as he remains in continuous, exclusive occupancy and diligently works towards making a discovery. See generally T. Fiske, *Pedis Possessio—Modern Use of An Old Concept*, 15 Rocky Mt. Min. Law Inst. 181 (1969). Sec. 38 provides a mechanism in which the occupation and working of a claim for a period of time equal to the state's statute of limitations would obviate the need for proving formal location. This is an important concept since, as the Court held in *Belk v. Meagher*, *supra*, "[t]he right to the possession comes only from a valid location." 104 U.S. at 284.

Since the duty to perform assessment work attaches only upon a discovery, mere performance of "assessment work" cannot, by itself, hold a claim under *pedis possessio*. See, e.g.,

—Continued

ber of years, assessment work requirements were suspended, compliance with the filing requirements of the suspension statutes would constitute "working" under sec. 38. See *Judson v. Herrington*, 130 P.2d 802 (Cal. Dist. Ct. App. 1942).³⁷

While it was also understood that a claim must be "held" as well as "worked," Courts seldom examined the parameters of this concept beyond noting in individual cases that the specific land involved either had or had not been "held" in compliance with the statutory provisions. See, e.g., *Law v. Fowler*, *supra*; *Phelps v. Pacific Gas & Electric Co.*, 246 P.2d 997 (Cal. App. 1952); *Lind v. Baker*, 88 P.2d 777 (Cal. App. 1939). The Courts did recognize, however, that "actual possession" of the claim was required and that this encompassed something more than simply performing assessment work. Thus, the Court in *Law v. Fowler*, *supra*, stated:

Actual possession therefore means something more than mere compliance with the requirement to do the annual assess-

McInerny v. Allebrand, 290 P. 530, 532-34 (Cal. App. 1930).

Inasmuch, however, as the failure to perform annual assessment work would subject a claim, properly located and supported by a discovery, to relocation or forfeiture, the performance of assessment work has generally been seen as the minimum amount of work necessary to assert a claim of adverse possession under 30 U.S.C. § 38 (1976). As will be shown, *infra*, other factors will also have an impact in determining the extent of the claim.

³⁷ In this regard we would point out that contrary to the intimation of the Board's decision in *United States v. Bowen*, *supra*, it is the actual performance of the work, and not merely the recording of a statement that the work was done, which is dispositive of this question. See *California Dolomite Co. v. Standridge*, 275 P.2d 823, 825 (Cal. App. 1954); cf. *Ainsworth Copper Co. v. Beu*, 53 I.D. 382 (1931).

ment work as a basis of title under claim of adverse possession. Plaintiff has shown that at times, when doing assessment work and while the claim was worked under lease, she was in actual possession thereof. She has not shown that she was in such possession for any period of 5 consecutive years as prescribed by the statute (C. S. § 6600). The record shows that she failed to keep the boundaries of the Montezuma claim marked and indicated on the ground so as to afford actual notice. It also fails to show that plaintiff was in actual possession or occupancy of the Montezuma claim during the subsequent period when defendants initiated their rights by locating the Jennie R. claim.

261 P. at 670.

Under the above analysis, the fact that claimants therein had performed assessment work, while a necessary prerequisite to the assertion of a claim under 30 U.S.C. § 38 (1976), was not, itself, dispositive of the question of "holding." This question has traditionally been deemed to be one of fact, determinable only by reference to the specific evidence in any case. See *California Dolomite Co. v. Standridge*, *supra* at 825 (and cases cited). What we must initially examine, however, is whether the Ninth Circuit's decision in *United States v. Haskins*, *supra*, prohibits any Departmental inquiry into these matters.

Certainly some of the language used by the Court seems to foreclose examination by the Department of the applicability and extent of Haskins' sec. 38 claim. Thus, the Court stated:

We agree with the district court that the section is applicable to this case. The evidence unequivocally shows that Haskins and predecessors have been in pos-

session of the ground and have worked the claims for over half a century and for much longer than five years prior to the enactment of the Watershed Withdrawal Act of May 29, 1928. Section 38 permits them to assert valid placer locations for the ground in question without proof of posting, recording notices of location and the like. [Citations omitted.]

505 F.2d at 250.

Subsequently, the Court declared:

Haskins having occupied and worked the ground for more than five years may assert placer locations without proof of recording and posting. He must, nevertheless, prove discovery of a valuable mineral because the statute has no application to a trespasser on public lands, title to which cannot be acquired by entry under the mining laws of the United States. *Cole v. Ralph, supra*; *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145 (9th Cir. 1920).

Id. at 251.

As our review of the evidence adduced at the prior hearings shows, it is clear that appellant's family did work portions of the land now embraced by the Haskins Quarries placer mining claim, well before the withdrawal in 1928. The question which we wish to raise, however, is whether it was the intent of the Court to rule definitively on the areal extent of the placer claim or merely to rule that a showing of holding and working had been made, leaving the actual configuration of the claim, as well as its validity, to be determined by the facts as were developed at the subsequent hearing. We must admit that, whether intentionally or not, the Court arguably appeared to foreclose this entire line of inquiry. Nevertheless, absent a clear state-

ment that the issue of the extent of appellant's holding and working, or the permissible ambit of the claim, was beyond scrutiny of this Department, we will not assume the Court meant to preempt this Department's authority to initially determine all facts related to a claim of entitlement to land or the minerals found therein. *See generally Cameron v. United States*, 252 U.S. 450 (1920); *Schade v. Andrus*, 638 F.2d 122, 124-25 (9th Cir. 1981). Accordingly, to the extent we think necessary, we will treat these issues as open to our review.

First of all, however, we must determine whether the Haskins Quarries placer mining claim was, in 1928, and is today, supported by a discovery of a valuable mineral deposit in a placer formation. We will now examine the record developed at the most recent hearing.

The contest complaint which issued on Mar. 7, 1975, charged, *inter alia*,³⁸ that, with respect to the material in placer formation:

1. There are not presently disclosed within the boundaries of the mining claim, nor have there been disclosed at any time up to the present, minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery nor is such land chiefly valuable for building stone.

2. The land embraced within the claim is nonmineral in character.

³⁸ The allegations relating to materials other than those in placer formation are omitted since the decision of the Ninth Circuit clearly held that the lode values could not be utilized to support the placer location. *United States v. Haskins, supra* at 251. In any event, as we noted above, a lode discovery would not support a placer location. *See, e.g., Cole v. Ralph, supra.*

With reference to the claim, itself, the Department made seven separate allegations:

1. The claim does not conform to the United States system of public-land surveys and the rectangular subdivisions thereof.

2. The claim includes more than twenty acres for each individual claimant.

3. The boundaries of the claim have not been clearly marked on the ground.

4. The land embraced within the claim is not held in good faith for mining purposes.

5. The \$100 worth of labor or improvements required by 30 U.S. Code Section 28 has not been performed or made on or for such claim.

6. It has not been worked as a claim within the meaning of 30 U.S. Code Section 38; or has not been so-worked since May 29, 1928.

7. No portion is, nor since 1900 has it been, used or occupied as a millsite by the proprietor of a vein, lode, or placer for mining, milling, processing or beneficiation purposes or other operations in connection with such mines, nor has it been so-used by the owner of a quartz mill or reduction works.

On Mar. 27, 1975, contestee filed an answer denying all of the above allegations. A prehearing conference was held on Sept. 24, 1976, and the case came on for hearing on Feb. 1, 1977, and continued for 2 more days.

The first witness called by the Government was the contestee, Richard P. Haskins, who was examined as an adverse witness.³⁹ Haskins testified generally as to the

operation of the claim in the 1920's and 1930's, noting that after his father's death in 1929, his mother managed the claims until her death in 1954. At this time his brother, Bartholomew, assumed the major responsibility, which appellant, himself, assumed upon his brother's death in 1962. He testified, however, that except for the period from 1944 to 1954, he always stayed in contact with what was transpiring with the claim (1977 Tr. 122). He noted that in the 1930's material was being shipped to iron foundries and to Hill Brothers Chemical (1977 Tr. 122). He noted that his brother had been responsible in 1930 for contacting the iron foundries and initiating "the flux stone business" (1977 Tr. 123).

In response to a number of questions relating to the lode/placer conflict, Haskins testified that he had never used either term in describing his claim and basically stated that it was not until Emmett Ball, the Government mineral examiner in the 1965 hearing, had spoken with him, and Hale C. Tognoni, his present lawyer, had examined the claim, that Haskins commenced referring to the claim as a placer (1977 Tr. 123-25).⁴⁰ There was also general testimony that Tognoni had prepared the affidavit, dated June 2, 1972, which had been submitted to the District Court in connection with *United States v.*

³⁹ Actually, the first witness to testify was Patrick R. Haskins, son of the present claimant. His testimony was taken out of order to accommodate his schedule. This testimony will be discussed in the general analysis of contestee's evidence, *infra*.

⁴⁰ This reference to Ball was subsequently explained as follows: "[Mr. Ball] made the statement that it was illegal when I was selling rock there because it was placer material. This was in May of 1963." (1977 Tr. 142). See also 1977 Tr. 403; Exh. R-7.

Haskins, No. 72-246-JWC (*see* Exh. G-2 at 233), on the basis of "months of memoranda" which Haskins had sent to him (1977 Tr. 130). Haskins was admittedly unable to define all the terms used therein.

In discussing this affidavit, however, the following colloquy transpired:

Q. What do you understand to be meant by this selecting mining?

A. Well, you can pick out as to what it is all twisted so much. If you want a piece of gneiss, which is all broken loose, and everything, if you want a piece of dolomite, if you even want a piece of quartz, that is laying there, if you want a piece of quartz—

Q. Just a moment. What does the meaning consist of with this steep wall and steep slope?

A. Well, in other words, mother nature does the mining actually by storms and it loosens it and it throws it down into the creek bottom itself of lime rock creek.

Q. Are you stating that mother nature selectively mines this quarry face?

A. Well, lets put it this way. It will bring it all down. Then, you can shake it as it hits the main flow in the creek.

JUDGE: In other words, mother nature does mine it, is that it?

THE WITNESS: Yes. That is right. That is what I would say. It has removed it from its original location.

(1977 Tr. 131-32). Haskins subsequently testified, in relation to a statement in the affidavit concerning the selective mining of limestone which was kilned and sold as plaster, as follows:

JUDGE: All right. What is your definition or idea of what selectively mined means?

What do you mean by that?

THE WITNESS: If you are going to mine out a piece of dolomite, you are going to cut a piece out.

JUDGE: So, you can go up there and you cut a piece out.

THE WITNESS: Yes. That is right. (1977 Tr. 136-37).

Haskins also testified that, so far as he knew, there had never been any removal of materials from the two millsites (1977 Tr. 141-42). In reference to sales from the claim (which were listed with the 1968 application for patent, *see* Exh. R-6), appellant stated he was unable to say whether they differed from those used to support the patent application in the 1930's (1977 Tr. 169-70, 265).

Three other witnesses were called by the Government. Edward Medina, a realty assistant dealing in land administration, testified as to a search of the records of the county recorder's office to ascertain the nature and kind of proofs of labor which had been filed in reference to the lands embraced by the claim. His results were tabulated and submitted as Exhibit G-7. Medina pointed out that there was no recorded mention of a placer claim until 1968. While this compilation indicated that no evidence of assessment work or notice of holding under a suspension statute had been filed for a number of years for the lode claims, on cross-examination, when Medina was confronted with evidence that documents had been recorded for those years (*see* Exh. R-12), he admitted that the recorder's office had obviously made some errors (1977 Tr. 198-200).

James R. Mason, Jr., a mineral examiner, testified as to his physical examination of the site, and a number of photographs showing the claim were put into evidence. With specific reference to the area comprised by the streambed, Mason testified that there were 2.44 acres inside the flood plain on the Lap Wing and 1.23 acres inside the flood plain on the Lady Helen (1977 Tr. 223-24). Based on these figures, Mason then estimated the tonnage of carbonate rock on three different assumptions relating to its presence as a constituent component of all the material in the streambed, viz., 1 percent, 5 percent, and 10 percent. His conclusions were that on the Lady Helen, depending upon presumed percent of carbonate rock, there would be 29.72 tons per foot of depth (tpf), 148.6 tpf, and 297 tpf, respectively. For the Lap Wing, the estimated tonnage was 59 tpf, 295 tpf, and 590 tpf, respectively. His calculated figure for the total flood plain, at a 10 percent estimated presence of carbonate rock, was 887 tpf of depth (Exh. G-13). Mason's calculations also showed that, assuming 3 feet of depth on the Lap Wing, there would be 11,800 cubic yards on the Lap Wing, or roughly, 17,700 tons.

Finally, Gerald E. Gould, Regional Mining Engineer for the Forest Service, testified. His testimony was primarily directed to the physical situs of the claim. He stated that, based on the description in a notice of the claim filed by appellant in the county recorder's office on May 2, 1968 (Exh. R-1),

he had attempted to plot the claim. Based on his calculations, he stated that there was a descriptive error of over 46 feet, and that the description would be completely inadequate for the purposes of passing title (1977 Tr. 238-39). Similarly, he found that the description which Haskins had filed in his answer to the Government suit in ejectment (*see* Exh. G-2 at 19), had a closure error on the order of 350 feet (1977 Tr. 253). He admitted that he had not gone on the grounds of the claim in making his calculations (1977 Tr. 257).

Contestee presented the evidence of three witnesses: Richard Haskins, the claimant, Patrick R. Haskins, his son, and Dudley L. Davis, a registered geologist and mining engineer.

Patrick R. Haskins, who is employed by the California State Department of Transportation as a heavy equipment mechanic, testified that he also worked as a mechanic operator for his father. He stated that he was on the claim regularly from 1955 to 1968, and actually helped his father work the claim from 1966 to 1968. In 1968 he entered the military service. Subsequent to 1972, when he left the service, he has been responsible for maintaining the equipment and helping out with road repairs, though since his marriage he has had less time to help (1977 Tr. 48-50).

He described the mining operation as basically being one in which they hauled material from the streambed to a working area near

the highway where it would be accessible to trucks. There it would be stockpiled and loaded onto pallets, bound with chicken wire (1977 Tr. 51-52). He stated that mining was primarily down in the canyon and explained how the supply of minerals was replenished as follows:

A. During rain storms or we had earthquakes, that would knock hundreds of tons of rock down. However, normally if we wanted a specific rock out of this, we would take the D-8 and build the road up to it and take a cut out of it. When the rock falls, it comes into the creek and we pick it up.

However, usually something of this matter, we wouldn't have to go right to the face or whatever, because enough of it is in the creek already.

Q. It keeps falling off the creek?

A. Keeps falling from the lode or the face of the deposit.

Q. Well, after the earthquake, then, a lot of rock came down into the canyon?

A. Yes. In some areas it literally filled up the canyon.

Q. After each storm?

A. Okay. Those materials that have been knocked down by the earthquake had been washed down the creek. Usually your sand and dirt and what have you would be washed off exposing the boulder and your larger rocks.

Q. Well, each year then your road would be covered with the material washed down from the canyon?

A. Yes.

(1977 Tr. 54-55). He mentioned many times in his testimony that while the quarry faces were the source of the materials, most mining activities consisted of culling the dolomite which the rain had washed into the canyon (1977 Tr. 69, 78, 81, 84-85). He stated that his

father did not engage in drilling or blasting because of bad experiences he had had on other properties (1977 Tr. 73-74). He also stated that insofar as he could recollect, nothing had ever been removed from the two millsites, though they were used for stockpiling (1977 Tr. 66).

While Patrick Haskins made a number of references to veins, including a statement that "the veins are running parallel with the creek in some area" (1977 Tr. 89), he later explained that he used the term "vein" interchangeably with "outcropping" and that he was also using that term to refer to material after it was dislodged from an outcropping (1977 Tr. 106-08). He admitted, however, that he had no difficulty identifying the dolomite upon the hill.

The claimant, Richard P. Haskins, in addition to testifying as an adverse witness for the Government's case, also provided testimony for the contestee's side. First, Haskins described the history of the claims. He noted that while lime had been produced from the claims in the early years, production ceased around the late 1880's and that by 1915 the lime kilns were used as storage sheds (1977 Tr. 283-84).

He described the work done from 1900 to 1920 as primarily tunnel work looking for gold, silver, and precious metals. He also noted, though, that some dolomite was used as chicken grits, and cobble stones were sold for building houses (1977 Tr. 291-92). He subsequently

stated that both granite and dolomite were used for chicken grits (1977 Tr. 354). Haskins focused particularly on the period between 1918 and 1928.

Q. Then in 1918 and 1929 your dad was evidently managing and operating all the way through there?

A. Yes.

Q. What other kinds of rock were you selling? Now, we have chicken grits; you said dolomite?

A. Yes.

Q. What were you doing with that?

A. That was dolomite that was sold to—oh, they were sold to companies down in town here or they would process it themselves. I don't know exactly of this production here.

JUDGE: What kind of companies were they?

THE WITNESS: They were lime product works. They would crush the material. The companies or one of the companies were right by the gas works over there.

(1977 Tr. 305-06). Concerning recordkeeping, Haskins testified that he was the bookkeeper from 1930 on, but most of the records were destroyed after his mother's death.

Haskins then recounted more recent mining activities on the claim noting that most of the material has fallen into the creek over a period of years and that this process has been accelerated by storm waters. There have been times, however, when crowbars and dynamite were used to help a rock down the hill or to crack larger boulders (1977 Tr. 332-33, 396-97). He noted that an earthquake in 1970 deposited a lot of material in the creekbed (1977 Tr. 342). He stated that his present sales consist primarily of dolomite

with occasionally other rocks being sold (1977 Tr. 379).

Haskins was then examined concerning the similarity of the sales submitted as an exhibit to the 1968 placer patent application (*see* Exh. R-6) with those previously submitted in support of the lode claims. He indicated that the first 12 entries in exhibit R-6 were not duplicates of sales submitted in support of the lode claims in the 1965 hearing (1977 Tr. 394-95), though the rest of the sale listed were referred to in the 1965 hearing (1977 Tr. 409).

On cross-examination, Haskins was asked what he understood was meant by the term "building stone." The following discussion transpired:

A. Building stone, to my way, is to building walls, ornamental things, fireplaces, rock gardens, or even houses. The facing of houses, also.

Now, they use[d] to build them out of it but now they just use it as facing.

Q. Well, the answer may be obvious to you, but I would like your understanding.

Would you include material used in terrazzo?

A. Well, that could be because it is used as a flooring.

Q. It is essentially small pieces?

A. That is correct.

Q. The size of gravel?

A. Yes.

Q. You would regard that as building stone?

A. That would be processed building stone to me. It is put together.

Q. It could equally be any kind of stone process, couldn't it?

A. Yes, but you have to actually—terrazzo is made for the actual beauty and durability of it. You can't use all kinds of stone.

Q. Is it the use of material as terrazzo which in your mine [*sic*] makes it building stone?

A. Yes.

Q. I would infer that you would not include flux as building stone, would you?

A. Flux stone can be used as building stone.

Q. Yes, but when it is used as flux it is not used for building, is it?

A. That is correct.

Q. All right.

A. There is nothing left of it after it is used.

Q. You would not consider, I take it, stone used metallurgically as building stone?

A. I would.

Q. You would?

A. You can use it for that.

Q. Well, do you mean that anything which can be used in a building is building stone?

A. Any rock material.

Q. Which can be used in a building?

A. That is right.

Q. Is any rock material which can't be so used?

A. Well, soft sandstone or a decomposed granite.

Q. Other than that, almost any stone could be a building stone; is that correct?

A. If it is a presentable stone. It all depends as to what they want and as they it.

Q. I see. You include stone used for landscaping as building stone?

A. Yes. That can be used to build a wall or make a design or anything.

Q. What about roof granulars?

A. Roof granulars is actually most of it, is on your white type of material.

Q. But do you regard that as building stone?

A. It can be used for building stone.

Q. What about chicken grits?

A. Well, chicken grits can be used for building stone if it is hard enough.

Q. What about fillers?

A. Fillers is a filler material. It is your certain building material like dolomite ground up two or three hundred.

Q. I take it you include these things I have enumerated as building stone provided they could be used as building stone?

A. They can be used both ways. Some of them can.

(1977 Tr. 415-18).

Haskins admitted that the material which he presently sells is the same material which he had always sold (1977 Tr. 421) but that he had no idea of the amount of material sold, either before or after 1930, which was actually used in building (1977 Tr. 427). He stated that he had found no mineral values on the millsites (1977 Tr. 445). He also stated that the "decorative stone" consists of dolomite, gneiss, and granite-type of materials (1977 Tr. 446).

The last witness called by contestee was Dudley L. Davis, a registered geologist and mining engineer, who had considerable mining experience with both lode and placer claims. He first testified as to his general impression concerning lode and placer locations. Thus, concerning a question relating to whether the rock in place is locatable on the vein, he responded: "The valuable mineral which is contained in the vein is what you are actually looking for or locating for" (1977 Tr. 464). He subsequently elaborated on his understanding:

Q. Then you are talking about this vein being between some walls and rock in place. What do they mean by that?

A. The rocks there that I am talking about is the country rock which is distinctly different from the vein.

Q. Well, the vein can be any number of types of materials, is that correct?

A. That is correct.

Q. But is it the vein itself that is locatable or the gold?

A. I said that, in my opinion, it is the valuable minerals as contained within the vein which you are actually locating, which the claimant actually claims the valuable minerals.

(1977 Tr. 474-75).

Davis, noted, however, that building stones were locatable in placer form (1977 Tr. 476, 480). Davis also attempted, at a number of points, to define what he meant by "building materials." We set forth a consolidated version of his attempts.

BY MR. TOGNONI:

Q. When you spoke of building materials being locatable, what do you mean by building materials? What are some of the things included on that?

A. Building materials include granite, limestone, dolomite, schist, gneiss, and any other stone which are hard enough to be used in building.

(1977 Tr. 481).

[BY MR. LAWRENCE]

Q. All right. Now, you have used the expression building stone, in one or more places. What do you mean by that?

A. I think I defined that as any stone which is suitable for building, either because of its hardness or its beauty or its texture. Whatever appeals to a person that wants to use it in a building or garden or whatever.

Q. Do you imply in your definition, sir, that the stone can be so used?

A. Not necessarily. It should be useful as building.

Q. But it is acceptable use?

A. Yes.

(1977 Tr. 502).

BY MR. LAWRENCE:

Q. Okay. Going back, did you include terrazzo as a building stone?

A. Terrazzo are the chips which are made from building stone.

Q. I see.

A. They are put into cement and then they are polished and used for building purposes.

(1977 Tr. 553).

Davis also explored, in some detail, his perception of the proper mode of locating limestone. Because of its importance, we set out this exchange *in extenso*.

[BY MR. LAWRENCE]

Q. Now, do you have any knowledge as to whether or not limestone has been held properly locatable as a lode?

A. Yes. And it is my understanding that it depends on the use to which limestone is to be put.

Q. Do you believe it has no relationship to the mode in which it occurs in the ground?

A. Rather the use to which it has been put is my understanding of whether you should locate it as lode or placer.

Q. Well, would you explain that more fully? What is the difference?

A. My understanding is that if the material is to be used for chemical purposes you are not supposed to locate it as a placer claim.

Otherwise, it is my understanding that is should be located as a placer claim.

Q. But conversely it would be your understanding that it should be located as a lode?

A. If you do not use one you should use the other, correct.

Q. You would not automatically say that a lode location was improper?

A. I don't know what they are going to use it for, you see.

Q. But without further inquiry you would not question a lode location, would you?

A. A lode location of a limestone deposit?

Q. Yes.

A. I would question it immediately because if I were locating it I would locate it as placer.

However, if the material was to be used for chemical purposes, then, it is my understanding that it is properly located as a lode.

Q. You would include material used as flux stone?

A. I suppose so, although it is a matter of judgment of the locator.

Q. I mean you would regard that as a chemical use?

A. Yes.

Q. And the same would be true of a metallurgical use, is that the same thing?

A. Same thing.

Q. General chemical use as being the same thing?

A. I say it is a matter of—you don't know when you locate these claims what it is going to be used for. You think it is valuable for one thing and sometimes it turns out to be valuable for another.

* * * * *

BY MR. LAWRENCE:

Q. Now, in the event that a limestone vein or lode has been located as a lode claim and is used for chemical purposes, the entire body of the lode is utilized; is that correct?

A. It may or may not be.

Q. It can be used?

A. We are talking about a theoretical situation now?

Q. Yes.

A. It might be used regardless of how it is located, either properly or improperly. They might mine the entire body if that is your question.

Q. Yes.

A. Okay.

Q. In that event, the valuable continuity is the limestone itself; is that right?

A. The calcium carbonate that is in the limestone.

Q. Not a single component but in the limestone?

A. No. The limestone has a little dolomite and a little this and a little of that.

Q. Well, those are impurities?

A. You can see the entire amount they would not be so used. They would cast out the impurities that was conveniently possible.

Q. In some instances they would be further retained, right?

A. Yes.

(1977 Tr. 513-17).

Subsequently, Davis elaborated further on his contentions:

BY MR. LAWRENCE:

Q. Do you agree that dolomite deposited at a zone or mineralized rock lying within boundaries separating it from neighboring rock, may be regarded as a lode?

A. It may be by the uninitiated.

Q. By that you mean persons who have not been initiated by court's decision?

A. No. Who has not been through a course of geology because a sedimentary bed is always bounded by an entirely different rock.

If that sedimentary bed is then uplifted because it stands at a high angle so that its original sedimentary characteristics are obliterated, the uninitiated might consider it a lode.

Does that answer your question?

Q. Yes. I take it then you do not use the word lode to describe the kind of formation I have just described to you?

A. No. Not if I can determine that it is in or was in fact a sedimentary bed in its initial stages.

(1977 Tr. 520).

While Davis admitted that the materials found on the claim were of common and widespread occurrence, he argued that the claim provided a convenient gathering together in one spot of various varieties of stone (1977 Tr. 508). When asked to enumerate the deposits

which he thought were valuable he stated "schist, gneiss, quartzite, and dolomite and perhaps some others" (1977 Tr. 544). When asked of the distinction between the deposit and country rock, Davis declared "what you are calling the country rock I am calling building stone. There is no distinction in my mind" (1977 Tr. 541).

At one point, Davis attempted to shift the emphasis from dolomite. Thus, he declared: "I might state that [there] has been a great deal of emphasis placed on dolomite, but there has also been considerable material in the nature of building stone as decomposed granite and other stones which have been mined from the property other than dolomite" (1977 Tr. 524). In a later discussion concerning Davis' expressed opinion that a discovery of the deposit existed prior to 1929 the following exchange took place:

Q. And in your opinion did this discovery take place prior to 1930?

A. I am sure it did, yes. The records show that they did mine and ship this deposit before 1930.

Q. Now, did the record show any shipment of gneiss prior to 1930?

A. They referred to it as building stone.

I have no way of knowing whether it was gneiss, schist, quartzite or, they do mention shipping dolomite. However, as to the other building stones, other than the chicken grits, I believe he called it chicken grits, which was actually or technically called chicken liquor.

(1977 Tr. 545).

In sum, Davis' testimony was that the deposit of building stone was properly located as a placer and is now, as it was in 1930, supported by a discovery.

With Davis' testimony, the hearing closed. Both sides subsequently filed briefs, and on Dec. 30, 1977, Judge Morehouse rendered his decision. First, he reviewed the seven specific charges which we set forth earlier and, for various reasons, ruled against the Government on every one.⁴¹ Then, Judge Morehouse turned to the question of the existence of a discovery of a placer mineral. Judge Morehouse declared:

This is the crucial issue and, having reviewed the entire record, it is my conclusion that there has been disclosed within the boundaries of the claim placer materials sufficient in quantity, quality, and value to constitute a valid discovery. The record shows that the dolomite lode deposit on the claim consists of a series of lenses of dolomite in the gneissoid granite from 30 to 40 feet thick and from 100 to 200 feet in length. Tragitt and Davis estimate the quantity of dolomite in this formation to be a minimum of 900,000 tons. The Ninth Circuit in *Haskins*, *supra*, specifically held:

"Whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone in lode formation. Haskins cannot use the same material that he relied on as a discovery of valuable mineral under his lode locations to support his present placer locations."

However, in addition to the material in lode formation described above, both Tragitt and Davis estimated that there was a minimum of 100,000 tons of decorative stone marketable for use as roofing granules, terrozzo [*sic*] chips, and decorative stone in walls, rock gardens, fireplaces, and patios. It is recognized that records of sales of placer material during the 1920's are not voluminous and most of the sales used in support of the

⁴¹ We will discuss various of these points, *infra*.

patent application for the lode claims are used in the placer patent application. That they were so used does not alter the nature of the rock formation from which these sales were made and the record is clear that at least some of those sales for which records do exist, and many other sales for which records do not, were made from rock in placer formation. Many of the records were lost following Mrs. Haskin's death in 1954 and others were lost in a fire. Of particular significance is the fact that nowhere in this record is there any testimony by a Government mining engineer or geologist to the effect that this was not a valuable placer mineral deposit. Neither Mr. Mason nor Mr. Gould, both mining engineers who testified for the Government, were asked this question. In addition, Mr. Emmett Ball, who first advised Haskins that placer materials were being sold from a lode claim in 1963, was present in the courtroom during the hearing and was not called as a witness. The only reasonable inference to be drawn is that all three considered the placer material on the claim to be a valuable mineral sufficient in quantity, quality, and value to constitute a discovery.

(Decision at 24-25).

Our de novo review of the entire record convinces us that Judge Morehouse misinterpreted both the evidence presented at the 1977 hearing and the Ninth Circuit's decision in *United States v. Haskins*, *supra*. In addition, we find the inferences which he sought to draw unsupported by the record. Finally, we think it clear that the Haskins Quarries placer mining claim, even assuming it ever existed, was not supported by a discovery of placer material in 1928, when the land was withdrawn, nor is it today, and that the purported claim must be determined a nullity.

It is essential to realize that contestee and his expert were actually testifying about two separate types of deposit. First, they referred to loose rocks deposited in the stream bed by the natural action of erosion and, at least lately, by earthquakes. The physical extent of this deposit is actually quite limited, testimony from Mason indicating that it embraced only 3.67 acres out of the total 85 plus acres sought. We will refer to this as the detrital deposit.

There is also, however, another deposit which is involved. This claimed deposit is coextensive with the original four mining claims because, of course, it is exactly the same deposit which has been litigated since at least 1933.⁴² Contestee's position as regards this deposit, which we will refer to as the source deposit, is simply that it should have been located as a placer claim rather than as lode claims. While these two deposits are clearly related, it is necessary that we differentiate between the two in our analysis. We will therefore examine first the source deposit.

A review of the record of all the proceedings heretofore held may leave the impression that over the period of adjudication contestee's experts have been irreconcilably contradictory in their testimony. Thus, Baverstock, claimant's expert in 1933, stated that the deposits

⁴² With respect to the lands embraced by the millsites, however, we shall show that there is no possible way that appellant's placer claim, consistent with both appellant's earlier arguments and most recent testimony, could embrace this land.

were lenticular and "are most decidedly in place" (1933 Tr. 10), and Mallery, another expert testifying for the claimant, stated "I am stressing the continuity of the vein from a geological standpoint" (1933 Tr. 16). On the other hand, Davis testified in 1977 that the source deposit was properly locatable as a placer. Although these witnesses seemingly disagree on the nature of the deposition, they actually do not. The key to reconciling the apparent contradictions rests in recognition of the fact that Davis was of the opinion that the claim was and had always been located for building stone, which by statute must be in placer form, whereas the earlier experts merely testified on the form of deposition, which happens to be lode.

As we noted above, lands chiefly valuable for building stone must be entered as placers under the Building Stone Act, *supra*. Where, however, a limestone deposit is valuable for its chemical or metallurgical properties, it is the nature of the deposition which determines the proper form of location. Davis clearly had reference to this dichotomy when he testified, in response to a question of whether or not limestone has been held properly locatable as a lode, "it is my understanding that it depends on the use to which limestone is put" (1977 Tr. 513).⁴³ Davis was not denying that

the source deposit was rock in place.⁴⁴ Rather, he was contending that because the source deposit was building stone, it was, of necessity, located as a placer. If the lands embraced by the dolomite deposit are now, and were in 1928, chiefly valu-

474-75). As we noted *supra*, while this was, at one time, the view of the Department, as such early cases as *Henderson v. Fulton*, *supra*, and *Jefferson-Montana Copper Mines Co.*, 41 L.D. 320 (1912), attest, subsequent Court and Departmental decisions have long since necessitated abandonment of this concept. See, e.g., *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, *supra*; *Webb v. American Asphaltum & Mining Co.*, *supra*; *United States v. Bowen*, *supra*.

If, however, one adheres to this old interpretation, the conclusion which must flow is that limestone valuable for the limestone, itself, is only locatable as a placer, since it cannot be a lode. Thus, while Davis obviously recognized that a number of decisions exist which have affirmed the propriety of locating a limestone deposit of chemical or metallurgical grade as a lode, he has misinterpreted the scope of these rulings. There is no rule, despite Davis' belief (see 1977 Tr. 513-15), that limestone valuable for chemical purposes must be located as a lode. Rather, the rule is that such a deposit is properly located according to the form of its deposition. See *Vivia Hemphill*, *supra*; *United States v. Wurts*, A-30945 (Jan. 23, 1969). As an example, if the detrital deposit herein was valuable for chemical purposes it would be locatable as a placer, not a lode, because it is a placer deposit. Since Davis does not recognize the propriety of locating limestone as a lode (the values being the vein itself, rather than what the vein carried), he has misread the Departmental rulings on this point.

⁴⁴ The closest Davis came to actually asserting that the deposit was not in lode form occurred in this testimony relating to sedimentary rock (1977 Tr. 520). To the extent Davis is of the belief that the fact that the deposit may have originated as a sedimentary bed precludes its location as a lode, he is wrong. See *United States Gypsum Co.*, 60 I.D. 24 (1947); *San Francisco Chemical Co. v. Duffield*, *supra*. As was noted in *McMullin v. Magnuson*, 102 Colo. 230, 239, 78 P.2d 964, 969 (1938), "by no statute or judicial pronouncement is the origin or method of formation of a mineral body controlling in determining whether the ground is subject to location as a lode or placer."

⁴³ At this point we would emphasize that Davis' understanding is somewhat flawed, though understandably so. Davis' testimony clearly showed that he was of the view that a lode or vein deposit was only located for the mineral carried therein (1977 Tr. 464,

able for building stone, there can be no gainsaying that conclusion.

[7] When the records of the hearings held prior to 1977 are examined, however, it becomes impossible to sustain the argument that the land was chiefly valuable for building stone at any time until the most recent past, if ever.⁴⁵

In the various proceedings which occurred between 1930 to 1965, the claimants and their witnesses testified to uses to which the dolomite was put, or for which it was suitable, ranging from floors, roofing paper, plaster, and golf courses (1930 Tr. 29), chicken grits and gravel for mosaic terrazzo (1930 Tr. 54), terrazzo, stucco, chicken grits, sound proofing, in soda plants and the sugar industry (1933 Tr. 25-26, 34, 38), crushed for use as additives and filters (1965 Tr. 126), cement, tanning, glass, plaster, cow feed, and paper (1965 Tr. 161). But by far the use most consistently mentioned has been as flux (1930 Tr. 29, 74; 1933 Tr. 34; letter of July 19, 1935, from Tessie Cooke-Haskins to Secretary Ickes; 1965 Tr. 125-28, 161). The simple fact of the matter, however, is that use of dolomite for flux is simply not building stone use. Indeed, of all the myriad uses for this stone mentioned over this period only three are even arguably

building stone uses: terrazzo, roofing granules, and stucco. Even assuming, *arguendo*, that these are building stone uses, nothing in the record generated prior to 1968 could possibly support the conclusion that the land was chiefly valuable for building stone.⁴⁶ This is so even without taking into account the fact that Hearing Examiner Holt, who considered combined sales for all possible uses, found the deposit on the Lady Helen depleted by 1965, and no existing market for any other deposit within the claims.

In any event, we note that the Ninth Circuit specifically directed that "whatever the merits of Haskins' claimed placer locations, their validity cannot be supported by proof of the presence of dolomite or dolomite limestone *in lode formation*." *United States v. Haskins*, 505 F.2d at 251 (italics added). Even were contestee able to show that the source deposit contained a marketable supply of building stone, such a deposit would nevertheless be *in lode formation*, and thus could not, consistent with the directions of the Court of Appeals, properly be considered in support of the placer claim.

⁴⁵ We note that the repeated comments relative to the value of the land for subdivisional purposes certainly raise questions as to the principal value of the claim, even assuming the presence of a discovery of a valuable placer mineral deposit. See generally *United States v. Kosanke Sand Corp. (On Reconsideration)*, 12 IBLA 282, 299-302, 80 I.D. 538, 547-48 (1973).

⁴⁶ We wish to clearly emphasize that we are assuming *only for the sake of argument* that the sales of dolomite herein for stucco, roofing granules, and terrazzo would be classified as building stone uses. It is arguable whether any of these uses relate to the purposes for which the Building Stone Act was adopted. See *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, *supra* (limestone useful in the making of cement not locatable under the Building Stone Act); *Stanislaus Electric Power Co.*, 41 L.D. 653 (1912) (Building Stone Act applies to stone of special value for structural work and other recognized commercial uses).

Thus, we are left to examine the detrital deposit. We think it clear that both the Ninth Circuit and Judge Morehouse were primarily concerned with this deposit. It is obvious to us that, *to the extent* that this deposit was created and replenished by the natural forces of erosion, water runoff, and earthquakes, the deposit is in clearly placer formation (though its physical area is necessarily quite limited).

Our problem derives, however, from the fact that despite both the Tragitt affidavit and the 1977 testimony of both contestee and Davis, it is impossible to read the early records as supporting a contention that this detrital deposit has been the historical focal point of mining activities.

In contradistinction to the laudations directed to the effect of water runoff in the 1977 hearing, such storm waters were seen as a positive menace in the earlier testimony. Thus, in 1933, in reference to the "original" cut on the Lap Wing, Tessie Cooke-Haskins stated that "it was worked for several years and a cloud burst covered it up" (1933 Tr. 23). Concerning a recent cut she stated "[s]ome of that had been mined from this original cut the storm waters would come down and *we had to protect it where they had mined* and there was a pile of rock on high ground, I would say ten tons taken from this cut that is there now" (1933 Tr. 25). Subsequently, she spoke of another cut which had been "obliterated" by the rain storms (1933 Tr. 25). While there was passing mention of wash

"float" by Jesse Tiffany (1930 Tr. 53), he also expressed the view that "most of the lime had been removed" (1930 Tr. 55).

Regardless of the methods claimant may use for mining today, it is clear that historically cuts were blasted in the mountain side (Tiffany, 1930 Tr. 53; Bartholomew Haskins, 1933 Tr. 32). The blasting of lode material into a gully does not transform the material into a placer deposit. Clearly, a certain percentage of the float got into the creekbed through the affirmative intervention of the claimants and not the benign forces of nature.

We are not unaware that the testimony at the first two hearings did not relate to either the Lady Helen or Roger Williams claims. And we do recognize that various statements were made, particularly by Friedhoff in 1936, which indicated that the Lady Helen (and possibly the Roger Williams) lode claims were valid. We also note, however, that not only were these statements naked opinions unsupported by any evidence of record, but that claimants never attempted to follow through and actually patent those claims. When they were finally tested at a hearing in 1965, Hearing Examiner Holt found that such accessible deposits as may have existed had long since been mined out. Only after this decision does the detrital deposit (like a veritable Phoenix) arise from the ashes of the claims.

Indeed, there is a certain disingenuousness to claimant's case.

Claims originally located for gold, silver, and vanadium through the passage of time became metamorphosed into lode dolomite claims, and finally take on shape as a single placer claim for schist, gneiss, quartzite, decomposed granite and some dolomite (1977 Tr. 524, 544). These protean claims have, over the years, changed in type, name, number, mineral nature (millsites are now part of a placer claim) and deposit sought. Indeed, the only aspect which has remained constant is the situs of the land and its proximity to Los Angeles. Long ago, though to a far less egregious extent, the Department was faced with a similar case, *Clark v. Ervin*, 17 L.D. 550 (1893). In *Clark v. Ervin*, *supra*, it was contended that a location for building stone made prior to the enactment of the Building Stone Act, which location had clearly been made to acquire the building stone located thereon, could nevertheless be validated by the subsequent discovery of fire clay. Therein, Secretary Smith noted:

The question therefore to be considered is whether this location may be sustained by reason of the existence of fire clay. I do not think it will be seriously contended that if the location made for the building stone fails because unwarranted in law, the locators or their assigns can be permitted to claim a valid location upon the subsequent discovery of some material that is subject to entry under the placer law. In other words if the locators now insist upon the validity of their location by reason of fire clay they must show that the location was made for that purpose and none other. *The placer mining law*

was not intended to be a catch-all system of taking public lands, allowing parties to play fast and loose to suit their own caprice. [Italics supplied.]

Id. at 552. Secretary Smith analyzed the record and, determining that the claim for fire clay was but an "after-thought" of the claimants, held that the claim was properly nullified. *Id.* at 553.

We expressly find that the building stone argument which claimant has advanced herein was "thrown in as an afterthought and not in good faith." *United States v. Haskins*, *supra* at 252. Appellee may well be selling decorative stone today. But there can be no question that during the period for which discovery must be shown, 1923 to 1928 (in order to prevent the Watershed Withdrawal Act from attaching), there was no discovery of valuable placer material, nor could the land be said to have been chiefly valuable for building stone.⁴⁷

Normally, having reached a decision which would be dispositive of the ultimate question before us, we would not further examine other subsidiary or independent questions which an appeal might present. However, considering the lengthy

⁴⁷ Insofar as Judge Morehouse sought to draw inferences from the failure of the Government experts to assert that the mineral deposit was lode in form, we think that such action would be questionable in even the most optimal circumstances. Inasmuch as no one, including Judge Morehouse, saw fit to question the two experts who testified on this point, it seems passing strange to impute conclusions which could have been directly ascertained. As far as the failure of Ball to testify is concerned, we see equally little justification for the inference Judge Morehouse ascribed to this non-event.

and tortured path which this case has already traversed, it is our intention to specify other deficiencies which are manifested in this record. Should, on appeal, a Court determine to overturn our analysis, it would therefore not be necessary to remand this case to the Department for yet further protracted hearings and appeals. Rather, having expressly ruled on each ground, the instant claim would be ripe for patent, needing only compliance with such procedural requirements as remain unaccomplished. There should come a time when even the most inventive litigation comes to an end.

[8] We turn, therefore, to the question of acreage within the Haskins Quarries placer mining claim. We noted above that the Supreme Court expressly held in *Cole v. Ralph*, *supra*, that 30 U.S.C. § 38 (1976) in no way modified the amount of acreage which can be embraced within a single claim. 252 U.S. at 306. Under the mining laws, specifically 30 U.S.C. § 35 (1976), no placer location can include more than 20 acres for each individual claimant. Up to eight individuals, however, may join together and thereby locate an association placer with a maximum size of 160 acres (20 acres per individual). *See* 30 U.S.C. § 36 (1976).

The Haskins Quarries placer claim embraces 85 plus acres. In order for a single claim to obtain that dimension, there must be five colocators. In the patent affidavit filed with BLM in 1968, there were only four locators listed: Richard P. Haskins, Sr., Tessie Cooke-Haskins,

Bartholomew Haskins, and Richard P. Haskins, Jr. Under this allegation, even assuming that it could be shown that these for individuals had held and worked the land embraced by the claim, not more than 80 acres could have been included in a single claim. This point apparently occurred to contestee's counsel, since great pains were taken at the hearing to add on the name of Margaret Maude Haskins as another locator (1977 Tr. 321).

We would point out that Bartholomew Haskins was born in 1905, Margaret Maude Haskins in 1909, and Richard P. Haskins, Jr., in 1911. Thus in 1923, by which date adverse occupancy must have begun, the children would have been 18, 14, and 12 at the oldest. We recognize, of course, that minors may locate claims, and that parents may locate claims on their behalf. *See West v. United States*, 30 F.2d 739 (D.C. Cir. 1929); *Thompson v. Spray*, 14 P. 182 (Cal. 1887); 43 CFR 3832.1. What is involved here, however, is not merely location of a claim as provided by 30 U.S.C. §§ 23 and 35 (1976), with the requisite acts of posting and recording as contemplated by 30 U.S.C. § 28 (1976). This, rather, is a claim grounded in adverse possession in which a showing of actual possession is a necessity.

The record is somewhat obscure concerning the onground activities of Margaret Maude Haskins, Bartholomew Haskins, and Richard P. Haskins, Jr., during the critical years. With respect to Margaret

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Maude Haskins, claimant testified in the 1977 hearing that, while she was present on the property during weekends and the summer (1977 Tr. 287), he could not remember what she was doing (1977 Tr. 294), though some cooking was involved (1977 Tr. 315). Concerning his own activities, contestee stated that he was on the claim as early as age 4 (1977 Tr. 280), that he started physically working on the claim by age 7 (1977 Tr. 119, 285), and that some of his work included "helping and building trails" (1977 Tr. 155). Because he was attending school in Los Angeles, he, too, was only on the land on weekends and during the summer (1977 Tr. 311). In reference to the type of work he performed, he stated "it was my job to get up and milk the goats while [Bartholomew] slept and he went to work" (1977 Tr. 286). There were additional references to Bartholomew Haskins indicating that he was in the armed forces, and subsequently pursuing an education from 1918 to 1924 (1977 Tr. 310), after which he became involved, on a day-to-day basis, with the claims.

While we are willing to accept this evidence, meager though it may be, as establishing the necessary "holding and working" of Bartholomew Haskins for the requisite period (1923-28), we find the evidence insufficient to establish claimant's necessary possession. Sporadic weekend visits and summer vacations, when viewed in light of appellant's young age at that time, will not support a finding that

the claimant, personally, "held" or occupied the claim for 5 years prior to the Watershed Withdrawal Act. And there is no evidence, whatsoever, that claimant's sister ever "worked" the claim within the meaning of 30 U.S.C. § 38 (1976). Contestee has simply not established that Margaret Maude Haskins, or Richard P. Haskins, Jr., occupied and worked the land in conjunction with their parents during the necessary period.

We would point out that this whole question would have been avoided if Haskins had alleged *three* separate placer claims, since there is no limit to the number of 30 U.S.C. § 28 claims that can be simultaneously alleged. Indeed, there is sufficient confusion in the Ninth Circuit opinion to raise questions whether the Court clearly understood that there was only one placer claim. Thus, the Court's decision stated that "Haskins having occupied and worked the ground for more than five years may assert placer *locations* without proof of recording and posting." 505 F.2d at 251 (*italics supplied*). Haskins, however, was claiming only *one* location.

This is not a matter of technicalities. Had Haskins asserted more than one location he would have been required to show the individual validity of each claim. See *United States v. Williamson*, 45 IBLA 264, 278, 87 I.D. 34, 42 (1980); *United States v. Colonna and Company of Colorado, Inc.*, 14 IBLA 220, 226-27 (1974). He would

have been required to show the expenditure of \$500 per claim prior to the issuance of patent. *See* 30 U.S.C. § 29 (1976). And he would have been required to show that assessment work had been performed for the benefit of each of the placer claims.

We have examined the record and find no plausible way of holding that Margaret Maude Haskins or Richard P. Haskins, Jr., occupied any part of the land to the exclusion of others, either individually or in conjunction with their parents. Weekend visits and simply living on the claim are not "holding and working" within the meaning of 30 U.S.C. § 38 (1976). Appellant, having made the assertion of a single placer claim, must be limited to the natural and legal consequences thereof. Accordingly, we would hold that, even if the claim were to be found valid, to the extent that it exceeded 60 acres, such excess would be invalid under the dictates of *Cole v. Ralph, supra*.

[9] We also wish to focus on the question of the propriety of having this placer claim embrace land formerly within two millsites. In its decision of May 18, 1972, the District Court, in ruling in favor of contestee's right to allege a placer location under 30 U.S.C. § 38 (1976), noted: "There is after all a difference between a lode claim and a placer claim. * * * Both types of claims can, of course, be made upon the same property and can co-exist, even though in different ownership." *United States v. Haskins*, No. 72-246-JWC (C.D. Cal. 1972) at

3-4. This statement is correct, so far as it goes. But what neither the District Court nor the Circuit Court examined was the more particular question whether a *millsite* claim is compatible with a mining claim for the same land. The answer is clearly in the negative.

By statute, millsite claims may only be made on nonmineral lands. *See* 30 U.S.C. § 42 (1976). This has been the consistent ruling both of the Courts and the Department. *See Worthen Lumber Mills v. Alaska Juneau Gold Mining Co.*, 229 F. 966 (9th Cir. 1916); *Walsen v. Gaddis*, 194 P.2d 306, 318 (Colo. 1948); *Cleary v. Skiffich*, 65 P. 59 (Colo. 1901); *United States v. Silver Chief Mining Co.*, 40 IBLA 244, 248 (1979); *Emerald Oil Co.*, 48 L.D. 243, 245 (1921). In *United States v. Moorhead*, 59 I.D. 192 (1946), the Department examined an argument similar to that implicitly pressed herein by contestee—that a millsite location was not adverse to a subsequent placer location. In *Moorhead*, the Department noted:

Another contention of Moorhead is that the Coin No. 2 lode should be considered as an amendment of the Coin No. 2 mill site inasmuch as it was located by Thomas, the owner of the mill site, and was not an adverse location, and that therefore the Coin No. 2 mining claim should share in the common improvements as one of the earlier group of claims. This contention is clearly untenable. Rights to a mill site are initiated by its use for mining and milling purposes, whereas rights to a mining claim are initiated by discovery of mineral. The change of location from one to the other necessarily involves a change not merely of form but of purpose. The mill-site

must be located on nonmineral land. By changing the location to a lode claim because it was ascertained that the land therein was mineralized, it was thereby admitted that the mill site was void from its inception, and no mining title can be held to relate back to the inception of a void location. Furthermore, the common improvement work on the mill site could only be applied to the group of mining claims that it tended to benefit. Mill sites are not subject to the annual labor laws and there can be no such thing as the development of a mill site. [Italics supplied.]

Id. at 198.

We would point out that Tessie Cooke-Haskins attempted to acquire title to the Lap Wing mill site in 1929 on the implicit theory that the premises were nonmineral in character. In 1962, contestee, himself, represented that both millsites were nonmineral in character by filing a verified statement to that effect, and their validity was reasserted in his answer to the subsequent contest complaint filed by BLM.

We hold that, under the application of judicial estoppel, contestee cannot now be heard to contend that land he represented as nonmineral in character in prior actions, some of which sought the acquisition of title from the United States, was, in fact, during this entire period, mineral in character. The general parameters of the doctrine of judicial estoppel were described by the Tenth Circuit Court of Appeals in *In Re Johnson*, 518 F.2d 246 (1975):

Under the doctrine of judicial estoppel a party and his privies who have knowingly and deliberately assumed a particu-

lar position are estopped from assuming an inconsistent position to the prejudice of the adverse party. This rule ordinarily applies to inconsistent positions assumed in the course of the same judicial proceeding or in subsequent proceedings involving identical parties and questions.

Id. at 252. Considering the expense to which contestee had already put the Government by reason of the assertion of his millsite claims in past proceedings, contestee cannot now be heard to assert that the land is mineral in character.⁴⁸ Thus, even were we to find that a discovery of a placer deposit existed in 1929 and continues to exist to this day, we would exclude the lands embraced by the millsite claims from any patent which was to issue.

[10] Even without the invocation of judicial estoppel it is difficult to see how a 30 U.S.C. § 38 mining claim for the land embraced by the millsites could be sustained. The provisions of sec. 38 require that no "adverse claim" exist. Inasmuch as land cannot simultaneously be both mineral and nonmineral, the millsite claim would, perforce of logic, be adverse to the placer claim. In such a situation, the sec. 38 placer claim, to the extent of the conflict, must fall. *See Ikola v. Goff*, 107 Cal. Rptr. 663, 664-65 (Ct. App. 1973).

We will briefly examine two other issues which were raised by the complaint herein: (1) That the Haskins Quarries placer claim does not

⁴⁸ Contestee did not even attempt to show that the area formerly embraced by the millsite was mineral in character. Thus, Patrick Haskins stated that there had been no removals from the millsites (1977 Tr. 66), while the claimant said there were no mineral values on them (1977 Tr. 445). *But see* Exh. R-6, "Summary Report," at 7.

conform to the rectangular system of public land surveys, and (2) that \$100 of annual assessment work was not performed *for the benefit* of the Haskins Quarries placer claim as required by 30 U.S.C. § 28 (1976).

The first issue actually has two parts involved therein. First, is the question whether the various land descriptions provided for the placer claim attain the limits of closure. The second part, while related to the first, is substantially different and concerns the legal and factual question whether the physical configuration of the claim comports with the requirement of the law. The Government's contention relating to the first point was presented by the testimony of Gould relating to the failure of the land description to close within acceptable limits. Judge Morehouse's decision discussed only this question. The Judge noted that the claimant had attempted to describe the claim by metes and bounds and that since BLM had canceled the mineral survey of the placer claim, which claimant had sought, "the technical noncompliance is not of material significance" (Decision at 21).

Insofar as this aspect is concerned, we find ourselves in substantial agreement with Judge Morehouse. While we have no doubt that the descriptions provided by the claimant would be unacceptable as a basis upon which to pass title,⁴⁹

we note that such title as would pass would be based on a mineral survey. The question relevant herein is not whether the description is accurate to the extent that descriptive errors are within acceptable limits for a survey, but rather whether it is sufficient to reasonably describe the lands embraced by the claim. We hold that, for this purpose, the description is sufficient.

The second facet of this issue, as we have delineated it above, was not examined by Judge Morehouse. While this matter was admittedly not the subject of extensive analysis by the parties, there is sufficient information in the record for us to examine this question under our de novo review authority.

[11] Initially, we note that the Placer Act was amended in 1872 to provide that "all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys." 30 U.S.C. § 35 (1976). The critical phrase, of course, is the qualifying "as near as practicable."⁵⁰

As early as the decision in *William Roblin*, 2 L.D. 764 (1884), the Department recognized that conformity was a question of reasonableness and, therein, expressly recognized that a placer claim along the bed of a river, surrounded by

⁴⁹ Thus, with respect to mineral surveys, the *Manual of Surveying Instructions*, 1973, par. 10-17 requires that "all surveys must close within 0.50 ft. in 1,000 ft., and the error must not be such as to make the claim exceed the statutory limit."

⁵⁰ The Placer Act as originally adopted, 16 Stat. 217, had provided that any placer location "shall conform to the United States surveys." The 1872 Act was designed to permit certain variations where there were acceptable reasons therefor.

precipitous banks, which stretched 12,000 feet down the riverbed, embracing only a small quantity of surface ground along the shore, was permissible as a location made in exceptional circumstances. This approach was reaffirmed in *Pearsall and Freeman*, 6 L.D. 227 (1887).

Subsequently, however, a vast array of differing shapes and forms were entered as placer claims and approved for patent. As a result of this increasing practice, irregular swaths were being carved out of the public domain, thereby making management of such lands as were not patented increasingly difficult. As a result of these practices, the question of conformity was reexamined in a series of cases beginning with the *Miller Placer Claim*, 30 L.D. 225 (1900), and the *Wood Placer Mining Co.*, 32 L.D. 198 (1903), finally culminating in the *Snow Flake Fraction Placer*, 37 L.D. 250 (1908).

In *Snow Flake Fraction Placer*, *supra*, the First Assistant Secretary examined the history of Departmental adjudication on this question and established a general rule that:

Whether a placer location conforms sufficiently to the requirements with respect to form and compactness is a question of fact for determination by the land department in the light of the showing made in each particular case, keeping in mind that it is the policy of the government to have all entries, whether of agricultural or mineral lands, as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public

domain into long narrow strips or grossly irregular and fantastically shaped tracts.

Id. at 250 (syllabus). This constitutes the general rule which has been followed to the present time. *See, e.g., Fuller v. Mountain Sculpture, Inc.*, 314 P.2d 842 (Utah 1957); *United States v. Henrikson*, 70 L.D. 212, 217-20 (1963); *Fred B. Ortman*, 52 L.D. 467 (1928).

The shape of the instant claim is a matter of record. Its bizarre configuration, particularly the area embracing the Lap Wing and Lady Helen millsites, clearly compels the conclusion that this claim does not reasonably comport with the system of public land surveys "to the extent practicable."

We are well aware that various references were made to "gulch" placers. *See* 1977 Tr. 477, 487, 517. Both the Department and the Courts have long recognized that situations occasionally occur wherein a placer claim is located along a ravine, canyon, or gulch, surrounded by precipitous and, in many cases, impassable canyon walls and cliffs, which themselves contain no mineral values, and that in these situations, unusual modes of location may be necessary. Thus, in *William F. Carr*, 53 L.D. 431 (1931), the Department held proper a placer location over a mile in length which was located in a narrow gulch. Similar results were reached in *Wiesenthal v. Goff*, 120 P.2d 248, 252 (Idaho 1941), and *Steele v. Preble*, 77 P.2d 418, 427-28 (Ore. 1938).

It is impossible, however, to validate the instant claim as some sort of "gulch" placer. The critical factor in validating such locations is the inaccessibility of and lack of mineral values in the confining banks, which, as a practical matter, prevent the claimant from embracing these areas within the location. Clearly, this concept has no relevance to a situation, as is disclosed herein, where the claim actually does embrace the surrounding banks. Having actually located both the stream bed (which testimony indicated had an areal extent of only 3.67 acres) and the surrounding canyon walls, claimant can hardly contend that the unusual shape which resulted was occasioned by the location of a "gulch" placer.

We also recognize that the rule mandating conformity also excepts claimants in situations where the existence of other prior claims prevent location in compliance with the system of survey. *United States v. Henrikson, supra*; *William F. Carr, supra*; *Snow Flake Fraction Placer, supra*. At one point in the hearing, Davis testified that "since the area is bounded by other patent claims, and you could not take up a legal subdivision because of infringement on someone else, I might look at a part of it as a gulch placer" (1977 Tr. 487). Leaving aside this commingling of two discrete concepts, we merely note that the only land which has been patented that actually abuts the claim is on the western side, and, in fact, embraces land formerly within the

original Roger Williams location. Moreover, the relevant question is not what claims, if any, presently exist adjacent to or in the relevant vicinity of the Haskins Quarries placer, but what claims existed during the period from 1923-28 when the claim was purportedly located under 30 U.S.C. § 38 (1976). Contestee presented no evidence on this point, and, as the proponent of the rule that his claim was properly located (*see Foster v. Seaton, supra*), the absence of proof of justification impels a finding that no such justification existed. Finally, under the doctrine enunciated in *Cole v. Ralph, supra*, there is no warrant for holding that the nature of a claim established pursuant to the provisions of 30 U.S.C. § 38 (1976), alleviates the requirement that claimants make placer entries in conformance to the system of survey "to the extent practicable."

It does not necessarily follow that failure to comply with the conformity requirement works to invalidate the claim. Rather, invocation of the rule has normally resulted in requiring a claimant to amend the claim so that it does conform as nearly as practicable with the rectangular system of survey. Thus, in many cases, as in *Fred B. Ortman, supra*, failure to conform was held a curable defect which "in the absence of adverse claim to the added land" could be cured by either amendment or relocation. 53 L.D. at 471. *See also United States v. Henrikson, supra*; *Hogan and Idaho Placer Mining Claims*, 34 L.D. 42 (1905).

However, in those situations in which conformance was either judged to be impossible by the very nature of the original shape, as in *Miller Placer Claim, supra*, and *Wood Placer Mining Co., supra*, the entry was canceled. In the instant case, addition of new land either through amendment or relocation is not possible since the Watershed Withdrawal constitutes an adverse claim which prevents the acquisition of any rights to land not already appropriated. See generally *R. Gail Tibbetts*, 43 IBLA 210, 217-20, 86 I.D. 538, 542-43 (1979). Moreover, inasmuch as we have held, *supra*, that the evidence was sufficient to establish only three individuals as colocators, it would not be legally possible to add any land to this claim. Thus, the corrections that would be required could only be accomplished by the deletion of land.

We will not attempt, at this time, to delineate a configuration of the claim which would comport with the requirements of 30 U.S.C. § 35 (1976). If the other grounds relied upon in our decision are invalidated upon review, claimant should be accorded the initial opportunity to attempt to describe his claim in conformity to the system of survey. We can, however, see no way in which the area formerly embraced by the millsites could be conformed and, accordingly, we hereby reject the patent application to the extent that it includes this area for this additional reason.

[12] The second issue which we

wish to briefly address relates to the performance of assessment work *for the benefit* of the Haskins Quarries placer claim. Judge Morehouse in his decision noted that proofs of labor had been filed every year since 1921 and that the Government had made no effort to pursue this allegation in its brief, and then found "there has been substantial compliance with the provisions of 30 U.S.C. § 28" (Decision at 22).

On this point, we think that Judge Morehouse misinterpreted the thrust of the Government complaint. The crucial import of Medina's testimony was not the fact that he was unable to find recorded proofs of assessment for various years. See Exh. G-7. Indeed, Medina readily admitted on cross-examination that it was possible that the county records were inaccurate with respect to those years in which no assessment work had been recorded. Rather, the point which the Government was attempting to make was that these assessment proofs related only to the *lode* claims. The Government was, in effect, arguing that, since the claimant and his predecessors had not performed assessment work for the *placer* claim, that claim could not be validated.

We wish to make a few general observations on this point. In our recent decision in *United States v. Bohme, supra*, we reviewed, at considerable length, the historical development in the law concerning the performance of assessment work, which culminated in the Su-

preme Court decision in *Hickel v. The Oil Shale Corp.* (TOSCO), 400 U.S. 48 (1970). It is sufficient, for the purposes of this decision, merely to note that the Supreme Court held that failure to substantially comply with the requirements of 30 U.S.C. § 28 (1976) might, in certain circumstances, result in a forfeiture of those claims to the United States. It is our view that included within the ambit of this rule are those claims which are located on land now withdrawn from mineral entry and for which there has not been substantial compliance with the assessment work requirements.⁵¹ Cf. *Andrew L. Freese*, 50 IBLA 26, 36, 87 I.D. 395, 399 (1980).

The placer claim asserted herein is, by its nature, a separate and distinct entity from the lode claims and millsites which formerly embraced the subject lands. As such, the mere fact that assessment work was performed for the benefit of the lode claims does not, ipso facto, establish that assessment work was performed for the benefit of the placer claim. Indeed, some of the work involved herein, in particular the work relating to the construction of tunnels and adits to develop the lode claims for gold and vanadium, which expenditures were submitted in support of the original patent application in 1929, could not be seen as benefiting a placer loca-

tion for building stone, which claimant alleges was then in existence.

At the same time, however, while the recording of proofs of assessment work might provide some indication that the assessment work was actually accomplished, recordation neither established that the work was, in fact, accomplished (*California Dolomite Co. v. Standridge, supra*), nor did the failure to record locally establish conclusively that the work was not done (*United States v. Bohme, supra*).

The record on this point is less than clear. Work done in road construction and maintenance could clearly redound to the benefit of both the lodes and the asserted placer. While the question is not free of all doubt, we believe that Exhibit G-7, which showed that no assessment work had been recorded for the placer claim, established a prima facie case that the work had not been performed. The burden then devolved to the claimant to show that despite the absence of recorded statements, the requisite work *for the benefit of the placer claim* had been accomplished. This, we hold, the claimant has not done. Therefore, we hold that even were we to find that a discovery of a placer deposit had existed prior to the Watershed Withdrawal Act, the failure of the claimant to substantially comply with the requirements of 30 U.S.C. § 28 (1976) resulted in an effective forfeiture of the claim to the United States.

[13] Finally, we wish to address various concerns which were expressed by attorneys for both the

⁵¹ While the TOSCO case dealt with the question of maintenance of claims for minerals which were no longer locatable, due to the passage of the Mineral Leasing Act, the rationale is, we think, equally applicable to claims located on lands which are withdrawn from the initiation of new mineral rights.

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Department of Justice (during the Federal Court litigation) and the Department of Agriculture concerning what was perceived as a likely result emanating from the District and Circuit Court approach in this case, viz., a practical requirement that every contest brought against either a lode or a placer claim would, for safety's sake, have to include a charge of invalidity directed to the *possibility* of the existence of a 30 U.S.C. § 38 claim in the form of a placer or lode, *mutatis mutandis*, or run the risk, at some indefinite future date, of being required to bring such an allegation to contest and hearing again.

Much of this concern was, we feel, generated by the essential difference between the factual milieu of the instant case and that which attended the decision in *Springer v. Southern Pacific Co.*, 248 P. 819 (Utah 1926), the only major precedent for the argument that a claimant could locate a 30 U.S.C. § 38 (1976) placer claim adverse to his own lodes. In that case, the Supreme Court of Utah found that Southern Pacific (the defendant) and its predecessors in interest had been in possession of lode claims adjacent to its track for over 20 years, and had expended upwards, if not in excess of \$500,000 for their development. These claims, however, while located as lodes, were located for building stone which could properly have been taken up by placer location. Plaintiffs, as the Court noted, "early in the morning of said day, long before working hours and either before or about daylight,

clandestinely and surreptitiously entered upon and invaded the actual possession of said claims" of the defendant. *Id.* at 821. The Court found, in fact, that this subsequent location was not made in good faith but was rather made "for the sole purpose of dispossessing the respondent and to compel it to pay tribute to appellants." *Id.* at 825. Thus, considering the manifest equities, it was not surprising that in a suit between the two locators the Court held that the railroad should prevail, on a theory that it was possessed of a subsisting placer claim under 30 U.S.C. § 38 (1976), embracing the area covered by its lodes.⁵²

This factual construct has been juxtaposed unfavorably with the instant case. Thus, it has been pointed out that the Department did not invalidate contestee's claims in the 1965 proceedings because they were in an improper form. Rather, considering most of the very sales presented herein, the Hearing Examiner had found the claims invalid because such marketable mineral as may once have existed had long since been depleted. Therefore, it has been argued that there was no justification for giving the claimant two bites out of the apple.

⁵² Indeed, to the extent the Court vitiated the location of the plaintiffs as invalid ("[w]hat one may not do by force he likewise may not accomplish surreptitiously or by stealth" 248 P. at 824), the Court was more properly invoking the doctrine of *pedis possessio* and not the adverse possession rationale implicit in 30 U.S.C. § 38 (1976). Though *pedis possessio* applies to prediscovery locations, since the claims were in lode form and the deposit in placer, there was no lode discovery. Thus, paradoxically, *pedis possessio* was factually applicable.

We, however, feel that both the District and Circuit Courts, mindful of the procedural difficulties which prevented the claimant from obtaining any substantive review of the 1965 determination of invalidity, and possibly misled by certain assertions on appeal, intended no such radical approach to public land law adjudication.

In any event, the adoption of sec. 314 of FLPMA, 43 U.S.C. § 1744 (1976), should allay such fears as have been expressed. The recordation provisions of FLPMA required the recording of all claims located prior to Oct. 21, 1976, no matter how located, on or before Oct. 22, 1979, or the claims would be deemed conclusively to be abandoned and void. *See* 43 U.S.C. § 1744(c) (1976). Specific provision was made for recording claims premised or dependent upon 30 U.S.C. § 38 (1976). *See* 43 CFR 3833.0-5(i); *Marvin E. Brown*, 52 IBLA 44 (1981).

Since FLPMA also required the recording of new claims within 90 days of their location, it is difficult to see how any new claims can arise, for which recourse to 30 U.S.C. § 38 (1976) *to establish the existence of the claim* is necessary or possible. Rights of individual ownership of the claim may still be determined by 30 U.S.C. § 38 (1976), but if that claim has not been duly recorded under FLPMA, it can only be treated as a nullity. Thus, the possible problems foreseen by some will not occur.

In summary, we hold that the evidence establishes that there was not disclosed within the limits of the claim, during the critical period, a

placer deposit of minerals of such quantity or quality as to constitute a discovery under the mining laws. In addition, we expressly find that the land was not chiefly valuable for building stone during this same period. We also find that appellant is estopped, under principles of judicial estoppel and the terms of 30 U.S.C. § 38 (1976), from asserting that the lands formerly embraced by the Lap Wing and Lady Helen mill-sites are now, and were at the critical time, mineral in character.

Insofar as the specific allegations of paragraph 5.C. of the complaint are concerned we find that the claim does not conform to the rectangular system of survey "to the extent practicable" (5.C.1); that the claim embraces more than 20 acres for each individual claimant (5.C.2.); and that the \$100 worth of labor and improvements required by 30 U.S.C. § 28 (1976) were not performed for the benefit of the Haskins Quarries placer mining claim as required by law (5.C.5).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the Haskins Quarries placer claim is declared null and void.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

BRUCE R. HARRIS
Administrative Judge

**APPEAL OF ALPINE MOVING
AND STORAGE****IBCA-1434-2-81**Decided *October 21, 1981***Purchase Order PX1379-0-0142, Na-
tional Park Service.****Sustained in part.****1. Contracts: Construction and Opera-
tion: Actions of Parties—Contracts:
Construction and Operation: General
Rules of Construction—Contracts:
Formation and Validity: Fixed-price
Contracts**

Where an appellant acknowledges that it received a purchase order calling for moving Government-owned furniture and furnishings shortly prior to the move and the record shows that without making a protest of any kind the contractor proceeded with the move and that it subsequently billed the Government for the services rendered in accordance with the rate stated in the purchase order, the Board finds the purchase order to constitute the agreement of the parties.

**2. Contracts: Construction and Opera-
tion: Modification of Contracts: Gener-
ally—Contracts: Formation and Va-
lidity: Fixed-price Contracts—Con-
tracts: Formation and Validity: For-
malities—Contracts: Formation and
Validity: Governing Law**

In a case involving the movement of Government office furniture and furnishings within the State of Colorado, the Board finds (i) that the National Park Service is not required to pay a higher rate for the movement of its property than the rate negotiated with the contractor as reflected in an accepted purchase order and (ii) that it is not required to forego presenting to the contracting officer for decision a claim for

damages sustained to Government property during the course of the move, even though at the time the move took place the tariff rates promulgated by the Colorado Public Utilities Commission required payment of a higher rate than that specified in the purchase order and even though the same tariff rates required payment of the full amount billed for services rendered before claims against the carrier for damages to property during the move could be entertained.

**3. Contracts: Disputes and Remedies:
Damages: Actual Damages—Con-
tracts: Disputes and Remedies: Dam-
ages: Measurement—Contracts: Dis-
putes and Remedies: Equitable Ad-
justments**

Where in connection with the movement of Government property, a contractor employs workers not provided for by terms of the purchase order covering the move and it appears that the need for such extra workers resulted in part from deficiencies in performance by the contractor and in part from failures of co-operation by the Government, the Board—noting the absence of any precise measurement for determining the relative fault of the parties—resorts to a jury verdict approach in finding the amount to which the contractor is entitled for one of the items included in the claim for equitable adjustment.

APPEARANCES: Timothy W. Ross, Alpine Moving & Storage, Gunnison, Colorado, for Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY CHIEF
ADMINISTRATIVE JUDGE
McGRAW*

*INTERIOR BOARD OF
CONTRACT APPEALS*

The appeal with which we are

here concerned presents the following questions for our decision:

1. Whether the instant purchase order was accepted by the contractor when it performed thereunder without having taken exception to any of its terms prior to moving all of the Government-owned furniture and furnishings covered thereby.

2. Whether for moving its property within the State of Colorado the Government must pay the tariff rates established by the Colorado Public Utilities Commission¹ even though they are higher than the rates negotiated with the carrier months before the move as reflected in the instant purchase order.

3. Whether the Government must pay the carrier the entire amount billed at the rate established by the Colorado Public Utilities Commission even though Government property was damaged in the course of the move² for which the Govern-

ment is authorized to submit a claim to the contracting officer for decision³ as provided for in the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613 (Supp. II 1978)).

4. The extent to which the contractor is entitled to additional compensation by reason of actions of the Government which allegedly increased the cost of the move called for by the instant purchase order.

Findings of Fact

1. Purchase Order PX1379-0-0142, dated Mar. 27, 1980, shows an estimated price for the job of \$300 and includes the following provisions:

Move Office Furniture and All Furnishings From 216 N. Colorado to new Administrative Building located at Elk Creek, 16 miles west of Gunnison Co. approximately 1600 sq. feet on June 14, 1980.

Move three offices located at Elk Creek (Division Chiefs offices) to new Administrative Building, June 13, 1980 at 1:00 p.m.

Price was quoted at \$18.00 per hour, should not take more than the two days stated, June 13, June 14, 1980.

* * * * *

Alpine Moving will be responsible for all packing, handling and physical work involved in the move. [4]

for the filing of a claim, it is apparent that a freight bill must be paid before a claim can be filed."

(Complaint, Enclosure 3).

³ Sec. 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605 (Supp. II 1978)) provides:

"(a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."

⁴ Appeal File K; hereinafter AF followed by reference to the letter of the exhibit.

¹ In a letter to an official of the National Park Service under the date of Aug. 27, 1980, the Colorado Public Utilities Commission states:

"[E]stimates are not binding under Colorado Law, as carriers are specifically prevented by law from charging more, less or any different from the charges that they have legally on file with the Public Utilities Commission. * * * [T]he legal tariff charges on file at the time of the move are the charges that must be assessed by Alpine and these charges must be accepted for any and all time which was legitimately spent in making this move."

(Complaint, Enclosure 2).

² A letter from the Colorado Public Utilities Commission to the contractor under date of Sept. 23, 1980, answers the question in the affirmative, stating:

"I am enclosing a photocopy of page 7 of the Colorado Motor Tariff Bureau's Tariff No. 6, which is the household goods' tariff from which your rates would be determined. * * * Item 70 provides that any claim for loss, damage, or overcharge shall be in writing and shall be accompanied by the original paid bill for transportation. As this is a prerequisite

2. The date the instant purchase order was received is disputed with the contractor asserting that it was received just prior to the move. In a letter to the Colorado Public Utilities Commission dated July 11, 1980, the contractor asserts that the Park Service did not request an estimate and none was given. Later in the same letter, however, the contractor acknowledges (i) that it had been contacted in March by Malinda A. Spendlove of the National Park Service⁵ concerning this move; (ii) that when it quoted a rate of \$18 an hour for two men and a van in March, it was for a move that was supposed to occur in mid-April; (iii) that the mid-April move was delayed at the request of the Park Service because their new building was not ready; (iv) that subsequent to the March quote of tariff rates the contractor requested and was granted a tariff increase;⁶ and (v) that the active rate for June was \$20 per hour for two men and a van,

with additional charges for additional men (AF H, 2, 4-5).

3. The record shows that the office furniture and furnishings covered by the purchase order were moved on June 13, 14, and 16, 1980. In the decision from which the instant appeal was taken the contracting officer noted that the contractor was (i) requesting payment in the amount of \$1,044.60;⁷ (ii) asserting that the Government was obligated to pay the contractor at the rate increase approved by the Colorado Public Utilities Commission after the date of the purchase order but before the move, without regard to claims for damages to Government property sustained during the move which could only be settled after full payment to the carrier was made; and (iii) that the amount of \$18 per hour quoted by the contractor represented a charge for two men and a van.

Commenting upon various aspects of the claim, the contracting officer states:

[I]t is deemed appropriate to pay the contractor for the full period of time

⁷ The claim as initially presented and as finally submitted is as shown below:

Initial claim

28 hours (2 men w/van) @	
\$18.00 per hr-----	\$504.00
65 extra manhours @ \$6	
per hr-----	390.00
Boxes -----	94.60
	<hr/>
	\$988.60

Final submission

28 hours (2 men w/van) @	
\$20 per hr-----	\$560.00
65 extra manhours @ \$6	
per hr-----	390.00
Boxes -----	94.60
	<hr/>
	\$1,044.60"

(AF F and J).

⁵ In an affidavit dated July 30, 1981, Malinda A. Spendlove states: (i) that during the time in question she was a purchasing agent for the National Park Service, Curecanti National Recreation Area, Gunnison, Colorado; (ii) that she was involved in the preparation of the instant purchase order which resulted from a meeting with Alpine Moving and Storage (Alpine); (iii) that the move was discussed with Mrs. Eunice Ross of Alpine on several occasions prior to June 13, 1980; (iv) that Mrs. Ross came to one of the locations from which the furniture was to be moved but declined the opportunity to see the other offices from which furniture was to be moved or the new building to which the furniture would be moved; and (v) the purchase order was sent to Alpine on Mar. 27, 1980 (Government Brief, Affidavit at 1).

⁶ In the same letter, Mr. Tim Ross of Alpine expressed the opinion that its problem centers around what it had expected in March and what the move involved in June (AF H).

spent by the two men with the van, due to the fact that the total price was estimated and the quote by the contractor that the move "should not take more than two days" was somewhat indefinite * * *. [T]he Government's obligation to pay is limited to the \$18.00 rate specified on the purchase order. The prices and terms were accepted by the contractor and thereby became contractually fixed. Accordingly, the claim for \$504.00 is approved, but the \$56.00 representing the higher hourly rate is denied. We believe that if the contractor had packed the truck to full capacity the extra manhours would not have been necessary. The requirement for extra movers was not contemplated in the contractor's analysis of the job and was never approved by the National Park Service. The amount of \$94.60 claimed for furnishing boxes appears to be reasonable and it is approved.

(AF B, 2, 3).

4. According to the contractor's letter of July 11, 1980 (Finding 2), the conditions encountered in the move differed substantially from those anticipated in a number of respects. In that letter, Mr. Ross relates that personnel from his office did visit the Park Service office to see what the job would entail and that they were told that the Park Service would do all its own packing and have everything ready to move. They were not shown the storage room in the basement, however, which was packed to the rafters and even included a refrigerator and a large built-in cabinet, which the contractor's men had to disassemble, remove from the wall, and saw the base in two to get it out.⁸

⁸ The contracting officer found that during the course of the move damages to Government property amounted to \$210 for which the contractor was responsible (AF B, attachment B). In the Complaint, the appellant says

While acknowledging that the contractor had not correctly anticipated the time it would take to move the offices (e.g., narrow doors, long halls, short stairs, and equipment requiring special handling and disassembly), the contractor contends that it could not have anticipated that the Park Service personnel would keep changing their minds as to how their offices were to be arranged; nor could it have been foreseen that none of the desk drawers would have been emptied; that the tops of the drafting tables, file cabinets, and desks would be cluttered with small items (calculators, maps, coffee pot, supplies, coffee cups, and mail baskets) all of which had to be packed; and that the electric typewriters would have to be unplugged, requiring the movers to crawl under desks and chase drop cords (AF H at 3-4).

5. The Government has an entirely different view of the principal source of the problems encountered in the move. In an affidavit (n.5, *supra*), Malinda A. Spendlove states that the contractor's moving operations were very inefficient (e.g., it arrived at the Elk Creek facility without boxes; truck sometimes only partially filled, resulting in additional trips; movers very careless in manner in which furni-

that it is willing to accept the Park Service figure for damages to Government property during the move of \$210, except for the \$60 item claimed for damages to the desk. While denying that the contractor was directed to cut the desk in two, the Government's Answer says that the circumstances surrounding this particular allegation are sufficiently questionable for the Government to accept the appellant's position that damages to the Government's property during the course of the move amounted to \$150 (Government Answer, par. 8).

October 21, 1981

ture was handled). More specifically, the affidavit states:

12. Upon arrival with furniture, etc. at the new building, Alpine merely left filing cabinets and the like in the middle of the walkways. This necessitated NPS making a second move of the furniture just to get into the building to begin carrying the furniture.

* * * * *

14. * * * Alpine * * * sent people to perform the work who were unable to physically handle the weight of the furniture and other articles to be moved. In addition, Alpine was generally unorganized resulting in wasted time and effort.

(Government Brief, Affidavit at 2).

6. Accepting the contractor's statement that its bid was based on using two men and a van and that 28 hours had been spent in making the move, the contracting officer found that, at the bid price of \$18 per hour, the contractor was entitled to be paid the sum of \$504. Found reasonable and also allowed the \$94.60 claimed for furnishing boxes. Denied, however, was the \$56 claimed for the higher hourly rate for the 28 hours spent in moving and the \$390 claimed for extra movers (n.7, *supra*). Thus, the amount found due the contractor totalled \$598.60.

The contracting officer found for the Government, however, on its counterclaims totalling \$327 and comprised of a \$117 claim for Park labor used in the move⁹ and a \$210

claim for repairs to door and desk¹⁰ attributed to the move.

The net amount found due the contractor was \$271.60 (\$598.60 - \$327) (AF B, 3).

Discussion

In her affidavit, Malinda A. Spendlove states that the instant purchase order was prepared after a meeting with the contractor and was sent to the contractor on Mar. 27, 1980 (n.5, *supra*). The contractor asserts, however, that the purchase order was not received until just prior to the move (Finding 2). The Board notes (i) that the purchase order carries the date of Mar. 27, 1980; (ii) that the purchase order shows the \$18 per hour rate which the contractor acknowledges it had quoted to the Park Service in March of 1980; and (iii) that the purchase order shows the same address for the contractor as is shown on the notice of appeal, the complaint and other documents emanating from the contractor contained in the appeal file. There is nothing in the record indicating that the envelope or other means by which the purchase order was transmitted did not carry the same address.

[1] In the above circumstances, it appears that in resolving the disputed question of when the purchase order was received, the Board might rely on the long-established rule that a letter properly mailed and posted is presumed to have reached its destination and to have been received by the party to whom

⁹ The claim is for the services of two National Park Service employees who were furnished to move items placed in walkways by Alpine Movers so that the heavy furniture could be moved in. In a letter to the contractor dated July 24, 1980, the contracting officer states: "These men were furnished in response to a threat by one of your employees that the move would not be completed unless we moved these items ourselves" (AF G, 1).

¹⁰ Footnote 8, *supra*.

it is addressed. See *Sancolmar Industries, Inc.*, ASBCA No. 16879 (Dec. 12, 1972), 73-1 BCA par. 9,812. In this case, we need not rely upon any such presumption, however, since assuming *arguendo* that the purchase order was not received until shortly prior to the move as alleged by the contractor, the record clearly shows (i) that without taking exception to the terms of the purchase order or making a protest of any kind, the contractor proceeded with the move; (ii) that the bill submitted by the contractor for the services rendered during the course of the move reflected the terms of the purchase order prepared by the Park Service; and (iii) that it was a month after the move was completed before the Government was apprised that the appellant considered a higher rate was applicable than was stated in the purchase order (AF H, J, and K).¹¹ The Board, therefore, finds that the terms of the instant purchase order constitutes the agreement between the parties which will be used in determining the rights and obligations of the parties to this appeal.

In this case, the appellant and the

¹¹ Following the completion of the move, the contractor billed the Park Service at the \$18 per hour rate quoted for two men and a van. See Bill of Lading and Freight Bills 00396 (June 13) and 00397 (June 14 and 16) (AF J).

Insofar as the record discloses, it does not appear that the Government was aware of the \$20 per hour rate now claimed until July 16 (AF H), or a whole month after the move was completed. A claim reflecting the \$20 per hour rate was not presented to the contracting officer until the contractor's letter of Sept. 4, 1980, was received (AF F).

Colorado Public Utilities Commission seem to have been oblivious of the need to consider the question of the applicability of the doctrine of sovereign immunity to cases involving activities of the Federal Government in areas where state or local governments also exercise jurisdiction. One of the leading cases on the subject is *United States v. County of Allegheny*, 322 U.S. 174 (1944).¹² In that case the question presented was whether the County of Allegheny could impose and collect an ad valorem tax on property purchased or manufactured by a contractor but as to which title had passed to the Government upon reimbursement therefor by the United States. There the Supreme Court stated at page 183:

Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State.

More directly applicable to the case at hand is the decision of the Supreme Court in the case of *Public Utilities Commission of California*

¹² Cited and quoted from in the Government Brief at 3 in support of the proposition: "The position that an apparent state regulation authorizing Appellant to raise its rates invalidates the specific terms of a contract entered into with the United States is untenable."

v. *United States*, 355 U.S. 534 (1958),¹³ in which it was held that a state may not regulate by tariff or by other means the contract prices under a Government contract. Five years later in the case of *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963),¹⁴ the Supreme Court held that a contract for the carriage of household goods of civilian employees of the United States was exempt from Georgia law which required that rates of carriage of household goods were to be based upon a single family unit.

[2] Turning to the case here in issue, the Board finds that the rates

¹³ There the Court states:

"* * * Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it was in *Arizona v. California*, 283 U.S. 423, 451, where a State sought authority over plans and specifications for a federal dam, in *Leslie Miller, Inc. v. Arkansas*, *supra*, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland*, 254 U.S. 51, where a State sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve."

(355 U.S. 544).

¹⁴ After noting that its decision in the Public Utilities Commission of California case (n.13, *supra*, and accompanying text) had involved construing regulations issued under the Armed Services Procurement Act of 1947 (10 U.S.C. § 2301 (1976)), the Supreme Court went on to state:

"The same policy of negotiating rates for shipment of federal property now governs nondefense agencies. The basic statute is the Federal Property and Administrative Services Act of 1949, 63 Stat. 383; 40 U.S.C. § 481; 63 Stat. 393, as amended, 41 U.S.C. § 251 *et seq.* Its procurement provisions are substantially similar to those contained in the Armed Services Procurement Act of 1947." (371 U.S. 289).

negotiated between the appellant and the National Park Service for the movement of its furniture and furnishings within the State of Colorado involved the exercise of a Federal procurement function; that the purchase order issued to the contractor and accepted by him reflected the policies established in the regulations issued under the Federal Property and Administrative Services Act of 1949 (n.14, *supra*, and accompanying text), and the Contract Disputes Act of 1978 (n.3, *supra*); and that under the authorities cited herein (nn.13 & 14, *supra*, and accompanying text), the National Park Service is not required to pay a higher rate for the movement of its property than specified in the instant purchase order; nor is it required to forego presenting a claim to the contracting officer for damages sustained to its property during the course of a move until after it has paid the amount billed by the contractor for the services rendered.

[3] Remaining for consideration is the amount the appellant is entitled to be paid for moving the furniture and furnishings covered by the instant purchase order. The contracting officer found that the contractor was entitled to be paid the sum of \$504 for 28 hours claimed by the contractor for two men with a van at the rate specified in the purchase order of \$18 per hour and an additional \$94.60 claimed for boxes used in the move. The amount so allowed totals \$598.60 (Finding 3).

For the reasons previously stated, the contracting officer properly denied the \$56 claimed by the contractor based upon the higher hourly rate of \$20 established by the Colorado Public Utilities Commission. Also denied by the contracting officer was the \$390 claim for extra manhours¹⁵ used in the move (n.7, *supra*) on the ground that it was not contemplated in the contractor's analysis of the job and was never approved by the National Park Service (Finding 3). While the contractor appears to have been somewhat slipshod in accomplishing the move, *e.g.*, utilizing some workers who were physically unable to handle the weight of the furniture (Finding 5), it does not appear that the Park Service personnel concerned took even rudimentary measures to prepare for the move (Finding 4). In the absence of any precise measurement being available for determining the relative fault of the parties, the Board concludes on the basis of a jury verdict approach¹⁶ that one-half of the amount claimed for extra movers of \$390 or \$195 should be allowed. Thus, the amount allowed the contractor on its claims totals \$793.60.

¹⁵ One of the contentions advanced by the appellant is that when its personnel visited the Park Service Office they had been told that the Service would do all of its own packing. This position is contrary to the plain terms of the purchase order (Finding 1), however, which we have found was accepted by the contractor. The appellant's contention is therefore found to be without merit.

¹⁶ *Cf. Seldo Co., Inc., d.b.a. Desert Materials Co.*, IBCA-1194-5-78 (Sept. 30, 1981), 88 I.D. 895, 81-2 BCA par. —.

With respect to the Government's counterclaims, the Board finds that damages to Park Service property sustained in the course of the move totaled \$150 (n.8, *supra*), and that \$117 was properly charged for the services of two National Park Service employees who moved items placed in walkways when the contractor's employees refused to move them (n.9, *supra*).

Giving effect to the amount to which the appellant has been found to be entitled of \$793.60 less approved Government counterclaims totaling \$267, the Board finds the contractor is entitled to be paid the net sum of \$526.60 for performing the work covered by the instant purchase order.

Decision

1. For the reasons stated and on the basis of the authorities cited, the appellant is found to be entitled to be paid the sum of \$526.60.

2. The amount found due herein shall also include an allowance for interest on the above-stated amount of \$526.60, computed in accordance with the provisions of the Contract Disputes Act of 1978 (41 U.S.C. §§ 605, 611 (Supp. II 1978)), from Sept. 8, 1980, until payment thereof.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

ESTATE OF DANA A. KNIGHT**9 IBIA 82**

Decided *October 22, 1981*

Appeal from an order denying a petition for rehearing by Administrative Law Judge Sam E. Taylor.

Affirmed.

1. Indian Lands: Patent in Fee: Jurisdiction

The Federal trust responsibility over allotted land or any fractional share thereof is extinguished as to that interest immediately upon its acquisition by a non-Indian. The ministerial issuance of a fee patent serves only a recordkeeping function and is without legal significance in respect to dissolution of the Department's role as trustee.

2. Indian Lands: Patent in Fee: Jurisdiction

The Department of the Interior owes no fiduciary duties of any kind to a non-Indian who has acquired an interest in allotted trust land.

APPEARANCES: Yvonne T. Knight, Esq., for appellants Yvonne T. Knight, Hepsey Knight, Ruth Eva Knight, Vanessa Knight Wilson, and Rozina Knight. Counsel to the Board: Kathryn Lynn.

OPINION BY
ADMINISTRATIVE JUDGE
ARNESS

INTERIOR BOARD OF
INDIAN APPEALS

Dana A. Knight, an unallotted Ponca, died on Dec. 5, 1978, at the

age of 62 years. After a hearing held at Pawnee, Oklahoma, on Aug. 1, 1979, Administrative Law Judge Sam E. Taylor approved decedent's will dated Jan. 21, 1976, and ordered distribution of decedent's property to his wife, Hepsey Knight, and daughters Yvonne Teresa Knight, Ruth Eva Knight, Vanessa Knight Wilson, and Rozina Knight (appellants). The Judge denied a motion to include in decedent's trust property certain portions of allotments that had descended to decedent from his maternal Indian grandparents through his non-Indian father. The appellants petitioned for a rehearing on the sole issue of whether the motion was properly denied. On June 5, 1980, Judge Taylor denied the petition for rehearing and made several technical corrections to the earlier order approving the will and ordering distribution. Appellants sought review of that order by the Board.

Background

The decedent's mother, Lena Black Hair Horse Knight, Ponca Allottee No. 244, was the daughter of Black Hair Horse, Ponca Allottee No. 239, and Ruth Black Hair Horse, Ponca Allottee No. 240. Upon the deaths of her parents, Lena Black Hair Horse Knight inherited a portion of each of their allotments. Lena Black Hair Horse Knight died intestate on Apr. 25, 1955. Her heirs were determined to be her non-Indian husband, Tony

H. Knight, and her two sons, Dana A. Knight (decedent) and Louis V. Knight, both Ponca unallottees. Each heir inherited an undivided one-third interest in her trust property. *Estate of Lena Black Hair Horse Knight*, Probate No. H-171-55 (Aug. 5, 1955).

Tony H. Knight died testate in October 1956. Under the provisions of his will, all of his property was devised equally to his sons Dana A. Knight and Louis V. Knight. Included in Tony H. Knight's real property were the portions of Ponca allotments 239 and 240 inherited from his wife. *In the Matter of the Estate of Tony H. Knight, Deceased*, No. 14,547-A (Kay County Ct., Okla. Aug. 2, 1957). At the time of his death, Tony H. Knight had not been issued a fee patent to his inherited portions of Ponca Allotments 239 and 240.

Discussion and Conclusions

Appellants argue first that land allotted under the General Allotment Act of Feb. 8, 1887, 24 Stat. 388 (Act), which passes to a proper Indian beneficiary through a non-Indian, to whom a fee patent has not been issued, regains its full trust status under the Act. Appellants acknowledge that under *Bailess v. Paukune*, 344 U.S. 171 (1952), allotted Indian lands take on a different status when they are held by a non-Indian. They urge, however, that *Chemah v. Fodder*, 259 F. Supp. 910 (W.D. Okla. 1966), makes the issuance of a fee patent to the non-Indian owner the sig-

nificant point at which Federal Indian statutes no longer apply to the land. Until the fee patent is issued, they argue, title to the land remains in trust, although the Department of the Interior owes no fiduciary duties to the owner. If, therefore, the land is acquired by a proper Indian beneficiary before the fee patent is issued, this theory would revive the entire panoply of trust responsibilities involving the Department.

Appellants' characterization of the issue involved in this case attempts to shift the inquiry away from the effect of the inheritance of trust land by a non-Indian to the effect of a later inheritance by an Indian. The question before the Board, however, is not whether the General Allotment Act intends to protect Indians inheriting from non-Indians, but what the consequences are when trust property is inherited by a non-Indian.

The *Bailess* and *Chemah* opinions concern the legal status of allotted land in Oklahoma when inherited by non-Indians. Both *Bailess* and *Chemah* agree that the acquisition of an interest in trust property by a non-Indian renders the trust "dry and passive." The Supreme Court held in *Bailess* that when allotted land is inherited by a non-Indian "there remains only a ministerial act for the trustee to perform, namely the issuance of a fee patent to the *cestui*." 344 U.S. at 173. In *Chemah*, the Federal district court was bound by the Supreme Court's interpretation of law but expanded on it by

noting that the Secretary of the Interior could issue the required fee patent to a non-Indian heir in one of two ways, thereby addressing that part of the case which pertained to requested partitioning of an allotment. The *Chemah* opinion states:

The plain import of the decision of *Bailess v. Paukune*, supra, is to require the issuance of a patent in fee to the non-Indian plaintiff. The Secretary of the Interior may cause her interest to be partitioned in kind from the remainder of the allotment and issue a patent in fee to her for her aliquot part. It would seem that he could also issue to her a patent in fee for her undivided interest in the whole allotment, but it is suggested that the use of such method would solve nothing and would further confound the existing problems of multiple ownership.

259 F. Supp. at 912-13.

[1] The *Chemah* opinion therefore cannot be cited for the proposition advanced by appellants (that the Secretary may refrain from granting fee patent title to a non-Indian heir). Consequently, it is a logical consequence of the holdings in *Bailess* and *Chemah* that if by administrative oversight the Secretary fails to perform the ministerial act of issuing the required fee patent to a non-Indian heir of Indian land, this breach of duty cannot serve to bestow trust privileges on the non-Indian heir or his successors in interest. Accordingly, the Federal trust responsibility over allotted land or any fractional share thereof is extinguished as to that interest immediately upon its acquisition by a non-Indian. The ministerial issuance of a fee patent serves

only a recordkeeping function and is without legal significance in respect to dissolution of the Department's role as trustee.

This holding comports with long-standing Departmental precedent. In a memorandum opinion dated Sept. 10, 1938, former Interior Solicitor Nathan R. Margold stated:

The interest inherited by Amanda Pratt, she being a white woman passed to her free from restrictions. Departmental jurisdiction then terminated and Mrs. Pratt became invested with unrestricted control, with full power of disposal. *Levindale Lead Co. v. Coleman*, 241 U.S. 432; *Mison v. Littleton*, 265 Fed. 603; *Unkle v. Wills*, 281 Fed. 29, 35. Such restricted control and power of disposal is unaffected by the fact that the legal title may remain in the United States until fee simple patent issues. The unrestricted power of control and disposal depends in no way upon issuance of patent. It may be exercised before patent issues and in such event the patent, when issued, inures to the benefit of the grantee. *Mison v. Littleton*, supra. Nonissuance of the patent, therefore, constitutes no valid ground for reassumption of departmental jurisdiction nor may it be properly used as a basis for a demand that the parties submit to departmental jurisdiction. Any proposal so to do savors strongly of an abortive effort to reimpose by administrative action restrictions which have lawfully terminated.

I Op. Sol. 851-852.

Therefore, in this case, the fact that a fee patent had not been issued to Tony H. Knight, decedent's non-Indian father, before his death in 1956 is not dispositive because the Department's trust responsibilities over the disputed interests in Ponca Allotments 239 and 240 were terminated when those interests

were acquired by a non-Indian. The subsequent inheritance of those interests by the decedent, an Indian, could not operate in itself to reestablish a relationship that had been legally terminated.

Appellants further argue by analogy to common law trust principles that a trust remains active during the winding-up period and the trustee continues to owe fiduciary duties to the beneficiaries in determining how to terminate the trust. Appellants suggest the Supreme Court did not address the question of the Department's responsibilities in winding up a trust when it stated in *Bailess* that the trust as to a non-Indian was "dry and passive." Therefore, they urge that some active trust responsibilities are not precluded by *Bailess*. The statutory trust relationship established between the Department and Indian owners of allotments differs, however, from a trust set up under the common law. See *United States v. Mitchell*, 445 U.S. 535, 542 (1980). It is, therefore, misleading to rely too heavily on the common law of trusts in interpreting that relationship.¹

[2] Appellants, however, misconstrue the Department's duties in winding up the trust because of the acquisition of an interest in allotted lands by a non-Indian. As was pre-

viously discussed, when an interest in trust property is acquired by a non-Indian, the trust is immediately terminated to the extent of that interest. The Department owes no trust duties of any kind to the non-Indian.² Any remaining fiduciary duty to be circumspect in the manner of terminating the trust would be owed only to those Indians who might be affected by the termination.³ Thus, it cannot be found that the trust as to Tony H. Knight's interests in Ponca Allotments 239 and 240 remained active because the Department had not discharged its duties relating to winding up the trust.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order denying the motion to add the interests in Ponca Allotments 239 and 240 inherited by decedent from Tony H. Knight to the inventory of decedent's trust property is affirmed.⁴

² See, e.g., *Administrative Appeal of James P. Bowen v. Superintendent, Northern Cheyenne Agency*, 3 IBIA 224, 82 I.D. 19 (1975). In this case a fee patent was issued before a dispute arose.

³ It is conceivable that in discharging its trust responsibilities to such Indians, the Department might be required to terminate a trust in a manner unfavorable to the best interest of the non-Indian owner, or as opined in *Chemah*, *supra* at 913, in a manner which will not "further confound the existing problems of multiple ownership."

⁴ Sec. 5 of the Indian Reorganization Act, June 18, 1934, 48 Stat. 984, 985, 25 U.S.C. § 465 (1976), permits acquisition of lands in trust for individual Indians by the Secretary. Applications to acquire lands in trust status are treated on a case-by-case basis by the Department. There appears to be no impediment to an application by appellants in this case for acquisition by the United States of their inherited lands to be held in trust status for them. Appellants acknowledge that they have not pursued this administrative remedy to achieve the results sought by this probate appeal. Appellants' Opening Brief at 2.

¹ The problems inherent in such reliance are also seen in appellants' argument that the Indian trust relationship, like a common law trust, can survive the absence of any one of the three elements of a trust: A trustee, a beneficiary, and trust property. Assuming, *arguendo*, that the relationship could survive the absence of a trustee or of trust property, as was just discussed, the Indian trust relationship terminates in the absence of a proper Indian beneficiary.

This decision is final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

APPEAL OF DAMES & MOORE

IBCA-1308-10-79

Decided *October 27, 1981*

Contract No. MOOC14202869, Bureau of Indian Affairs.

Denied.

1. Contracts: Construction and Operation: Contract Clauses—Contracts: Formation and Validity: Authority to Make

When a contractor expressed a desire to avoid legal action and suggested submitting a dispute to arbitration rather than following the dispute resolution process required by the disputes clause, the contracting officer was without authority to delegate his duties under the disputes clause to an arbitrator and the document entitled "Agreement to Submit to Arbitration" was a nullity which conferred no right on the contractor to claim expenses during the arbitration period.

APPEARANCES: Mr. Oliver Keese, Contracts Manager, Dames & Moore, Los Angeles, California, for the Appellant; Mr. Thomas O'Hare, Department Counsel, Albuquerque, New Mexico, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from a decision of the contracting officer denying the contractor's claim for \$8,459.35 under the terms of a document entitled "Agreement to Submit to Arbitration." Neither party elected an oral hearing and this appeal is submitted on the record.

On Aug. 9, 1976, the Bureau of Indian Affairs awarded Contract MOOC14202249 in the amount of \$45,000 to the consulting firm, Dames & Moore, for an irrigation plan and report for the utilization of water from the Mancos River on lands of the Ute Mountain Ute Reservation, Colorado. The contract contained the standard disputes clause required by FPR 1-7.102-12.

On Nov. 23, 1977, the contracting officer sent to Dames & Moore his comments concerning their final report under the contract, and pointed out that the report did not contain material requested in his comments on the initial draft report.

At a meeting held on Jan. 24, 1978, to discuss the Government's objections to the final report, a representative of Dames & Moore stated that the contract fee of \$45,000 was too low for the work requested and further stated that his company had lost \$20,000 on the job. He advised that it would be necessary to charge an additional fee of \$9,000 for the requested work which he regarded as being outside the scope of the

contract. Another representative of Dames & Moore expressed a desire to avoid legal action and proposed that the dispute be submitted to arbitration. For reasons which are not a matter of record, the contracting officer agreed to the proposal (Appeal File, Exhibit 2).

Dames & Moore drafted a document entitled "Agreement to Submit to Arbitration," which was signed by the contracting officer, Dames & Moore, and the arbitrator (Appeal File, Exhibit 1).

The arbitrator found for Dames & Moore and the Government paid him \$1,899.50 for his services as arbitrator (Appeal File, Exhibit 8).

Dames & Moore submitted a claim for \$8,459.35 for personnel charges, equipment charges, and services and supplies during the arbitration period from Jan. 31, through June 23, 1978 (Appeal File, Exhibit 9).

The contracting officer declined to pay the amount claimed by Dames & Moore for their services during arbitration. Dames & Moore has taken a timely appeal of the decision to this Board.

Decision

The question presented by this appeal is what rights, if any, were acquired by Dames & Moore as a result of the signing of the document entitled "Agreement to Submit to Arbitration."

The Court of Claims has consistently held that where the contract designates a specific officer or body as the one to render to contractual decision under a disputes clause,

other persons cannot displace the designated decisionmaker. *Fischbach and Moore International Corp. v. United States*, — Ct. Cl. —, 617 F.2d 223 (1980), and cases cited therein at n.7.

In the present case, the disputes clause imposes a duty on the contracting officer to make a personal and independent decision on disputes under the contract, with provisions for appeal to the Board if the contractor is aggrieved. This function can neither be delegated to nor usurped by anyone not authorized by the terms of the contract. *Climatic Rainwear Co., Inc. v. United States*, 115 Ct. Cl. 520, 559 (1950).

The sole reason advanced by Dames & Moore for arbitration was the desire to avoid the appeal procedure it had agreed to use under the disputes clause. The Supreme Court has stated that the purpose of the disputes clause system of avoiding "vexatious litigation" would not be served by substituting the actions of persons acting in derogation of the contract. *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 8 (1972). Dames & Moore may not be relieved of their contractual obligation to pursue their remedies under the disputes clause merely because they perceive such a course to be "legal action" which they prefer to avoid.

The contracting officer stated that the agreement to submit the dispute to arbitration was entered into in accordance with FPR 1-7.102-12 DISPUTES. The contracting officer's reliance on such authority is

mistaken. The cited section of the Federal Procurement Regulations (41 CFR 1-7.102-12) is merely a requirement that the standard disputes clause be included in contracts such as the original contract with Dames & Moore. It does not authorize circumvention of the normal dispute resolution process.

Neither party has cited any authority under which they might be relieved of their contractual duty to resolve disputes in accordance with the disputes clause, and we are aware of none. It follows, therefore, that the attempt to delegate the duties of the contracting officer to an arbitrator was a nullity and conferred no rights upon Dames & Moore.

The claim for expenses incurred during the course of the unauthorized arbitration process is denied in its entirety.

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

ESTATE OF RONALD RICHARD SAUBEL

9 IBIA 94

Decided October 28, 1981

Appeal from order by Administrative Law Judge reopening estate and redetermining heirs.

Reversed and remanded.

1. Indian Probate: Wills: Disapproval of Will

Under the Supreme Court's holding in *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), the Department may not revoke or rewrite an otherwise valid will disposing of Indian trust or restricted property that reflects a rational testamentary scheme simply because the disposition does not comport with the deciding official's conception of equity and fairness.

2. Indian Probate: Wills: Failure to Mention Child

The failure of decedent's will to provide for two after-born children is insufficient to render the dispositive scheme irrational.

APPEARANCES: Elizabeth Anne Bird, Esq., for appellants Ronette Saubel, Ronald Richard Saubel, Jr., Antoinette Saubel, and Desmond Saubel; Isabel Uribe for Ronald Richard Saubel, Jr., appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF
ADMINISTRATIVE JUDGE
HORTON

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal from an order redetermining heirs after reopening entered by Administrative Law Judge William E. Hammett on May 5, 1980. Appellants are Ronette Saubel, Ronald Richard Saubel, Jr., Antoinette Saubel, and Desmond Saubel, the four minor children of Ronald Richard Saubel, deceased Palm Springs Allottee No. 26, and his wife, Sally Del Rio Saubel. Appellant children maintain first, that

it was error to reopen the estate. Second, they contend it was error to limit the hearing to whether the son of Isabel Uribe, also named Ronald Richard Saubel, Jr., is an illegitimate son of the decedent entitled to share in the decedent's trust estate pursuant to the provisions of 25 U.S.C. § 371 (1976). Appellants submit that the decedent left a valid final will and testament upon his death which expressly omits Ronald Richard Saubel, Jr., son of Isabel Uribe, as a beneficiary of his estate, and that this testamentary wish of the decedent must be upheld by the Department in this probate proceeding.

Background

Ronald Richard Saubel was born on Apr. 30, 1943, and died in Banning, California, Apr. 3, 1977. He was a Palm Springs allottee under the jurisdiction of the Palm Springs Agency, Palm Springs, California.

A hearing to determine heirs was held on May 1 and 22, 1978, by Administrative Law Judge S. N. Willett. Testimony at that hearing disclosed that decedent married Sally Del Rio on Mar. 15, 1965, and had four children of that marriage: Ronette Rhonda, born Sept. 15, 1966; Ronald Richard, Jr., born Sept. 13, 1968; Antoinette Flora, born Aug. 29, 1974; and Desmond Damon, born Sept. 21, 1975.

On May 13, 1964, decedent executed a will devising all of his property to certain of his collateral relatives. In 1973 decedent was hospitalized for a serious illness, and

on Jan. 28, 1973, he composed a holographic will leaving all of his property to Ronette and Ronald, Jr., the only two of his children then living. A third will, prepared for decedent by his aunt's attorney, was signed on Feb. 1, 1973. This will expressly revoked all prior wills and again left all decedent's property to his two children. Decedent's wife was expressly omitted from taking under this will.¹ Another provision of the February 1973 will sought to disinherit Ronald Richard Saubel, Jr., allegedly the illegitimate son of decedent and Isabel Uribe. There was evidence that a fourth will had been prepared for decedent subsequent to Feb. 1, 1973, which included all four of his children born to Sally Del Rio Saubel. This purported will was never signed by decedent.²

Following the hearing, Judge Willett issued a memorandum and order on July 6, 1978. The order found that the Feb. 1, 1973, will was technically valid and was decedent's final will. However, it also found that because the will made no provision for decedent's two youngest children and because the evidence indicated that decedent had equal concern and affection for all four of his children borne by Sally Del Rio Saubel, it did not establish a rational testamentary scheme. Therefore, Judge Willett disapproved the will.

¹ The testimony showed that Sally Del Rio was not Indian and had agreed with decedent that his trust property should descend directly to their children so that it would not lose its status as Indian trust land.

² See Transcript of Hearing held May 22, 1978, at 8.

Despite the disapproval of the testamentary provisions of the will, Judge Willett held that the clause revoking all earlier wills and codicils was effective to revoke decedent's 1964 will.³ Thus, she held that decedent had died intestate and ordered distribution of one-fourth of the estate to each child of Sally Del Rio Saubel with a one-third life estate to decedent's spouse.⁴

On July 3, 1979, Isabel Uribe, acting on behalf of her minor son, Ronald Richard Saubel, Jr., petitioned to reopen the estate on the grounds that her child, who was not represented at the hearings before Judge Willett, was the illegitimate son of the decedent and was entitled to share in the estate under 25 U.S.C. § 371 (1976). The petition was assigned to Administrative Law Judge William E. Hammett, who, on Oct. 16, 1979, ordered that the estate be reopened for the sole purpose of determining whether this child was the decedent's son.⁵

Following a Nov. 20, 1979, hearing, Judge Hammett entered an order on May 5, 1980, finding that Isabel Uribe's child was the decedent's son and ordering that the

estate be distributed in five equal shares to decedent's one illegitimate and four legitimate children, subject to Sally De Rio Saubel's one-third life estate. Decedent's legitimate children appealed from this order.

Discussion, Findings, and Conclusions

This case is technically before the Board on an appeal from the order reopening the estate and holding that only the question of the paternity of the child of Isabel Uribe would be considered. However, under 43 CFR 4.320 (1980), appearing in the Board's revised procedural rules at 46 FR 7334, 7336 (Jan. 23, 1981), the Board is not limited in its review of probate decisions by the arguments raised by the parties, but "may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." Such an error appears on the record in this case.

Under 25 U.S.C. § 373 (1976) an Indian may dispose of trust property by will in accordance with regulations prescribed by the Secretary of the Interior. The regulations promulgated pursuant to sec. 373, found in 43 CFR Part 4, Subpart D, deal almost exclusively with the mechanics of executing and proving a will, the administration of the estate, and the conduct of probate hearings.

[1] The Supreme Court considered the scope of the Secretary's power to disapprove an Indian will under sec. 373 in *Toohnippah v.*

³ Judge Willett's order does not consider the validity of the Jan. 28, 1973, holographic will. Decedent's holographic will, which also failed to provide for two of his children born to Sally Del Rio Saubel, would similarly not reflect a "rational testamentary scheme" under the rationale of the order.

⁴ This distribution was based on California intestacy laws (*see* 25 U.S.C. § 348 (1976)) and a second disclaimer of interest signed by Sally Del Rio Saubel on May 22, 1978.

⁵ Judge Hammett limited the hearing to this one issue on the grounds that a broader hearing would constitute an improper collateral attack on Judge Willett's order.

Hickel, 397 U.S. 598 (1970). Although the Court declined to explore the full extent of the Secretary's power, it held that the Secretary or his representative could not revoke or rewrite an otherwise valid will that reflected a rational testamentary scheme simply because the disposition did not comport with the approving official's conception of equity and fairness. See *Estate of William Mason Cultee*, 9 IBIA 43 (1981); *Estate of Dorothy Sheldon*, 7 IBIA 11, 85 I.D. 31 (1978); *Estate of Anthony Bitseedy*, 5 IBIA 270 (1976); *Estate of Gerald Martinez, Sr.*, 5 IBIA 162, 83 I.D. 306 (1976).

In disapproving the decedent's will in this case the Administrative Law Judge found that the will did not reflect a rational testamentary scheme because it failed to mention decedent's two youngest children. In essence, the Administrative Law Judge's decision is an attempt to fill a gap in Federal Indian probate law. Under 25 U.S.C. § 348 (1976) the Department looks to state intestate succession laws in determining the legal heirs of an Indian who dies without having executed a will. There is no similar statutory or regulatory provision for applying state laws regarding the construction of wills. The only Federal regulations in this area concern lapse (43 CFR 4.261) and the felonious taking of the testator's life (43 CFR 4.262). Thus, when faced with a problem of pretermitted children (or of a pretermitted spouse, advances, or ademption), the Depart-

ment is generally required to approve the will as written. It is difficult to perceive how the disinheritance of a child born after the execution of a will may be considered irrational or contrary to public policy when no policy has been articulated through either statute or regulation.⁶

[2] The evidence in this case does not disclose the testamentary scheme established in decedent's will to be irrational. On the contrary, the plan shows careful consideration and could be considered reasonable in light of decedent's personal circumstances. The fact that two children

⁶ We agree, therefore, with the following dictum expressed by Judge Willett at page 7 of her July 6, 1978, opinion:

"The rights of omitted or pretermitted heirs is one of the many substantive issues in Indian probate for which no express provision has been made. It is incongruous that the Federal government has not yet addressed this problem which has been universally acknowledged and dealt with by the states through the enactment of special statutes. Indian probate proceedings are deprived of the valuable device which permits an overall testamentary scheme to be upheld through the validation of a will as to the beneficiaries and the world at large while at the same time permitting the participation of omitted heirs in the estate to the extent of an intestate share."

To the above dictum we would add that the Supreme Court has suggested that it is within the authority of the Secretary of the Interior to promulgate substantive regulations to govern the devise of Indian trust lands. In *Tooahnippah*, *supra* at 610, Chief Justice Burger observed: "The Secretary's task [in approving or disapproving Indian wills] is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines." In a concurring opinion, Justice Harlan stated: "I do not mean to suggest that the Secretary might not promulgate a regulation that, like certain state statutes, provides that a testator cannot completely disinherit any of his offspring. A general standard like this would, of course, eliminate the dangers inherent in *ad hoc* determinations of whether the will is in some vague sense fair to an heir." *Id.* at 619 n.10.

were born to decedent after the execution of this will is insufficient to render the dispositive scheme irrational.⁷ Therefore, decedent's Feb. 1, 1973, will should not have been disapproved on the grounds that it evidenced an irrational testamentary scheme.

It is possible, however, that the will dated Feb. 1, 1973, should not be approved for other reasons. Ronald Richard Saubel, Jr., the son of Isabel Uribe, was not present at the hearings before Judge Willett, not having been furnished notice of the proceedings, and was limited by Judge Hammett to establishing that decedent was his father. He has thus not had an opportunity to present any arguments he may have against approval of the will. The case must, therefore, be remanded to the Hearings Division.⁸

Pursuant to the authority vested in the Board of Indian Appeals by 43 CFR 4.1, the Order Disapproving Will and Determining Heirs is reversed. The Order Redetermining

Heirs After Reopening is modified by striking that part of the order distributing decedent's estate but retaining all findings and conclusions establishing Ronald Richard Saubel, Jr., to be decedent's illegitimate son. The case is remanded to the Hearings Division for further action not inconsistent with this decision.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

**ADMINISTRATIVE JUDGE MUSK-
RAT CONCURRING:**

I concur with the majority in overruling the Administrative Law Judge's decision of July 6, 1978, and with the order remanding for a new hearing. To that holding I offer some additional analysis and rationale for I consider this case significant in that it raises for Indian probate the classic problems of subsequent-born children and pretermitted heirs.

At the initial hearings on May 1 and 22, 1978, the Administrative Law Judge faced a dilemma for which there presently exists no satisfactory solution. Because of the absence of Departmental regulations regarding pretermitted heirs, she was forced by the apparent unfairness of the decedent's omission of his two younger children to "destroy the will in order to save it."

⁷ The evidence suggests that a new will had been prepared for decedent that was identical to the February 1973 will except that it provided for equal distribution of all four of decedent's natural children. Decedent failed to execute this document. Despite some evidence that decedent was generally lax in attending to certain business matters, any finding as to his motivation for failing to execute the will would be purely conjectural. It is as possible that he intentionally failed to sign the new document as that he merely procrastinated too long and the omission was inadvertent. See *Estate of William Mason Cultee*, *supra*.

⁸ On remand it is suggested that the two older children and the two younger children of decedent and Sally Del Rio Saubel be represented by separate guardians *ad litem* because their interests are potentially conflicting.

Unfortunately, such an approach creates more problems than it resolves.

In her decision of July 6, 1978, the Administrative Law Judge disapproved an Indian will under the authority of 25 U.S.C. § 373 (1976) for the reason that the testator's failure to provide for two subsequent-born children rendered the will's testamentary scheme irrational.¹ In so exercising the authority of the Secretary of the Interior under sec. 373, the Administrative Law Judge relied upon the decision of the United States Supreme Court in *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), and in particular upon the concurring opinion of Justice Harlan. In *Tooahnippah*, *supra*, the Supreme Court reviewed the Secretary's authority to approve Indian wills under 25 U.S.C. § 373 (1976) and provided the analytical model for subsequent judicial review of Secretarial actions and for Secretarial review of the actions of subordinate officials. Although the Administrative Law Judge was thus correct in relying on *Tooahnippah*, *supra*, she nevertheless erred in her application of its principles.

In her decision of July 6, 1978, she misread and misapplied a point

made by Justice Harlan in footnote 9 of his concurrence.

Moreover, under *Tooahnippah v. Hickel*, disapproval of a will for the benefit of afterborn, minor children appears to be sanction as a reasonable exercise of the discretionary authority contained in 25 U.S.C. § 373. See n.9, *Tooahnippah v. Hickel*, 397 U.S. *supra*, at p. 618.

On the basis of these factors, the February 1, 1973 will of the decedent should and may properly be disapproved to insure the participation of the afterborn, minor children in the testator's estate.

(Opinion of July 6, 1978, at 16).

A closer look at footnote 9 of Justice Harlan's concurrence, however, reveals that it was merely an explanatory note indicating that the opinion of the Regional Solicitor in the case then before the Court cited three unreported decisions in support of his (the Regional Solicitor's) claim of his right, in resolving whether or not to approve an Indian will, to determine whether the will achieves a just and equitable result. The three cases cited involved the disinheritance of minor children whom the decedents were obligated to support at the time of their deaths and two of the cases involved the disinheritance of children born after the execution of a will. The mere recitation of the facts of those cases in footnote 9 does not constitute an endorsement of the proposition that an Indian will can be disapproved and set aside because the reviewing official finds that the will in question, by disinheriting subsequent-born children, is unjust and inequitable.

Rather than relying on footnote 9, the Administrative Law Judge

¹ According to the Administrative Law Judge: "the February 1, 1973 will of the decedent should and may properly be disapproved to insure the participation of the afterborn, minor children in the testator's estate." (See opinion of July 6, 1978, at 16.) In all other respects the will of Feb. 1, 1973, appeared "rational" in that it provided for the wife, existing legitimate children, and the illegitimate son of the testator—i.e., his "natural heirs."

should more properly have relied on the analytical criteria described by Justice Harlan in the text of his concurrence. Accordingly, Justice Harland sets out three standards to be considered in exercising the Secretary's approval authority under sec. 373:

A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertence—as might be the case if the testator married or became a parent after the will was executed—the Secretary *might* properly disapprove it. However, I do not think the Secretary can withhold approval simply because he concludes it was unfair of the testator to disinherit a legal heir in circumstances where as here there is a perfectly understandable and rational basis for the testator's decision. [Italics added.]

(*Tooahnippah v. Hickel*, *supra* at 619 (Harlan, J., concurring)).

The case before us thus requires close scrutiny for the will in question does have the effect of disinheriting the natural objects of the testator's bounty—*i.e.*, his subsequent-born children. In so doing, it must be noted initially that there is no evidence in the record of overreaching by a beneficiary or of fraud (opinion of July 6, 1978, at 13). Consequently, this ground for disapproval must be rejected. The other considerations however do afford grounds for possible disapproval. The will in this instance is

inconsistent with the decedent's existing legal obligation of support and the fact that it does not provide for subsequent-born children may offend public policy. Furthermore, the disinheritance may be the product of inadvertence in that the testator became the parent of two subsequent children after the will was executed. Therefore, the Secretary, or as in this case his representative, "might properly disapprove" the will.

An argument can thus be made for properly disapproving the will in question. The Administrative Law Judge then might have been "right for the wrong reason" in disapproving the will and permitting the state intestate laws to apply. However, I do not believe this is a proper case for reaching such a result. There are equally strong countervailing arguments, facts, and policies against disapproval. Both grounds which support the decision of the Administrative Law Judge can be refuted. First, the testator was already a parent when the will was executed and in the will he provided for his two then existing children. To be sure, he subsequently fathered two additional children following execution of his will, however, the record suggests that he likewise subsequently drew another will which provided for these, his subsequent children (May 22, 1978, Tr. 8). For whatever his reasons, the testator did not execute this later will providing for these children. It cannot be said then that their omission from the testator's estate was

necessarily "inadvertent." His failure to execute this later will, which was allegedly the same in all respects as the Feb. 1, 1973, will now before us except for the inclusion of the subsequent-born children, may have been "intentional." He did after all have this later will available for execution for approximately 6 months (May 22, 1978, Tr. 8).

A second ground for disapproving the Indian will before us rests on the finding that the will contravenes public policy—policies such as those regarding provision for persons to whom the testator has a legal obligation of support, inheritance by subsequent-born children, or the problems of pretermission.

At the common law, the birth of a child did not of itself revoke a will previously executed by its parent, and such child did not have any rights in the testator's estate as against the devisee. Also at the common law, a child which the testator had omitted without any intention of excluding it from its share of the testator's estate had no rights in the testator's estate as against devisees or legatees. * * *

* * * * *

In most states the common-law rule that the subsequent birth of a child did not affect the prior will of its parent has been altered or abrogated by statute. While these statutes vary greatly in their details, they may be considered to fall into two general classes: (1) those which provide that the birth of a child revokes the will; and (2) those which provide that an after-born child (and, in many states, also a child omitted from the will, for whom no provision is made, without affirmative provision in the will showing an intention to omit him) shall take

though the testator had died intestate. [Footnotes omitted.]

2 *Page On Wills* § 21:104 at 527.

The American experience with the problems of subsequent-born children and pretermission has been to change the common law rule of disinheritance not by judicial decree but by legislative action. The enactment of pretermission statutes by state legislatures declared the public policy of their respective forums regarding these issues and dictated how these problems were to be resolved. However, because there is no Federal law respecting these matters and because there exists such wide variety of state statutes on the subject, it would be hazardous indeed to generalize as to what the national public policy is or to speculate as to what the Federal policy should be. Thus, I believe it inappropriate for an Administrative Law Judge in an Indian probate case to disapprove an Indian will on the grounds that it violates public policy by failing to provide for subsequent-born children. That "public policy" has not been identified nor defined and is more properly a subject for legislative (*i.e.*, administrative rulemaking) rather than judicial action.²

Moreover, there are serious practical problems associated with up-

² Whether the offense against public policy is omitting subsequent-born children, pretermitted heirs, or persons to whom the testator owes a legal obligation of support—the fact of the matter remains that Federal policy in these areas is undetermined and it is for those charged with making policy rather than those charged with judicial review to resolve the matter.

holding the Administrative Law Judge's decision. The result of the disapproval of the will was that the testator's estate passed according to the State of California's laws of intestate succession. This resulted in not only the subsequent-born children taking their intestate share but also enabled the testator's wife and illegitimate son, both of whom the testator explicitly disinherited under the will in question, to inherit an intestate share as well. This obviously ran counter to the testator's testamentary intent as manifested by his will and subsequent actions. Such a result also runs counter to what Justice Harlan himself recognized in his concurrence in *Toonahnippah*, *supra* at 617:

Without attempting to define with precision the outer limits of the Secretary's authority under the proviso of § 373, I think it clear that it cannot be construed this broadly. First, it must be remembered that the primary purpose of § 373 is to give to the testator, not to the Secretary, the power to dispose of restricted property by a will. In according to the Indian testamentary capacity over restricted property Congress could have only intended to give him the power to dispose of restricted property according to personal preference rather than the predetermined dictates of intestate succession. Such is the essence of the power to make a will. The notion that the Secretary can disapprove a will on the basis of a subjective appraisal—governed by no standards of general applicability—that the disposition is unfair to a person who would otherwise inherit as a legal heir simply cuts too

deeply into the primary objective of the statutory grant. [Footnotes omitted.]

Even if the Board upheld the Administrative Law Judge's decision to disapprove the Indian will, other questions and problems would remain, but because of the Board's disposition of this appeal, these questions and problems need not be addressed and I express no opinion regarding them. Nevertheless, perhaps a brief recitation concerning them is in order so that the seriousness and difficulty posed by the absence of regulations governing this subject may be appreciated.

For example, when the Secretary or his representative disapproves a will, the estate passes under state laws of intestacy and 25 U.S.C. § 371 (1976) regarding inheritance by illegitimate Indian children. The ascertainment of legal heirs under state statutes can create significant problems especially with respect to the inheritance of Indian trust properties. The present case illustrates several potential problems including the inheritance of Indian trust lands by a non-Indian spouse and inheritance by legal heirs contrary to the decedent's wishes. Furthermore, if the disapproval power of the Secretary is interpreted as permitting "partial" versus "total" abrogation of the will, then the decedent may not be considered to have died "intestate." The question then arises as to what law does apply. If under partial abrogation the decedent is deemed

to have died testate, there is no provision for applying state law to fill the void; nor can Federal law apply since there is no Federal law (*i.e.*, Federal regulations) on the subject. Only the common law with its harsh rules of disinheritance remains.

This appeal represents a classic example of problems posed for Indian probate by pretermitted heirs. The absence of Federal regulations in this area leaves the Department of the Interior with no satisfactory means to resolve the problem. As this case indicates, an attempt to

disapprove an Indian will solely on grounds of pretermision in order for state intestate provisions to govern would be difficult to justify. As my colleagues emphasize in their opinion and as the Supreme Court observed in *Tooahnippah, supra* at 610: "The Secretary's task is not always an easy one and perhaps is rendered more difficult by the absence of regulations giving guidelines." I agree and respectfully recommend that such regulations be adopted without delay.

JERRY MUSKRAT
Administrative Judge

1008] **WHETHER LEASES ISSUED PRIOR TO AUG. 4, 1976, SUBJECT TO READJUSTMENT AFTER THAT DATE MUST BE READJUSTED TO CONFORM TO THE FEDERAL COAL LEASING AMENDMENTS**

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WHETHER LEASES ISSUED PRIOR TO AUG. 4, 1976, SUBJECT TO READJUSTMENT AFTER THAT DATE MUST BE READJUSTED TO CONFORM TO THE FEDERAL COAL LEASING AMENDMENTS ACT OF 1976*

M-36939

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**Coal Leases and Permits: Diligence—
Coal Leases and Permits: Readjustment—Coal Leases and Permits: Royalties—Mineral Leasing Act: Applicability**

Although Congress revised the provision governing readjustment of federal coal leases in 1976, the deletion of the clause "unless otherwise provided by law at the time of expiration of such periods" from sec. 7 of the MLA (30 U.S.C. § 207) did not alter the Secretary's obligation not to establish any lease terms contrary to law in readjusting a coal lease.

**Coal Leases and Permits: Diligence—
Coal Leases and Permits: Readjustment—Coal Leases and Permits: Royalties—Mineral Leasing Act: Applicability—Statutory Construction: Legislative History**

The legislative history of sec. 6 of the Federal Coal Leasing Amendments Act shows that the revision of sec. 7 of the MLA (30 U.S.C. § 207) was not retroactive, but applied to new leases and to "old" leases upon readjustment. The ten-year production period and revised royalty rates of amended sec. 7 must be imposed on "old" coal leases at readjust-

ment. The legislative history to the 1978 coal leasing revisions (Act of Oct. 30, 1978) discloses that Congress understood and acted on the assumption that the amended sec. 7 royalty rates did apply to all "old" leases upon readjustment.

**OPINION BY OFFICE
OF THE SOLICITOR**

TO: ASSISTANT SECRETARY, LAND AND WATER RESOURCES ASSISTANT SECRETARY, ENERGY AND MINERALS

FROM: SOLICITOR

SUBJECT: WHETHER LEASES ISSUED PRIOR TO AUG. 4, 1976, SUBJECT TO READJUSTMENT AFTER THAT DATE MUST BE READJUSTED TO CONFORM TO THE FEDERAL COAL LEASING AMENDMENTS ACT OF 1976.

The question has repeatedly arisen whether coal leases issued prior to Aug. 4, 1976 ("pre-FCLAA leases") are at readjustment subject to the new requirements that the Federal Coal Leasing Amendments Act of 1976, Pub. L. 94-377 (the "FCLAA"), added to the coal provisions of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 *et seq.* (1976) (the "Act"). The Department decided as a matter of policy in 1976 to readjust pre-FCLAA leases to conform to the provisions of the FCLAA, and the question of whether that policy is legally compelled has not been fully analyzed.

Further analysis confirms our

*Not in chronological order.

prior conclusion:¹ when the Secretary readjusts a pre-FCLAA lease, he must do so in conformity with the Act as amended. Accordingly, pre-FCLAA leases must be readjusted to contain the terms which the Act mandates for all leases, including the 12½ percent minimum production royalty for surface mined coal and the ten-year production requirement. Those lessees that find the FCLAA royalty rate requirements onerous may seek relief on a case-by-case basis under sec. 39 of the Act, 30 U.S.C. § 209 (1976).

I. READJUSTMENT UNDER THE 1920 ACT PRIOR TO THE FCLAA.

A. Indeterminate Leases And Twenty-Year Leases Compared.

Sec. 7 of the Act, 30 U.S.C. § 207 (1970), originally read in part:

[Coal] Leases shall be for *indeterminate* periods upon condition . . . that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary may determine, *unless otherwise provided by law at the time of expiration of such periods.* (Italics added.)

The 1920 Act also provided that phosphate and oil shale would be leased for an indeterminate term

subject to periodic readjustment.² Oil and gas and sodium were to be leased for twenty years, with the lessee having a preferential right to renew for successive periods of ten years.³

Why did Congress choose to lease coal for an indeterminate term subject to readjustment of all terms and conditions at twenty-year intervals instead of for a twenty-year term with a preferential right to renew? In the legislative history of the 1920 Act, lease renewal was frequently equated with lease readjustment. *E.g.* 56 Cong. Rec. 7045, 7046 (May 24, 1918) (Remarks of Rep. Robbin). Nonetheless, Congress employed different language in sec. 7 to describe the term of a coal lease than it did in sec. 17 to describe the term of an oil and gas lease.

The legislative history of the 1920 Act suggests that Congress chose indeterminate coal and phosphate leases and twenty-year oil and gas leases primarily to satisfy what Congress perceived to be a greater need for reliability of investment in coal mines and phosphate plants. *See* 51 Cong. Rec. 14945 (Sept. 10, 1914) (Remarks of Rep. Thomson

¹ Solicitor's Opinion, M-36920, 87 I.D. 69 (1979); Memorandum dated Feb. 16, 1979 to Assistant Secretary, Land and Water Resources from Associate Solicitor, Energy and Resources, "Readjustment of coal lease royalties"; Letter dated Sept. 12, 1978, to Senator Henry Jackson from Frederick N. Ferguson, Deputy Solicitor; Memorandum dated May 2, 1978 to Chris Farrand, Deputy Under Secretary, from the Deputy Solicitor, "Royalty terms upon readjustment of coal leases."

² Sec. 10 of the Act, 30 U.S.C. § 212 (1976) (phosphate); sec. 21 of the Act, 30 U.S.C. § 241 (1976) (oil shale). All the terms and conditions of phosphate leases are subject to readjustment at the end of successive twenty-year periods; however, only the royalties of oil shale leases may be readjusted.

³ Sec. 7 of the Act, 41 Stat. 443 (oil and gas); sec. 24 of the Act, 30 U.S.C. § 262 (1976) (sodium). Competitive oil and gas leases are currently issued for a primary term of five years and noncompetitive leases for a primary term of ten years, and so long thereafter the primary term as oil and gas is produced in paying quantities. 30 U.S.C. § 226 (1976).

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of Ill.); Letter dated Sept. 12, 1914 from George H. Ashley, Acting Director of the U.S. Geological Survey to Rep. Scott Ferris, Chairman of the House Committee on Public Lands. Both readjustable leases in the 1920 Act allow the lessee to continue operations until the mineral is extracted. The critical difference in the reliability of investment provided by an indeterminate and a determinate lease is in the termination procedures. With an indeterminate lease, if a lessee fails to comply with a condition the lessor must go to court in order to end the lease. Sec. 31(a) of the Act, 30 U.S.C. § 188(a) (1976). But if a lessee fails to comply with the terms and conditions of a twenty-year lease, the lessor can end the lease simply by notifying the lessee at the end of the lease term. This difference provides the added security that Congress sought for coal and phosphate leases by assuring lessees their leases can be terminated only by judicial order.

B. The Scope Of The Secretary's Discretion To Readjust Under The 1920 Act.

The phrase "unless otherwise provided by law" in former sec. 7 gave the Secretary discretion to readjust lease terms as he deemed proper, unless at the expiration of the twenty-year period the law specifically directed that a term be included in the lease. If at the end of the twenty-

year period the law directed that a lease contain a new provision, sec. 7 compelled the Secretary to readjust the lease.

Sec. 7, then as now, required certain provisions be included in all coal leases. Nothing in the 1920 Act or its legislative history suggests that readjustment may be contrary to mandatory lease terms. *See* 56 Cong. Rec. 7047 (May 24, 1918) (Remarks of Rep. Mondell). Thus, under former sec. 7, readjustment could not reduce the royalty to less than five cents per ton, since the Act prevented a royalty of less than five cents per ton. 30 U.S.C. § 207 (1970). Similarly, readjustment could neither eliminate the diligent development and continued operation requirements nor delete those lease provisions required by sec. 30 of the Act, 30 U.S.C. § 187 (Supp. III 1979).

Former sec. 7 provides no guidance as to the Secretary's present readjustment authority since it was repealed by the FCLAA without any preservation, grandfather, or "subject to" clause. The former provision for a minimum five cents per ton royalty no longer exists and can no longer govern pre-FCLAA leases. *See* Sutherland, 1A *Statutes and Statutory Construction*, 236 (4th ed. 1972).⁴ Sec. 7 as amended

⁴ While sec. 6 of the FCLAA eliminated the provision "unless otherwise provided by law at the time of expiration of such periods" from sec. 7 of the Act, the former wording of

by the FCLAA now provides authority for readjustment.

II. READJUSTMENT UNDER THE ACT AS AMENDED BY THE FCLAA.

A. Amended Readjustment Provision.

Sec. 6 of the FCLAA amended sec. 7 of the Act, 30 U.S.C. § 207 (1976), to read in part:

Such rentals and royalties and other terms and conditions of the lease will be *subject to readjustment* at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended. (*Italics added.*)

The legislative history of the FCLAA does not specifically address the altered readjustment provision except to note that the readjustment interval is changed from twenty to ten years. The legislative history simply indicates that this change was made so that the Secretary could readjust terms to reflect more closely changing market conditions. *See* H.R. Rept. No. 94-681, 94th Cong., 1st Sess. 18 (1975).⁵

sec. 7 is preserved in the leases issued prior to the FCLAA. *E.g.* Form 4-696 (Dec. 1958). Since the lease readjustment term tracks former sec. 7, the pre-FCLAA lease itself requires that the readjusted terms conform to the law in existence at the end of the 20-year term—in other words, conform to the FCLAA. But since the provision “unless otherwise provided by law” is no longer statutorily required, the United States and the lessee could agree to ignore or revoke it. *See Welner v. Compagnie Generale Transatlantique*, 61 F. 2d 893, 895 (2d Cir. 1932); *Littell v. Morton*, 369 F. Supp. 411, 422 (D. Md. 1974), *aff’d* 519 F. 2d 1399 (4th Cir. 1975).

⁵ H.R. 3265, which was the subject of House hearings, provided for readjustment at the

Nonetheless, as it did prior to the FCLAA, the Act makes certain lease terms mandatory, such as a 12½ percent royalty for surface mined coal. At least for leases issued after Aug. 4, 1976, the Secretary may not later readjust to delete or alter the mandatory lease terms. For example, the Secretary may neither readjust the royalty of a post-FCLAA lease to less than 12½ percent of the value of surface mined coal nor may the Secretary readjust to eliminate the terms and conditions required by sec. 30 of the Act, 30 U.S.C. § 187 (Supp. III 1979).

A comparison of sec. 7 before and after the enactment of the FCLAA shows the change in wording did not change the restraints on the Secretary's discretion to formulate readjusted lease terms. While pre-FCLAA sec. 7 expressly limited the Secretary's readjustment determinations by the phrase “unless otherwise provided by law,” that phrase is implicit in amended sec. 7, since the Secretary cannot act—or readjust—contrary to law. The question remains whether readjustment of pre-FCLAA leases must be in accordance with the requirements the FCLAA added to the Act.

end of a primary lease term of ten years and at five year intervals thereafter. The Department of the Interior commented that such frequent readjustment would disrupt economic planning, discourage production and create an unnecessary administrative burden. Instead, the Department urged that the primary term be increased to twenty years, with readjustment periods each ten years thereafter, which was done. H.R. Rept. No. 94-681, 94th Cong., 1st Sess. 32 (1975).

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*B. Application of the FCLAA to
Pre-FCLAA Leases.*

*1. Legislative History of the
FCLAA.*

The legislative history of the FCLAA sheds little light on whether pre-FCLAA leases must be readjusted to conform with the FCLAA since Congress generally failed to distinguish between the FCLAA's effect on existing leases that become subject to readjustment from those in the middle of a twenty-year period. Congress intended that the FCLAA not affect pre-FCLAA leases before those leases become subject to readjustment, with one exception—sec. 3 of the FCLAA, 30 U.S.C. § 201(a)(2)(A) (1976). That exception provides that a lessee who holds a non-producing lease, including pre-FCLAA leases, for ten years after the enactment of the FCLAA may not be issued new federal leases. *See* H.R. Rept. No. 94-681, 94th Cong., 1st Sess. 15 (1975).

Rep. Mink, Chairwoman of the House Subcommittee on Mines and Mining, summarized the effect of the FCLAA on pre-FCLAA leases:

The 533 existing Federal leases would be unaffected by the bill *except to the extent its provisions are made applicable upon the periodic ten [sic] year readjustment of the lease terms or upon the inclusion of an existing lease in a logical mining unit.* The only other sanction imposed on existing leases would be a prohibition on leasing any additional Fed-

eral tracts to an entity which holds a nonproductive lease [ten] years after the date of enactment of this bill.

122 Cong. Rec. 489 (1976).⁶ Rep. Mink's use of "except to the extent" in conjunction with readjustment may be read in several ways. First, it could indicate she thought the Secretary has the authority to readjust pre-FCLAA leases but is not compelled to exercise that authority. Second, "to the extent" may also mean that some, but not all, of the provisions of the FCLAA must govern the readjustment of the 533 pre-FCLAA leases. Rep. Mink used the phrase "except to the extent" in a sentence addressing the two events which make at least some of the FCLAA provisions applicable to pre-FCLAA leases: the inclusion of pre-FCLAA leases in logical mining units, and readjustment. Sec. 5 requires that a pre-FCLAA lease included in a logical mining unit become subject to other provisions of the FCLAA. As used in connection with logical mining units, then, Rep. Mink's "except to the extent" did not indicate that the Secretary has discretion to impose FCLAA requirements on pre-FCLAA leases consolidated into a logical mining unit, but rather that only part of the FCLAA requirements were mandatory for such leases. The

⁶ By floor amendment the fifteen year provision was changed to ten years. 122 Cong. Rec. 504 (Jan. 21, 1976). Prior to the enactment of the FCLAA, the leases had twenty-year readjustment periods.

same understanding may explain her use of the phrase in speaking of readjustment as well. Thus, those provisions of the FCLAA affecting issuance of leases could not apply to pre-FCLAA leases at readjustment. But provisions imposing mandatory requirements on all leases govern the readjustment of pre-FCLAA leases.

2. Readjusted pre-FCLAA lease becomes new contracts governed by the FCLAA.

The legislative history confirms that the FCLAA applies only prospectively and does not alter leases issued prior to Aug. 4, 1976 before those leases become subject to readjustment. 122 Cong. Rec. 489 (1976) (Remarks of Rep. Mink). But the FCLAA does affect conduct, events and circumstances which occur after its enactment. Sutherland, 2 *Statutes and Statutory Construction*, 245 (4th ed. 1973). The lessee of a pre-FCLAA lease has no vested rights to the indefinite continuation of existing lease terms, since *all* the terms and conditions were prescribed subject to periodic readjustment. The legislative histories of the 1976 and 1978 Acts, as discussed, indicate that readjustment of a pre-FCLAA lease after Aug. 4, 1976 is, like issuance of a new lease, an event which the FCLAA governs.

Lease readjustment is like a lease renewal accompanied by a revision of lease terms. The exercise of an option to "renew" a contract for a further term is generally held to

produce a new contract.⁷ This is particularly true if the renewal involves the substitution of new terms rather than the retention of the existing terms. One court stated that to renew means to "begin again" or to "continue in force" the old contract. *East Bay Union of Machinists, Local 1304 v. Fibreboard Paper Products Corp.*, 285 F. Supp. 282, 287 (N.D. Cal. 1968), *aff'd*, 435 F.2d 556 (9th Cir. 1970).⁸ In *Wyodak Chemical Co. v. Board of Land Comm'rs*, 51 Wyo. 265, 65 P.2d 1103, 1105 (Wyo. 1937), the Supreme Court of Wyoming held a lease issued for a term of ten years with a preferential right to renew for successive ten-year periods meant that:

The old lessee must meet all reasonable terms and conditions which may be laid down from time to time by the board, and which other persons are willing to meet, thus making the lease *not a continuing one . . . but in fact a new one.* (Italics added.)

Courts have similarly held statutes enacted after the parties have entered into a contract but before the contract is renewed applies to that contract. *See Wright v. Paine*, 289 F.2d 766, 769 (D.C. Cir. 1961) (federal oil and gas lease); *United States v. Ohio Oil Co.*, 163 F.2d 633, 638-41 (10th Cir. 1947)

⁷ *E.g. Hennigan v. Chargers Football Co.*, 431 F.2d 308 (5th Cir. 1970). Renewals have been distinguished from extensions of a contract, which is a mere extension of the original term rather than a new contract, although the two terms can be synonymous. *Haddad v. Tyler Production Credit Ass'n*, 212 S.W. 2d 1006, 1008 (Tex. Civ. App. 1948).

⁸ *Accord, Seymour v. Coughlin*, 609 F.2d 346, 351 (9th Cir. 1979); *cert. den.* 446 U.S. 957 (1980); *Hauben v. Harmon*, 605 F.2d 920, 925 n. 2 (5th Cir. 1979).

cert. den. 333 U.S. 833 (1948) (same).⁹ The implication of the contract renewal cases for coal lease readjustments is that readjustment produces a new contract to which the law existing at the time of readjustment applies.

That the FCLAA applies to pre-FCLAA leases at readjustment is clear. Sec. 6 of the FCLAA amended Sec. 7 of the Act without any grandfather clause or exemptions. Unless the FCLAA applies, pre-FCLAA leases are no longer subject to statutory minimum royalty and rental rates and the Secretary would be free to eliminate royalty and rental obligations from a readjusted lease. The Secretary could even liberate a lease from the conditions of diligent development and continued operation. Given the strong expressions in the legislative history of the FCLAA of Congress's desire to exact a fair return

and ensure that leases are developed and not held for speculative purposes, it is not likely that Congress intended to free the Secretary from any statutory restraints in readjusting pre-FCLAA leases. Since former Sec. 7 no longer exists to govern the exercise of the Secretary's readjustment authority, the only alternative is that the Act as amended by the FCLAA controls.

3. Lease terms made mandatory by the FCLAA.

The FCLAA amended the Act to require new mandatory lease terms, most notably a minimum 12½ percent production royalty rate for surface mined coal and a ten-year production requirement. Sec. 6 of the FCLAA, amending sec. 7 of the Act, 30 U.S.C. § 207 (1976). The 12½ percent minimum royalty rate is by its terms absolute; it does not read "a lease issued after August 4, 1976 shall require", and I conclude that the Secretary must readjust the royalty rate of pre-FCLAA leases to not less than 12½ percent the value of surface mined coal. Statements regarding application of the 12½ percent royalty at readjustment in the legislative history of the Act of Oct. 30, 1978, Pub. L. No. 95-554, 92 Stat. 207 ("1978 Act") discussed below, support this conclusion.

Sec. 6 of the FCLAA also amended sec. 7 of the Act, 30 U.S.C.

⁹ See also *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp.*, 627 F.2d 44, 49 (7th Cir. 1980) (statute prohibiting termination of franchise contract without good cause applies to renewal of existing franchise agreements); *Consumers Oil Corp. v. Phillips Petroleum Co.*, 438 F.2d 816, 818 (3rd Cir. 1973) (same); statute expressly applies to renewal or amendment of existing franchises). Cf. *Mimi Corp. v. Hill*, 310 F.2d 467, 470 (10th Cir. 1962) (assignor of federal oil and gas lease retains overriding royalty interest in "new" preference lease issued to assignee under Mineral Leasing Act); *Gibbons v. Pan American Petroleum Corp.*, 262 F.2d 852, 855 (10th Cir. 1958) (distinguishing effect of amendment to Mineral Leasing Act on automatic extension of oil and gas leases by operation of law and their extension upon application, which is "akin to the issuance of new leases.")

§ 207, to provide that "[a]ny lease which is not producing in commercial quantities at the end of ten years shall be terminated." The statute neither specifies when the period begins nor expressly limits the requirement to leases issued after Aug. 4, 1976. Both Senator Metcalf and Rep. Mink stated that the ten-year period runs from lease "issuance". 122 Cong. Rec. 19379 (June 21, 1976);¹⁰ 122 Cong. Rec. 25456 (Aug. 4, 1976)¹¹ Readjustments were not at issue when they spoke, however. The House report states that leases existing at the enactment of the FCLAA would be exempt from the ten-year production requirement "except to the extent it might be made applicable upon readjustment of lease terms." H.R. Rept. No. 94-681 at 15. Immediately before the House voted to override President Ford's veto of the bill, Rep. Baucus stated in support of such a vote that, contrary to the veto message:

S. 391 was carefully drafted to increase coal production from Federal leases by requiring production from leases within 10 years. This requirement is in S. 391 because only 59 of the 534 [sic] existing Federal leases have ever produced coal. Indeed 239 of 467 western leases have no

production plans prior to 1990. Instead, most existing leases are held for speculative purposes—to be developed when the price for coal is right—for the coal companies. Profits from rising coal prices, therefore, go not to the Federal Government which owns the coal, but to the lessee. As trustee of the Federal coal lands, Congress must put an end to this. S. 391 does, and yet so reasonable are its provisions that the 534 [sic] existing leases will not have to produce coal until *10 years after the next scheduled readjustment of lease terms, which in many cases will not be for 15 or 20 years. This can hardly be termed unfair.*

122 Cong. Rec. 25464 (Aug. 4, 1976).

Rep. Mink and Senator Metcalf did not state that the ten-year period runs exclusively from lease issuance; readjustment was not an issue in the immediate context of their statements. The House report is ambiguous. Thus, Rep. Baucus's remark that pre-FCLAA leases would have ten years from readjustment to produce coal in commercial quantities is not inconsistent with the statements that leases must produce within ten years of lease issuance. Further, it is the only unambiguous statement how and whether the ten-year production requirement applies at the readjustment of pre-FCLAA leases. Because of Rep. Baucus' comment, and the express language of the Act that "[a]ny lease" not producing in ten years shall be terminated, I conclude that the ten-year production requirement is also a mandatory term that applies to pre-FCLAA leases at readjustment.

¹⁰ Senator Metcalf submitted a summary of the major differences between the House and Senate bill, which stated that while the Senate bill required development of the lease in seven years the House bill provided that any lease not producing at the end of ten years from the issuance of the lease shall be terminated.

¹¹ In urging the override of President Ford's veto Rep. Mink stated that the bill would "enact Interior's regulatory provisions requiring production from coal leases within 10 years of lease issuance."

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C. 1978 Act

The legislative history of the 1978 Act supports my conclusions about Congress' understanding of how readjustment works under the FCLAA; an understanding which is entitled to consideration as an expert opinion regarding the proper interpretation of the FCLAA. Sutherland, 2A *Statutes and Statutory Construction*, 966 (4th ed. 1972). See *Bobsee Corp. v. United States*, 411 F.2d 231 (5th Cir. 1969). The 1978 Act, among other things, amended sec. 3 of the Act, 30 U.S.C. § 203 (Supp. III 1979), which authorizes the modification of existing leases to add up to 160 acres of contiguous lands. As amended in 1976, sec. 3 read in part:

The Secretary shall prescribe terms and conditions which shall be consistent with this chapter and applicable to all of the acreage in such modified lease.

Pub. L. 94-377, § 13(b); 90 Stat. 1090. The House report on what became the 1978 Act noted that lessees were reluctant to apply for modifications because "they would be faced with having to accept the more stringent requirements of the 1975 Act [the FCLAA] for the entire lease area." H.R. Rept. No. 95-1635, 95th Cong., 1st Sess. 3 (1978). Consequently, the 1978 Act altered the modification provision by adding after the sentence quoted above:

except that nothing in this section shall require the Secretary to apply the pro-

duction or mining plan requirements of section 202a(2) [40-year mine out] and 207(c) [3-year operations and reclamation plan submittal] of this title. The minimum royalty provisions of section 207(a) [12½ percent] of this title shall not apply to any lands covered by this modified lease prior to a modification *until the term of the original lease or extension thereof which become effective prior to the effective date of this Act has expired.* (Italics added.)

In 1978 the readjustment provision stated that leases "will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended." Thus, the 1978 amendment to 30 U.S.C. § 203 means that the 12½ percent minimum royalty "shall not apply to any lands covered by this modified lease prior to a modification until" the lease is readjusted. The Senate report on S. 3189 noted while discussing sec. 3 that:

All leases would of course be subject to the provisions of the 1976 amendments at the expiration of their original lease term. Section 3 does not affect this eventuality in any way. It only addresses changes in a lease which would result from modification. (Italics added.)

S. Rept. No. 95-1169, 95th Cong., 2d Sess. 7 (1978). See also H.R. Rept. No. 95-1635, 95th Cong., 1st Sess. 3 (1978).

Senator Melcher proposed a floor amendment to S. 3189 which would have required that all leases that had become subject to readjustment

prior to the enactment of the 1976 Act be readjusted to conform with the minimum 12½ percent royalty.¹² Cong. Rec. S15613 (daily ed., Sept. 20, 1978). With respect to pre-FCLAA leases that become subject to readjustment *after* Aug. 4, 1976, Senator Melcher stated:

The usual terms of the coal lease, I think in all cases, was that every 20 years they would have to be renewed. The effect of the bill passed in 1976 was that, as those leases became renewable at the end of 20 years, the terms of the lease would be changed to 12.5 percent royalty.

Id. It follows that at readjustment, the lease must be readjusted to comply with the minimum royalty. Since neither 30 U.S.C. § 203 nor any other provision of the Act provides a basis for treating modified pre-FCLAA leases differently from other pre-FCLAA leases *at readjustment*, I conclude that Congress in 1978 understood, and legislated on the understanding, that all pre-FCLAA leases that become subject to readjustment after Aug. 4, 1976 must be readjusted to comply with the minimum production royalty provision of sec. 7(a), 30 U.S.C. § 207(a) (1976).

CONCLUSION

After reassessment of our prior advice that the 12½ percent minimum royalty and other provisions

¹² The amendment was adopted and passed by the Senate. Cong. Rec. S15617 (daily ed., Sept. 20, 1978). The amendment, however, was subsequently dropped without explanation when the Senate substituted the House bill, H. R. 13553, for its bill. H. R. 13553 contained no provision comparable to the Melcher amendment.

of the FCLAA apply to leases issued prior to Aug. 4, 1976 when they are thereafter readjusted, I affirm our original conclusions. Analysis of the legislative history of the Mineral Leasing Lands Act and its amendments in 1976 and 1978, and the import of lease readjustment leads to the conclusion that the Act as amended by the FCLAA governs the terms and conditions that the Secretary may impose when he readjusts pre-FCLAA leases. The only question then is whether Congress intended that particular provisions of the FCLAA apply to all leases, or only to leases issued after Aug. 4, 1976. From the express language of the Act and from the legislative history, I conclude that the minimum 12½ percent royalty and the ten-year production requirement are mandatory terms for all leases, including pre-FCLAA leases at readjustment.

WILLIAM H. COLDIRON
Solicitor

DOMESTIC PETROLEUM CORP.

59 IBLA 370

Decided November 9, 1981

Appeal from decision of New Mexico State Office, Bureau of Land Management, holding oil and gas lease NM 24455-A to have terminated by operation of law.

Affirmed.

1. Oil and Gas Leases: Reinstatement—
Oil and Gas Leases: Termination

November 9, 1981

A lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that the failure to make timely payment was "justifiable." In the absence of such proof, a petition for reinstatement is properly denied.

2. Oil and Gas Leases: Reinstatement— Oil and Gas Leases: Termination

A late rental payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee. However, where the lessee has entrusted payment to an employee who is hospitalized because of an injury and another employee who assumes the injured employee's responsibilities fails to make timely payment, the injury of the employee is not the proximate cause of the late payment.

APPEARANCES: Debra R. Lappin, Esq., Robert C. Hawley, Esq., Gretchen VanderWerf, Esq., Susan L. Perkins, Esq., Denver, Colorado, for appellant; Robert Uram, Esq., Office of the Solicitor, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

Oil and gas lease NM 24455-A was issued on Mar. 1, 1975. The annual rental for the seventh lease year was due on Mar. 2, 1981. The New Mexico State Office, Bureau of Land Management (BLM), received the rental payment on Mar. 20, 1981,

on behalf of Dome Petroleum Corp. (Dome). On Mar. 24, 1981, BLM received a letter from Dome explaining as follows:

Our computer inadvertently omitted one tract under this lease, thereby incorrectly reducing the rental. This error was noted by our Lease Rental Clerk and the check put to the side so that a manual check could be written for the correct amount. Unfortunately, before this could be done, the Lease Rental Clerk broke her leg in two places, as well as her arm. Thus traumatized and hospitalized, she was unable to relay to anyone the action required on the captioned lease.

By letter dated May 7, 1981, BLM's Chief, Oil and Gas Section, notified Dome that its oil and gas lease NM 24455-A had terminated on Mar. 1, 1981, for failure to pay the annual rental on or before Mar. 1, 1981.¹

On June 1, 1981, the New Mexico State Office issued a formal decision holding that the lease terminated on Mar. 1, 1981 (*see n.1*), pursuant to 30 U.S.C. § 188 (1976), because the annual rental which was due on Mar. 1, 1981, was not received until Mar. 20, 1981. The decision stated that under 43 CFR 3108.2-1(c) the lessee was allowed 15 days from receipt of the decision within which to file a petition for reinstatement of the lease and to submit a showing that failure to pay the rental on or before the anniversary date was justifiable or not due to lack of reasonable diligence on the part of the lessee.

¹ The correct due date for the rental payment as subsequently recognized by BLM was Monday, Mar. 2, 1981, as Mar. 1, 1981, was a Sunday.

In its notice of appeal and statement of reasons filed June 8, 1981,² appellant contends, *inter alia*, that BLM's decision to terminate the lease should be reversed because appellant paid the rental within 20 days of the due date³ and appellant's failure to pay timely the rental was not due to a lack of reasonable diligence, but rather to excusable clerical error which reasonably could not have been prevented by Dome.

Appellant explained the events which led to its failure to make a timely rental payment as follows:

During the week ending February 13, 1981, Frances Jones, Dome's Lease Rental Analyst, discovered that the computer check issued to pay the delay rentals on the subject lease was for \$240, rather than the correct amount of \$320. Ms. Jones removed the check from the computerized system and flagged the Lease record so that she could request a new delay rental check in the correct amount. Over the holiday weekend which followed, Ms. Jones was seriously injured in an accident. The following week Ms. Jones underwent surgery and was incapacitated until late March, 1981. Diane Tower, who assumed Ms. Jones' responsibilities, did not discover the flag on the Lease record until mid-March, 1981, because the flag had been accidentally tucked into the record book itself.

² Appellant did not file a petition for reinstatement of the lease. Its notice of appeal was directed to BLM's May 7, 1981, letter. However, its letter received by BLM on Mar. 24, 1981, was clearly couched in terms of a petition for reinstatement. Therefore, the May 7, 1981, letter may be considered the denial of that "petition." Dome filed a timely appeal of that denial.

³ In its letter of May 7, 1981, BLM had mistakenly stated that the rental was not received until Mar. 24, 1981. The rental was actually received by BLM on Mar. 20, 1981.

Appellant submitted affidavits of Frances Jones and Diane Tower in support of its explanation of the facts.

In its answer, BLM states that the lease terminated by operation of law because the rent was not paid on time. BLM contends that the lessee does not qualify for reinstatement because it did not show that the failure to make timely payment was either justifiable or not due to a lack of reasonable diligence. BLM states that the failure to pay annual rental on time is justifiable only if it is caused by circumstances beyond the control of the lessee. BLM asserts that the failure to pay in this case is attributable to events within Dome's control and that the record does not support a finding that the injury to Ms. Jones caused the annual rental to be paid untimely.

[1] An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976); 43 CFR 3108.2-1(a). A terminated lease can be reinstated only if, among other requirements, the lessee shows that the failure to not due to lack of reasonable diligence. 30 U.S.C. § 188(c) (1976); 43 CFR 3108.2-1(c).

Appellant has made no allegation that payment of the rental was made on or before the anniversary date of the lease. A check for the rental was hand-delivered to the BLM office on Mar. 20, 1981. De-

livering the payment to BLM after it is due does not constitute reasonable diligence. See 43 CFR 3108.2-1 (a); *Melbourne Concept Profit Sharing Trust*, 46 IBLA 87 (1980); *Gilbert Mark Castillo*, 36 IBLA 32 (1978).

[2] A failure to make timely payment may be justifiable, however, if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee. *International Resource Enterprises, Inc.*, 55 IBLA 386 (1981); See *Ramoco, Inc. v. Andrus*, 649 F.2d 814 (10th Cir. 1981); see also *Martin Mattler*, 53 IBLA 323, 88 I.D. 420 (1981); *Bernard W. Crowe*, 40 IBLA 114 (1979). Proximity in time and casualty of the unfavorable occurrence are essential elements. *Earl Chancellor*, 24 IBLA 121 (1976). Accordingly, we are most concerned with circumstances affecting appellant at or near the anniversary date of the lease. Negligence, forgetfulness, or inadvertence do not justify failure to pay timely since they are events within the lessee's control. *Jan R. Christensen*, 15 IBLA 72, 75 (1974).

We do not believe that appellant has provided adequate justification for the late payment. It is true that circumstances adversely affecting an employee entrusted with payment of the annual rental may justify a late payment. See *David Kirkland*, 19 IBLA 305 (1975) (secretary solely responsible for personal accounts in

hospital under sedatives on and before the due date). However, in her affidavit (pages 1-2), Ms. Tower stated that she assumed the responsibilities of Frances Jones on Feb. 17, 1981; that she requested checks in the correct amount for those leases which were flagged and which had not been handled earlier by Frances Jones; that by Feb. 20, 1981, all of the checks which were flagged had been issued in the proper amount and sent for payment of March rentals; that the flag for the lease in question had been accidentally tucked into a book and was not readily visible; and that the check for lease NM 24455-A was not discovered until sometime in March.⁴ It is apparent from Ms.

⁴ There is a certain inconsistency in the affidavits of Ms. Jones and Ms. Tower. Ms. Jones explained her procedures prior to her accident as follows:

"In February, 1981, I was working on paying the delay rentals due on all of Dome's leases for March, 1981. The checks came out of the computer during the first week in February. My analysis of the computerprinted delay rental checks revealed that approximately one dozen checks were incorrect. One of these checks was the delay rental check on Federal Lease No. NM-24455-A. Dome Petroleum Corp.'s Lease No. NM-24455-A covered 640 acres. The lease annual rentals are 50 cents per acre. Dome had assigned operating rights in one quarter section, 160 acres. Because of this, the computer had made the check out for \$240.00; however, the amount should have been \$320.00. On this particular check, as well as the remaining ten or twelve checks, I placed a yellow self-adhesive tab on the rental book page on which this lease was described. This was my reminder system to request a manual check and personally see to proper posting of the delay rental check. The notation that I made to myself on the delay rental check for Federal Lease No. NM-24455-A was made on or about February 13, 1981, which was a Friday. The following weekend was a long weekend due to a holiday on February 16, 1981, which was a Monday. On Friday, February 13,

—Continued

Tower's statement that other checks were issued in the normal course of business, despite Ms. Jones' accident. Therefore, the proximate cause of the failure to make timely payment for the lease in this case was the fact that the flag had been accidentally tucked into the book, rather than the injury to Ms. Jones. Ms. Jones stated in her affidavit at page 3:

In my opinion, the failure of Diane Tower to catch this one payment was completely inadvertent and due entirely to the fact that the flag which I had placed in the book for my reference had been accidentally tucked in and was not obvious to anyone looking at the flagged pages of the books.

The Board has held that mere inadvertence or negligence of the lessee's agent or employee is not sufficient justification for reinstatement. *Phillips Petroleum Co.*, 29 IBLA 114 (1977); *Serio Exploration Co.*, 26 IBLA 106 (1976); *Samuel J. Testagrossa*, 25 IBLA 64 (1976). In addition, the complexities of appellant's business operations do not

I manually requested the checks that I had not been able to mail out during that work-week to insure that proper payment was made of all delay rentals. Under usual procedure, the check requests would be issued and back to me within three days and the mailing of the delay rental checks would occur no later than the 19th or 20th of the month, which is substantial time for those checks to be received by the lessors. (Italics added.)

Therefore, it would appear from her affidavit that she requested new checks for all the incorrect ones on February 13th, prior to her accident. However, Ms. Tower stated in her affidavit: "As first priority, I went through the flags placed on lease delay rentals, the amounts of which were incorrect. I requested checks in the correct amount for those leases which were flagged and which had not been handled earlier by Frances Jones." Apparently, based on Ms. Tower's affidavit, Ms. Jones did not request new checks for all the leases.

make its actions justifiable when they would not be so if committed by an individual lessee. *Fuel Resources Development Co.*, 43 IBLA 19, 23 (1979); see *Serio Exploration Co.*, *supra* at 108; *James Donoghue*, 25 IBLA 280, 281 (1976); *Monturah Co.*, 10 IBLA 347, 348 (1973), *dismissed without prejudice sub nom. Pashayan v. Morton*, No. F-74-5-Civ. (E.D. Cal., Apr. 11, 1974).

Given these facts, we cannot find that the failure to make a timely rental payment was justifiable.

It is not necessary to consider appellant's other arguments presented on appeal, as the above discussion is dispositive of this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

APPEAL OF WASHINGTON STATE UNIVERSITY

IBCA-1467-6-81 and 1469-6-81

Decided November 9, 1981

Contract No. 73-042-0036, Contract
No. 74-042-0008, ACTION.

Denied.

**Contracts: Construction and Operation:
Allowable Costs**

Under two cost-no-fee contracts with an educational institution requiring the work to be done in accordance with appellant's proposals and providing for a fixed-dollar amount to be paid for overhead expenses, the Board denies claimed overhead expenses attributable to the terminated portion of the performance time under the contracts and denies recovery as direct expense the salary of the project director because neither proposal contemplated this expense to be a direct cost.

APPEARANCES: Joseph D. Hamel, Assistant Vice President, Washington State University, Pullman, Washington, for Appellant; Randi J. Greenwald, Government Counsel, ACTION, Washington, D.C., for the Government.

*OPINION BY
ADMINISTRATIVE JUDGE
LYNCH*

*INTERIOR BOARD OF
CONTRACT APPEALS*

Background

Appellant was awarded contracts No. 73-042-0036 on June 27, 1973, and No. 74-042-0008 on Jan. 28, 1974, to provide preservice training for a number of Peace Corps volunteers scheduled to serve in Venezuelan schools. Both contracts reference the appellant's proposal to require the courses to be given as proposed. Contract 0036 was scheduled to be completed on Oct. 22, 1975, and contract 0008 was scheduled to be completed on Nov. 30, 1976. Both contracts were termi-

nated for the convenience of the Government on June 12, 1975. After an audit of the contracts, the contracting officer disallowed \$8,478.20 in claimed costs for indirect costs attributable to the terminated portion of the contracts costs accrued after termination, and the direct salary and fringe benefits for the project director. Appellant contests the disallowed costs.

Indirect Expenses

The contracts provided for the payment of a fixed sum for overhead expenses in four equal installments to be paid on specified dates about 6 months apart. Appellant claims the total fixed amount for overhead expenses. After audit, the contracting officer disallowed \$247 of the \$1,481 provided for overhead expenses under contract 0036 and disallowed \$779 of the \$1,558 provided for overhead expenses on contract 0008. Appellant relies on the schedule provision of the contracts, stating that "the fixed amount for all indirect expenses under this contract shall be paid * * *" on certain listed dates. The Government contends that upon termination of the contracts, the indirect costs as well as the direct costs ceased.

Appellant's contention that the fixed dollar amount of overhead expenses should be paid on both contracts is not supported by any evidence that actual overhead expenses were equal to the amounts provided for in the contracts prior to termination. There is no allegation or

proof that actual overhead expenses were incurred at a rate higher than the 8 percent factor used to compute the amounts provided. The Government allowed recoupment of 85.7 percent of the fixed amount on contract 0036 based upon a determination that this amount of the contract work was expended prior to termination. On contract 0008, the Government allowed 50 percent of the fixed amount even though the rate of expenditures for direct labor indicated only 33.38 percent of the contract work was completed.

The claim for actual direct labor expenditures and the total fixed amounts for overhead disregards the basic relationship between direct and indirect costs. Under the cost reimbursement contracts, the Government agreed to pay for the direct costs incurred and a fixed amount for overhead incurred. In most cases the obligation to pay indirect costs is expressed in terms of a percentage of the direct labor costs because indirect expense is accrued and distributed on the basis of the expenditure of direct labor costs. Here, the amount for overhead expenses were determined in accordance with Federal Procurement Regulations 1.15.3, which regulation is also referenced in the clauses of the contracts entitled "Termination for Convenience of the Government" (Clause 20). The fixed amounts for indirect costs were established in accordance with Attachment G to OMB Circular A-21, "Principles for Determining

Cost Applicable to Grants, Contracts, and Other Agreements with Educational Institutions," which is incorporated in the Federal Procurement Regulations at 41 CFR 1-15.303.

Clause 9 of the contracts, entitled "Allowable Cost and Payment" provides in pertinent part: "For performance of this contract, the Government shall pay to the Contractor the cost thereof." Therefore the Government's obligation to pay is limited to the actual costs incurred. The actual direct costs incurred are more readily determined than the indirect costs. However, whether the indirect costs are distributed on the basis of a percentage of direct costs or by means of a fixed-dollar amount, the obligation to pay for indirect expenditures is limited to actual expenditures. Here, the fixed-dollar amounts for indirect costs were allowed for performance prior to termination in proportion to the amounts expended for direct costs. We find that this method of determining the allowable indirect expenses to be proper and equitable to reimburse appellant for indirect expenses incurred prior to termination.

It is noted that the Government's Answer agrees to allow \$44.20 for telephone charges previously disallowed because they were incurred after the termination date of the contract (0036). The appellant's claim for additional indirect expenses in the amount of \$1,026 is therefore denied.

Salary and Benefits for Project Director

A total of \$7,408 claimed for payments of salary and fringe benefits to the project director was disallowed under the contracts. Appellant claims these costs should be allowed as direct costs because the director has supervisory responsibility for the teacher interns, was involved in the proposal and planning of the project, and participated in all negotiations and project decisions. The Government contends that the cost of the project director is properly an overhead expense because the cost proposals for the two contracts did not list the cost of a project director in the direct cost category. The Government does not contest the close involvement of the project director, Dr. Guzman, in the administration of the contracts. However, it is noted that Dr. Guzman signed the contract proposal and negotiated with the Government for the awards. The Government points out that the proposals allocate all of the budgeted direct costs for named instructors and advisors and specified expenses. Both contracts require the work to be done in accordance with appellant's proposal. It is clear from the proposals that Dr. Guzman did not contemplate his services would be charged directly to the contracts.

Appellant contends that the Government's assignment of a project manager to the contracts indicated the need for a counterpart to be as-

signed by the contractor; that travel to Venezuela by Dr. Guzman was approved by the Government; that there is no indication that the Government considered Dr. Guzman's performance to be less than satisfactory; that Dr. Guzman's efforts were necessary to assure the achievement of the contract objectives; and that the Government endorsed and actively utilized Dr. Guzman in the role of project director. None of these criteria are determinative of the question at issue since they do not address whether Dr. Guzman's salary was properly a direct cost under the contracts. The need for a project director, payment for his travel, his performance, and dealings with him, does not determine whether the salary costs should be charged direct or indirect. Instead, it is the contractor's accounting system and the contract agreements that determine whether a given cost is to be charged direct or indirect.

The appeal file does not disclose whether Dr. Guzman's salary was charged to other contracts as a direct cost, so that consistency or past practices of appellant's accounting system cannot be discerned. However, the proposals referenced in the contracts clearly show that all of the direct costs were allocated to instructors, advisors, and other specified costs without mention of a project director. Appellant does not contend that the plan for performance of the contracts was changed after award to give rise to the need for a project director. The cost pro-

posals indicate that neither party to the contracts contemplated that a project director would be a direct cost under the contracts. Therefore, we find that the salary and benefit costs of a project director were not proper direct cost under the contracts, and the appeals are denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

STATE OF ALASKA v. JUNEAU
AREA ACTING DIRECTOR, BU-
REAU OF INDIAN AFFAIRS, AND
ARCTIC JOHN ETALOOK

9 IBIA 126

Decided November 9, 1981

Appeal from decision by the Juneau Area Acting Director, Bureau of Indian Affairs, denying appellant easements across an Alaska Native allotment.

Affirmed.

1. Indian Lands: Allotments: Alienation

Where the owner of an Alaska Native allotment notified the Bureau of Indian Affairs that an agreement to alienate part of his allotment had been procured from him by fraud and that he revoked his consent to the use of his land for a road and pipeline by the State of Alaska, the Acting Area Director correctly declined to take action to grant an easement across the allotment to the State for a road and pipeline. Departmental regulations deny the agency authority to per-

mit alienation of part of an Alaska Native allotment subject to restrictions against alienation where the allottee refuses to consent to the alienation, and there is no other provision of law requiring or permitting the alienation.

APPEARANCES. E. John Athens, Jr., Esq., Alaska Attorney General's Office, for appellant State; Robert Thompson, Esq., Office of the Solicitor, Department of the Interior, for appellee Bureau of Indian Affairs; Clem H. Stephenson, Esq., for appellee Arctic John Etalook.

OPINION BY
ADMINISTRATIVE
JUDGE ARNESS

INTERIOR BOARD OF
INDIAN APPEALS

Procedural and Factual
Background

Prior to Mar. 27, 1980, the State of Alaska (appellant) sought an administrative concurrence by the Bureau of Indian Affairs (BIA) in a road and pipeline right-of-way easement agreement executed between appellee Alaska Native allottee Arctic John Etalook and Alyeska Pipeline Service Co. (Alyeska), appellant's predecessor in interest to the road and pipeline. On May 27, 1980, the Juneau Area Acting Director rejected appellant's easement request, for the stated reason that BIA was without authority to grant a road and pipeline right-of-way easement across an Alaska Native allotment without the consent of the allottee. The Acting

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Area Director found that where the allottee had notified BIA his agreement to grant an easement was procured by fraud and the allottee refused to agree to a grant by BIA of a right-of-way predicated upon his prior agreement, sec. 2 of the Act of Feb. 5, 1948, 62 Stat. 17, 18, 25 U.S.C. § 324 (1976) (all references are to 1976 edition), and Departmental regulation at 25 CFR 161.3 (b), deny BIA authority to approve the easement. Appellant seeks review of that decision.

On July 20, 1971, appellee Etalook applied for a Native homestead allotment pursuant to the Native Allotment Act of May 17, 1906, 34 Stat. 197. In 1974, subsequent to approval of appellee Etalook's allotment application by the Bureau of Land Management (BLM) but before survey of the homestead and granting of the allotment, Alyeska commenced construction of a portion of the Trans Alaska Pipeline and haul road crossing appellee Etalook's allotment. The road and pipeline were built before appellee Etalook's interest in part of the land crossed by the construction project was noticed by the builder.

After the allotment interest of appellee Etalook was recognized by Alyeska, the BIA's Fairbanks Realty Officer met with representatives of Alyeska and appellee Etalook. Several meetings resulted in a right-of-way proposal from Alyeska, said to have been interpreted to appellee Etalook in his native lan-

guage, which he accepted on May 27, 1975. BIA's recorded position concerning the negotiation consisted of a "letter of non-objection" also dated May 27, 1975. This document recited that it did not constitute a formal grant of an easement, which could not occur until appellee Etalook received his allotment, and concluded—"We have no objection at this time to the agreements and permits you submitted. However, this non-objection does not imply approval now and is not to be construed as any intent for approval in the future."

On May 21, 1979, prior to agency action upon a request by the State for easement, appellee Etalook withdrew his consent to all previously executed easements across his property and informed BIA he refused to consent to any other road or pipeline right-of-way easements across his allotment, stating:

Because both the State of Alaska and Alyeska Pipeline Service Company have misrepresented certain facts to me and have fraudulently misinformed me about certain matters connected there with, I hereby withdraw all easements that I have heretofore executed and specifically direct you to withdraw and not to approve any such easements.

Following receipt of appellee Etalook's withdrawal of consent, BIA notified the State it was unable to grant an interest to appellant in those lands described in the May 27, 1975, agreement. Notification of the Acting Area Director's decision was provided to appellant on Mar. 27, 1980.

Contentions of the Parties

Appellant contends, first, that the consent of appellee Etalook was in fact obtained and that the agency is now required under the circumstances of the case to execute the necessary documents to grant the desired easement to the State. Secondly, the State asserts that BIA approval is not needed because appellee Etalook transferred the desired easement prior to allotment, and a sufficient conveyance has already occurred. Appellant relies principally upon a decision by the Interior Board of Land Appeals, *State of Alaska*, 45 IBLA 318 (1980), in support of the position taken.

Appellee Etalook contends, first, that the appeal by the State is not timely, arguing that a final adverse decision was conveyed to the State prior to Mar. 27, 1980. This contention is not supported in the record and, as a factual matter, must be rejected. Appellee's second contention, which meets the appellant's arguments directly, focuses on the series of transactions between appellee Etalook and the appellant's agents, in an effort to find overreaching on the part of the State. To give full consideration to the contentions of appellee Etalook and the State an evidentiary hearing into the events surrounding the construction of the road and pipeline and subsequent negotiations would be required. Under the circumstances of this case, however, the factual issues urged on appeal by these parties are not reached.

The BIA contends that inquiry into the circumstances of the negotiations between the State, appellee Etalook, and Alyeska is not now the proper concern of the Department for the reason that Federal statutes and regulations preclude agency action in this case where an allottee refuses to consent to alienation of part of an Indian allotment which is subject to restrictions against alienation. The BIA takes the position that the State has a remedy in eminent domain proceedings where the merits of the factual positions stated by the State and the landowner may be fully aired. The above positions as briefed by the BIA are adopted by the Board for the following reasons.

Discussion and Decision

Pursuant to the Act of Feb. 5, 1948, 62 Stat. 17, 25 U.S.C. § 323 (1976), the Secretary is empowered to grant easements across Indian trust or restricted lands. This broad grant of authority is limited, however, by sec. 2 of the Act, 25 U.S.C. § 324, which requires the consent of the Indian "owners or owner." The relevant proviso codified at 25 U.S.C. § 324 reads:

Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose

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whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Thus, by dispensing with the need for consent in specified instances, sec. 2 implicitly forbids rights-of-way over individual Indian lands absent the Indian owner's consent in all nonspecified instances. *Coast Indian Community v. United States*, 550 F.2d 639, 650 n.25 (Ct. Cl. 1977). Therefore, except for the enumerated exceptions, the authority conferred upon the Secretary to grant easements across individual Indian lands by 25 U.S.C. § 323 is dependent upon the consent of the owner. Appellee Etalook has expressed in writing his refusal to permit an easement across his allotment for the State's road and pipeline.

Additionally, Congress has provided (25 U.S.C. § 323 (1976)) that the Secretary may prescribe conditions necessary to regulate the granting of easements over Indian lands. To implement this statute the Department promulgated 25 CFR 161.3(b), which provides that: "[N]o right-of-way shall be granted over and across any individually owned lands * * * without the prior

written consent of the owner or owners of such lands."

Accordingly, were the Acting Area Director to have granted the request by appellant, such a grant would have violated restrictions mandated by statute and regulation. See *Coast Indian Community v. United States*, above at 650. Since both the Act of Feb. 5, 1948, and the implementing regulation require owner consent as a prerequisite to the grant of easements, the Acting Area Director correctly found that he had no authority to grant road and pipeline easements across appellee Etalook's allotment.

Where Secretarial approval is the last act necessary to bring into effect an agreement between a restricted allottee and a purchaser of an interest in the allottee's land, and the allottee refuses to proceed with the previously concluded bargain, the good faith of the purchaser is of no consequence. *Bacher v. Patencio*, 232 F. Supp. 939, 942 (S.D. Cal. 1964), *aff'd*, 368 F. 2d 1010 (9th Cir. 1966). Therefore, even though appellant claims to have paid fair consideration for appellee Etalook's easement, the transaction may not stand without Secretarial approval.

Trying to find a completed grant of the desired easements, appellant seeks to distinguish between allotments in which legal title is retained by the United States ("trust patent") and those instances where legal title is held by the beneficial owner in a restricted status ("restricted fee"). Relying upon *State*

of *Alaska*, cited above, the argument of the State is that the execution of an easement is, in this case, a mere ministerial act for the Secretary since appellee Etalook is the legal title holder of the allotted lands. There is language in *State of Alaska* which appears at first to support appellant's argument. However, the three member panel of the Board which issued the decision each wrote a separate opinion to reach the result of that case, which was to find that an allotment to an Alaska Native under the 1906 Allotment Act which conflicted with State claims to the same land would not be canceled by the Department under the factual circumstances described. The language seized upon by appellant appears in only one of the three opinions. It is quoted out of context: even in the context of the case where it appears it is clearly dicta to the holding. If anything, the decision in *State of Alaska* supports the action taken by the BIA in the case at hand. The Board of Land Appeals, noting the provisions of 43 CFR 2561.3,¹ recognized that the

owner of any Alaska Native allotment may not convey the land without the Secretary's approval. 45 IBLA 318, 320, 322.

In practice, the Department has always regarded the two types of Indian title—"trust patent" and "restricted fee"—to be entitled to the same protections against alienation. The responsibility to prevent alienation of Indian land without consent of the Indian allottee and the United States cannot be avoided by attempts to create technical distinctions between the two types of Indian title. See Cohen, Handbook of Federal Indian Law at 108-10, 221-27. A distinction such as appellant seeks to make is inconsistent with the clear intent of Congress to restrict the power of an Indian to alienate allotted land, however the title may be characterized.

Appellant and appellee Etalook both attempt to define issues arising from the negotiations of the parties in 1975 as the basis for deciding this appeal; each argues that the other was guilty of some form of overreaching which would be dispositive of the controversy between them. Appellee Etalook, however, on May 21, 1979, divested the BIA of power to grant the easements demanded by appellant. As a consequence, the Board can go no further in review of this matter than to reaffirm the action of the agency which refused to provide administrative approval of the easement agreement dated May 27, 1975.

¹ The definitive regulation on the nature of property interest held by the owner of an allotment obtained under the Alaska Native Allotment Act, the provisions of 43 CFR 2561.3 state:

"(a) Land allotted under the Act is the property of the allottee and his heirs in perpetuity, and is inalienable and nontaxable. However, a native of Alaska who received an allotment under the Act, or his heirs, may with the approval of the Secretary of the Interior or his authorized representative, convey the complete title to the allotted land by deed. The allotment shall thereafter be free of any restrictions against alienation and taxation unless the purchaser is a native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions.

"(b) Application by an allottee or his heirs

for approval to convey title to land allotted under the Allotment Act shall be filed with the appropriate officer of the Bureau of Indian Affairs."

The State has the power to seek a remedy by action taken under the provisions of 25 U.S.C. § 357 (1976) to condemn the property rights it seeks in appellee Etalook's allotment. *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959). In this regard, the Board is advised that such an action has been filed by the State in federal district court for this purpose. (Civ. No. F81-40, U.S.D.C. D. Alaska, filed, Sept. 29, 1981.)

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Area Director dated Mar. 27, 1980, is affirmed. In the absence of the consent of the allottee in this matter, no easement across his restricted lands may be approved by the Secretary.

This decision is final for the Department.

FRANKLIN D. ARNESS

Administrative Judge

WE CONCUR:

WM. PHILIP HORTON

Chief Administrative Judge

JERRY MUSKRAT

Administrative Judge

SAHARA COAL CO.

3 IBSMA 371

Decided *November 30, 1981*

Petition for discretionary review by Sahara Coal Co. of a Dec. 30, 1980, decision by Administrative Law Judge

Frederick A. Miller in Docket No. IN 0-29-P which sustained the validity of Notice of Violation No. 79-III-009-10 and reduced the assessment of the civil penalty.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where OSM fails to serve permittee with copy of a proposed assessment and of the worksheets showing the computation within 30 days of the issuance of the notice of violation, pursuant to regulation, such failure shall not result in administrative relief since the regulation is directory rather than mandatory.

APPEARANCES: Charles R. Jelliffe, Esq., Jelliffe & Ferrell, Harrisburg, Illinois, for Sahara Coal Co.; Myra Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Susan A. Shands, Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY THE INTERIOR
BOARD OF SURFACE MINING
AND RECLAMATION
APPEALS*

The Board granted a petition for discretionary review submitted by Sahara Coal Co. (Sahara) of a Dec. 30, 1980, adverse decision by the Hearings Division upholding the issuance of Notice of Violation (NOV) No. 79-III-009-10 charg-

ing a failure to pass surface drainage from a disturbed area through a sedimentation pond. The review is limited to whether and how the instant case might be distinguished from *Badger Coal Co.*, 2 IBSMA 147, 87 I.D. 319 (1980). The decision is affirmed.

Background

On Nov. 19, 1979, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector issued NOV No. 79-III-009-10 to Sahara for an alleged violation at its underground mine No. 20 located in Saline County, Illinois. The NOV alleged that Sahara failed to pass surface drainage from a disturbed area through a sedimentation pond in violation of 30 CFR 717.17(a). The violation was terminated on Dec. 31, 1979. On Jan. 7, 1980, 49 days after the NOV was issued, OSM issued a notice of proposed civil penalty assessment of \$1,800 to Sahara for that violation. Sahara filed a petition for review of the proposed penalty assessment with the Hearings Division. At the hearing on Oct. 30, 1980, Sahara moved for dismissal of the NOV on the grounds that OSM had not complied with 30 CFR 723.16(b), which requires that a proposed assessment be issued within 30 days of the issuance of NOV. That motion was overruled.

In his Dec. 30, 1980, decision, the Administrative Law Judge upheld the violation and reduced the penalty from \$1,800 to \$700. Sahara

filed a petition for discretionary review on Jan. 12, 1981. The Board granted Sahara's petition on Feb. 13, 1981, subject to the limitation discussed below.

Discussion and Conclusions

[1] The sole question raised in this review is how the issues here might be distinguished from those in *Badger Coal Co.*, *supra*.¹ In *Badger* we held that the provisions of 30 CFR 723.18(b), requiring an assessment conference to be held within a specified period, are directory, not mandatory, and that anyone desiring to interpose the failure to hold the conference as a bar to an assessment must show actual prejudice.² Sahara has not distinguished the circumstances here from those in *Badger* and it has made no showing of actual prejudice.

Nothing in any of the briefs submitted or through any independent determination indicates that a different application should be made here from the one that was made in *Badger*. Further, no Departmental regulatory action since the issuance of the *Badger* decision suggests that the majority views expressed in that decision should be altered.³

¹ By Board order of Feb. 13, 1981, the petition for discretionary review was granted for the express, limited purpose of demonstrating such distinction.

² There is a factual distinction between *Badger* and this case. *Badger* was concerned with the "shall be held" of 30 CFR 723.18(b). We are here addressing the "shall serve" of 30 CFR 723.16(b). For the purposes of this decision, such a distinction does not make a difference.

³ See 30 CFR 723.17(b); 45 FR 58785 (Sept. 4, 1980).

The decision of the Hearings Division is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

SIERRA CLUB, INC. AND SOUTH-EAST ALASKA CONSERVATION COUNCIL, INC.

6 ANCAB 152

Decided *November 30, 1981*

Appeal from the approval on May 8, 1981, of the Alaska State Director, Bureau of Land Management, of a "Plan of Action for Meeting the Requirements of Section 22(k), Alaska Native Claims Settlement Act."

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The approval of the Alaska State Director of the Bureau of Land Management of a general plan of action for meeting the requirements of sec. 22(k) of the Alaska Native Claims Settlement Act is not a decision "rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act" within the context of 43 CFR 4.1(b)(5), and an appeal from the approval of such a plan must be dismissed by this Board for lack of jurisdiction.

APPEARANCES: Durwood J. Zaelke, Esq., Sierra Club Legal Defense Fund, Inc., for appellants.

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD**

On Oct. 5, 1981, the appellants jointly filed a Notice of Appeal from the approval on May 8, 1981, of the Alaska State Director, Bureau of Land Management (BLM), of a "Plan of Action for Meeting the Requirements of Section 22(k), Alaska Native Claims Settlement Act," 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA). The Plan appears to be an unpublished memorandum of understanding signed by representatives of BLM, the Forest Service, and the State of Alaska for implementing § 22(k) of ANCSA, with emphasis on four general areas of concern regarding forestry practices and coordination between Native corporations and the State and Federal governments. Sec. 22(k), as codified at 43 U.S.C. § 1621(k), provides:

Any patents to lands under this chapter which are located within the boundaries of a national forest shall contain such conditions as the Secretary deems necessary to assure that:

(1) the sale of any timber from such lands shall, for a period of five years, be subject to the same restrictions relating to the export of timber from the United States as are applicable to national forest lands in Alaska under rules and regulations of the Secretary of Agriculture; and

(2) such lands are managed under the principle of sustained yield and under

management practices for protection and enhancement of environmental quality no less stringent than such management practices on adjacent national forest lands for a period of twelve years.

On Oct. 21, 1981, this Board ordered the appellants to show cause why the Board should not decline to take jurisdiction over the subject matter of this appeal. Such order was based on the jurisdictional limits of the Board established by Departmental regulation at 43 CFR 4.1(b)(5) and the absence of any reference in this appeal to any BLM decision to convey lands under ANCSA. The appellants on Nov. 4, 1981, filed a response to the Board's order.

The jurisdiction of this Board is defined in 43 CFR 4.1(b)(5):

Alaska Native Claims Appeal Board.
The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act (85 Stat. 688).

Decisions "rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act," within the context of 43 CFR 4.1(b)(5), do not include policy formulation decisions regarding a certain class or category of lands unrelated to a particular land selection.

[1] Accordingly, the approval of the Alaska State Director of the BLM of a general plan of action for meeting the requirements of § 22(k) of ANCSA is not a decision "ren-

dered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act" within the context of 43 CFR 4.1(b)(5), and an appeal from the approval of such a plan must be dismissed by this Board for lack of jurisdiction.

Based upon the above findings and conclusions, this Board hereby dismisses the above-designated appeal.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

**PATRICIA AND WILLIAM
NORDMARK**

6 ANCAB 157

Decided November 30, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14844-A.

Partial decision. Appellants have standing to appeal.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Decisions pursuant to ANCSA affect property interests differently, depending, in part, upon the section of the Act on which each decision is based. Application of the standing tests in 43 CFR 4.902

must take into account the section of the Act relied upon in the decision under appeal.

2. Alaska Native Claims Settlement Act: Easements: Public Easements—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as a "property interest affected" within the meaning of 43 CFR 4.902.

3. Alaska Native Claims Settlement Act: Easements: Public Easements—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where appellants seek a public access easement under § 17(b)(1) of ANCSA, they may rely on their patented home-site, located outside the conveyance, as a property interest for purposes of meeting the standing requirements of 43 CFR 4.902.

4. Alaska Native Claims Settlement Act: Easements: Public Easements—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where appellants claim that their home-site is affected by the Bureau of Land Management's failure to reserve a § 17(b)(1) public access easement, along a road used by appellants and the public, because in the absence of such an easement their present access route to the homesite may be cut off by the proposed conveyance to a Native corporation, this

is a claim that their property interest is affected within the terms of 43 CFR 4.902.

5. Alaska Native Claims Settlement Act: Easements: Access

Sec. 17(b)(2) of ANCSA protects the private right of access, provided for under existing law, to any valid right recognized by ANCSA.

6. Alaska Native Claims Settlement Act: Easements: Access—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Sec. 17(b)(2) of ANCSA assures that persons who have valid existing uses do not lose access rights because of the public easements provided by § 17(b)(1). The private right of access provided to holders of valid existing rights pursuant to § 17(b)(2) of ANCSA is separate from the right provided by § 17(b)(1) of public access routes. An individual claiming standing to appeal a public easement decision must assert public use of the desired easement to distinguish it from a private access right under § 17(b)(2). However, the possibility of protection under § 17(b)(2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to meet the standing requirements of 43 CFR 4.902.

APPEARANCES: Patricia and William Nordmark, pro se; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD**

Summary of Appeal

In response to a motion to dismiss for lack of standing, the appellants

are found to have standing to seek a public access easement. The easement sought would provide access for appellants and the public, from a public highway to the Nenana River. Briefing is suspended pending a decision in a related appeal on whether the Nenana River is navigable, so that reservation of a public easement to the river would be consistent with criteria for easements under ANCSA and regulations.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural and Factual Background

Appellants' pleadings state that in the late 1950's William D. Nordmark took steps to establish a Federal homesite in the vicinity of the Native Village of Cantwell located in the SE $\frac{1}{4}$ of Sec. 24, T. 16 S., R. 7 W., Fairbanks meridian. The land in question was at that time part of the Federal public domain. The record shows that in 1959, Mr. Nordmark put in a road from the present Parks Highway to his homesite. It is the eventual legal status of this

road that forms the basis for this appeal. In 1961, Mr. Nordmark filed for the homesite and, after survey in 1968, Mr. Nordmark received patent to the homesite before the enactment of the Alaska Native Claims Settlement Act in 1971.

On Aug. 9 and Oct. 28, 1965, the State of Alaska (State) filed a community grant selection application pursuant to § 6(a) and general grant selections pursuant to § 6(b) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339, 340; 48 U.S.C. Ch. 2, §§ 6(a) and 6(b) (1976)). The selected lands were near the Native Village of Cantwell and surrounded the Nordmark homesite. Tentative approval was granted on Apr. 12, 1966.

On Dec. 18, 1971, § 11 of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. §§ 1601, 1610 (1976)), withdrew the lands surrounding the Native Village of Cantwell, including lands in the subject State selection application for Native selection. On July 9, 1974, Cantwell Yedatene Na Corp. filed village selection application F-14844-A, *as amended*, for the surface estate of lands located near the Village of Cantwell, including lands within the subject State selections and those surrounding the appellants' homesite.

The Bureau of Land Management (BLM), on Sept. 30, 1980, issued a decision which held that the disputed lands were properly selected by Cantwell Yedatene Na Corp. Accordingly, conflicting State selection applications, includ-

ing those for lands surrounding the appellants' homesite, were rejected, the tentative approval was rescinded and conveyance was proposed to the Cantwell Yedatene Na Corp.

On Oct. 23, 1980, appellants filed their Notice of Appeal with the Board in which their position was summarized as follows:

Please consider this letter to be a formal appeal to include in the conveyance document to Cantwell Yedatene Na Corporation an easement for an existing unimproved road from the Parks Highway to the Nenana River northwesterly along the left (south) bank of Sline Creek (known to the BLM as 'Slime Creek') located in the SE¼ of Sec. 24 T16S R7W Fairbanks Meridian. This is the same easement request that BLM included in their 'Notice' of September 28, 1978 and designated as easement 16a.

Easement 16a was eliminated from the 'decision' of September 30, 1980. This is an appeal to reinstate this easement. It is our means of access to our homesite.

Appellants' statement of reasons advance two arguments. First, William D. Nordmark is entitled to access to his patented homesite, which is an inholding within the village lands:

He has been using this road as access to the homesite for twenty years. He put this road in himself in 1959 following an older trail in the same location. This was in the days when the land was public domain, and the homestead laws were in effect. In 1961 he filed the paperwork to apply for the homesite. BLM surveyed the homesite in 1968, and he received patent in Dec. 1971. The road is currently in use by a tenant who occupies the homesite. We submit that this constitutes a *valid existing right*, and that the right

of access should not be diminished or limited. (*Italics added.*)

Appellants' Statement of Reasons at 1.

Secondly, appellants contend that the general public needs access from the Parks Highway to the public waters of the Nenana River. This would entail classifying the road from the Parks Highway to the appellants' homesite and then extending approximately 550 feet further to the Nenana River as a "public easement" under the provisions of § 17(b) of ANCSA and enabling regulations (43 CFR 2650.4-7).

The BLM has moved to dismiss the appeal. With respect to the appellants' contention that because of prior use they have a valid existing right to use the road for access to their homesite, the BLM states:

[A]ny valid right of access to the appellants' homesite is clearly protected by Section 17(b)(2) of the Alaska Native Claims Settlement Act (hereinafter 'ANCSA'), 43 U.S.C. § 1616(b)(2), and the provision at pages 16 and 17 of the Decision on appeal which both specify that '... any valid existing right recognized by this Act [such as the appellants' patented homesite] shall continue to have whatever right of access as is now provided for under existing law.' Section 17(b)(2) further provides that '... this subsection shall not operate in any way to diminish or limit such right of access.'

BLM's Memorandum in Support of Motion to Dismiss at 1.

Regarding appellants' argument that the existing road from the Parks Highway, through a part of appellants' homesite and up to the

Nenana River, should be classified as a public easement under § 17(b) of ANCSA, BLM contends that appellants lack any standing to bring the appeal. In support of its position, BLM cites 43 CFR 4.902 which provides in pertinent part:

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart.

BLM relies on Board decisions which have interpreted the above-cited standing regulation. (*See Appeal of Morpac, Inc.*, 3 ANCAB 89 (1978) [VLS 78-53]; *Appeal of Chickaloon Moose Creek Native Ass'n, Inc.*, 4 ANCAB 134 (1980) [VLS 80-1]; and *Appeal of Kodiak-Aleutian Chapter, Alaska Conservation Society*, 2 ANCAB 363 (1978) [LS 77-11].)

The Board issued an Order for Further Information and Clarification on Aug. 20, 1981. This order asked the appellants to explain and clarify the following three aspects of the case:

1. While appellants contend that the road between the Parks Highway and their homesite is a valid existing right (i.e., a private easement), do the appellants also desire a public easement for this road under § 17(b) (2) of ANCSA?

2. Do appellants desire the BLM to create a public easement under § 17(b) (2) through their property from where the road enters the homesite from the Parks Highway to the Nenana River?

3. Does the road in question run from the entrance of the homesite through the homesite as depicted on one map or does it follow the southern bank of the Sline Creek as depicted on another map?

In their response, the appellants answered the Board's first question in the negative. They say specifically that:

The appeal on behalf of public access was submitted in case there were no other way to get legal access to the homesite. If legal access to the homesite can be assured either by direct interpretation of the land claims act or by a "private" easement, then we request you drop consideration of a public easement.

In reply to the second inquiry from the Board, the appellants again respond in the negative and submit a sketch showing the road as it presently exists and how it could be realigned to bypass the appellants' property entirely. In answering the Board's third question regarding the orientation of Sline Creek to the homestead, appellants affirm that the sketch made by William Nordmark which accompanied his letter of Oct. 20, 1975, to BLM was the correct one. With the submission of the appellants' letter of clarification, the record on appeal was closed.

Decision

BLM's motion to dismiss presents the issue of whether the appellants have standing, within regulatory criteria in 43 CFR 4.902, to seek either (1) a public access easement, pursuant to § 17(b) (1) of ANCSA, from the Parks Highway across

Native lands to their patented homesite and thence across Native lands to the Nenana River, or (2) a private access easement, pursuant to § 17(b)(1) of ANCSA, across Native lands from the Parks Highway to their homesite, coinciding with the road they have constructed and used for this purpose.

Sec. 17(b)(1) of ANCSA provides for the reservation of public easements across lands selected by Native corporations, and at periodic points along major waterways, which are reasonably necessary to guarantee "a full right of public use and access for recreation, hunting, transportation * * * and * * * other public uses."

Sec. 17(b)(2) provides in pertinent part: "[A]ny valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access."

Sec. 17(b)(2) is implemented by regulations in 43 CFR 2650.4-7(d)(5): "All conveyance documents shall contain a general provision which states that pursuant to section 17(b)(2) of the Act, any valid existing right recognized by the Act shall continue to have whatever right of access as is now provided for under existing law."

Standing is governed by regulations in 43 CFR 4.902, which grant standing to appeal to "[a]ny party who claims a property interest in land affected by a determination

from which an appeal to the Alaska Native Claims Appeal Board is allowed * * *."

The appellants clearly have a property interest in their homesite. Having been patented to them prior to enactment of ANCSA, the homesite is not available for withdrawal, selection, or conveyance under the Act. Title to the homesite cannot be affected by ANCSA, and the appellants' ownership of the homesite does not place them in conflict with the Native corporation regarding the latter's title to land selections under ANCSA. Accordingly, the question arises whether this property interest can be affected, within the meaning of standing requirements in 43 CFR 4.902, by BLM's failure to reserve the public easement designated 16(a).

In cases where an appellant sought to prevent or condition conveyance of land to a Native corporation in favor of its own claim of interest in the same land, the Board has held that, to have standing, the appellant must claim a property interest in the land selected by the Native corporation. *Appeal of State of Alaska*, 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78-42]; *Appeal of Chickaloon Moose Creek Native Ass'n, Inc.*, 4 ANCAB 134 (1980) [VLS 80-1]; *Appeal of Chickaloon Moose Creek Native Ass'n, Inc.*, 4 ANCAB 250, 87 I.D. 219 (1980) [VLS 80-1].

However, the Board has distinguished from the application of this rule those cases in which an appel-

lant sought to have reserved a public easement:

There are fundamental legal differences between the effect of a decision to convey title and the effect of a decision to reserve a public easement. An easement reservation under § 17(b)(1) does not involve a competing title interest. A potential appellant desiring to appeal a public easement decision cannot claim a property interest in the land underlying the easement, because, pursuant to ANCSA, title to the land underlying the easement goes to the selecting Native corporation. Likewise, a potential appellant cannot claim a private property interest in a § 17(b)(1) easement because these are public easements. The concept of private ownership of a public easement is a contradiction in terms.

The argument that an appellant must have a property interest in the land to be conveyed, regardless of the subject matter of the appeal, ignores the fact that a decision to convey land and a decision to reserve an easement across land affect property differently.

[2] The Board holds that decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

* * * * *

[3] Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, the Board concludes that a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as his or her 'property interest' affected within the meaning of 43 CFR 4.902.

Joseph C. Manga et al., 5 ANCAR 224, 240-242, 88 I.D. 460, 467-468 (1981) [RLS 80-1].

[1] The Board reaffirms its holding in *Joseph C. Manga, supra*, that decisions pursuant to ANCSA affect property interests differently, depending, in part, upon the section of the Act on which each decision is based. Application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

[2] The Board also reaffirms its holding in *Manga* that, since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as a "property interest affected" within the meaning of 43 CFR 4.902.

[3] The appellants, like the appellants in *Joseph C. Manga, supra*, seek a public access easement under § 17(b)(1) of ANCSA. Accordingly, the appellants may rely on their homesite, located outside the conveyance, as a property interest, for purposes of meeting the standing requirements of 43 CFR 4.902.

[4] The appellants claim that this property interest is affected by BLM's failure to reserve a § 17(b)(1) public access easement, follow-

November 30, 1981

ing the route of a road constructed and used by the appellants and the public for many years, from the Parks Highway to appellants' homesite and thence to the Nenana River. It is the appellants' position that if such a public access easement is not reserved, following their present access route between the highway and their homesite, then their present access may be cut off by conveyance of the intervening land to the Native corporation. In effect, they fear that without reservation of the public access easement designated 16(a), they will become a "landlocked" inholding. It should be noted that the decision to reserve the public easement sought would affect the Nordmarks in the following manner: this easement would follow the route of access they built while the lands to be conveyed to the Native corporation were in public domain status, thus assuring the Nordmarks, as well as the public, the availability of this route. The Board concludes that, within the criteria set forth in *Joseph C. Manga, supra*, this is a claim that the appellants' property interest is affected, sufficient to confer standing.

As to the appellants' standing to seek a public access easement, it has also been argued that, so long as their existing private right of access to their property is guaranteed by § 17(b) (2), then they cannot claim that their property interest is affected by the lack of a public access easement under § 17(b) (1).

The Board addressed this argument in *Joseph C. Manga, supra*:

It has also been argued that even the holder of a private property interest lacks standing to appeal because such individual is provided a right of access under § 17(b) (2) of ANCSA, and therefore the placement of a public easement can have no effect on his or her property interest.

* * * * *

The Board has already ruled that an individual whose does not have a specific claim of property interest is without standing to bring an appeal. The thrust of the previous argument is that a person who *does* claim a property interest also lacks standing to appeal a public easement decision because such person will continue to have a private right of access, and the property interest is therefore not affected by the decision.

The consequence of this position would be that no member of the general public, regardless of any claim of property interest, would have standing to appeal a decision rendered pursuant to that subsection of ANCSA specifically drafted for the benefit of the general public—§ 17(b).

The Board concludes that neither the Act nor the regulations mandate this result.

* * * * *

[4, 5] The Board finds that the private right of access provided to holders of valid existing rights pursuant to § 17(b) (2) of ANCSA is separate from the right provided in § 17(b) (1) of specifically-identified public access routes. Possible protection under § 17(b) (2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to satisfy the standing test of 43 CFR 4.902. However, an individual claiming standing to appeal an easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b) (2) private access right.

88 I.D. at 468-469.

[5] Sec. 17(b)(2) of ANCSA protects the private right of access, provided for under existing law, to any valid right recognized by ANCSA.

[6] Sec. 17(b)(2) of ANCSA assures that persons who have valid existing uses do not lose access rights because of the public easements provided by § 17(b)(1). The private right of access provided to holders of valid existing rights pursuant to § 17(b)(2) of ANCSA is separate from the right provided by § 17(b)(1) of public access routes. An individual claiming standing to appeal a public easement decision must assert public use of the desired easement to distinguish it from a private access right under § 17(b)(2). However, the possibility of protection under § 17(b)(2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to meet the standing requirements of 43 CFR 4.902.

The appellants' interest in seeking a public easement does more than protect the access which is already guaranteed by § 17(b)(2). Located along the route currently used, the public easement guarantees them continued use of the existing route, without being required to seek resolution of the question of what specific right of access to a private inholding is protected by § 17(b)(2).

The appellants, accordingly, may

not be denied standing on the grounds that any private right of access they now have is in some manner protected under § 17(b)(2) of ANCSA.

The Board finds that Patricia and William Nordmark have standing to appeal BLM's failure to reserve the easement 16(a) in the conveyance document.

Having found appellants have standing to appeal, the Board now considers special circumstances of this appeal. Although the Board does not now rule on the merits, it must be noted that the remedy sought by the appellants, reservation of a public transportation easement, appears from the record to be unavailable at the present time.

While the easement designated 16(a) sought by the appellants connects at one end with a public highway, the other end is at the Nenana River. BLM has determined that the Nenana River at this point is not navigable. Such a finding will result in the conveyance of the submerged bed to the Native corporation and the bed will not be considered "public land." Accordingly, as BLM asserts, the easement would not provide public access across Native lands to public lands or waters, as required by § 17(b)(1) and implementing regulations, but would simply cross Native lands to reach a point within the same Native selection. There is no authority under ANCSA for BLM to reserve such an easement. The record indicates that BLM determined not to reserve easement 16(a) on the basis of its

finding that the Nenana River is nonnavigable through this area.

However, BLM's decision that the Nenana River is not navigable within the conveyance area is disputed in another appeal presently before the Board. (*Appeal of the State of Alaska*, VLS 80-54.) If the Nenana is found to be navigable, reservation of the easement sought by the appellant would no longer be inconsistent with criteria in § 17(b)(1) and the regulations, and could be considered by BLM.

Therefore, the Board will suspend further briefing on the merits of this appeal until *Appeal of the State of Alaska*, VLS 80-54, determining the status of the Nenana River, is decided. If the Nenana River is determined to be navigable, the Board will remand the question of whether easement 16(a) should be reserved to BLM for reconsideration. If the Nenana River is determined to be nonnavigable, the Board will rule on the merits.

The appellants not only seek a public access easement, pursuant to § 17(b)(1), but would prefer some form of private easement reservation, assuring them of access between the Parks Highway and their homesite by means of the road they built and have used since 1959. As they stated in their letter of Aug. 26, 1981,

The appeal on behalf of public access was submitted in case there were no other way to get legal access to the homesite. If legal access to the homesite can be as-

sured either by direct interpretation of the land claims act or by a 'private' easement, then we request you drop consideration of a public easement.

Moving to dismiss the appeal, BLM asserts that any valid right of private access the appellants may have to their homesite is clearly protected by § 17(b)(2) of ANCSA, and that this protection is adequately provided by the general assurance in the decision on appeal that "any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law," and "this subsection shall not operate in any way to diminish or limit such right of access."

It should be noted that § 17(b)(2) is not a granting clause conferring a new right of access to an individual's interest constituting a valid existing right under ANCSA. Sec. 17(b)(2) does not enhance or change any such right of private access; it merely offers the assurance that such right will not be diminished or limited by the reservation of access easements for the benefit of the public under § 17(b)(1). The right of access thus protected, if any, does not derive from ANCSA but must exist under other authority. Where such a claimed right of private access has not been formalized by a documented grant from the State or Federal Government, and has not been adjudicated in any forum or platted on official land records, no mechanism exists for BLM to adjudicate or locate such

an easement. Such adjudication would have to be undertaken by the courts.

Accordingly, in ANCSA conveyances, BLM is not required to adjudicate or reserve with specificity any private access rights pursuant to § 17(b)(2), and insofar as appellants seek such an easement reservation in this appeal, it appears that no remedy is available to them.

Finally, the Board notes that the appellants in their pleadings have referred to the road between the Parks Highway and their homesite as a "valid existing right," based on the fact that they built and used it. Sec. 14(g) of ANCSA provides that conveyances shall be subject to "valid existing rights"; where certain interests including rights-of-way or easements have been issued to third parties on lands to be conveyed, the conveyance shall be made subject to such interests and to the right of the holder to all the rights and privileges granted with such interests.¹

While the appellants' characterization of their road as a valid existing right may, on first impression, appear to invoke the provisions of § 14(g), it must be noted that the appellants do not purport to hold an easement or right-of-way granted to them by the United States in any formal manner. Their claim appears to be, rather, that by construction and use of a road across public lands to their homesite, they created in themselves an interest in the road, adverse to the United States, which must be recognized as a valid existing right. It does not appear to the Board that such a claim of right was within the contemplation of § 14(g).

Based on the findings and conclusions herein, BLM's motion to dismiss for lack of standing in the appellants is denied. Further briefing in this matter is suspended pending determination of the navigability of the Nenana River in *Appeal of the State of Alaska*, VLS 80-54.

¹Sec. 14(g) of ANCSA states: "All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act

shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement."

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

PATRICK J. BLISS

6 ANCAB 181

Decided *November 30, 1981*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14932-A through F-14932-C and F-21915.

Partial decision. Appellant Patrick J. Bliss has standing to appeal.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed" as required by 43 CFR 4.902.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the

standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

3. Alaska Native Claims Settlement Act: Easements: Public Easements—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally—Alaska Native Claims Settlement Act: Easements: Public Easements

Possible protection under § 17(b)(2) does not preclude an individual from asserting that a public easement decision affects his or her property interest so as to meet the standing test of 43 CFR 4.902.

5. Alaska Native Claims Settlement Act: Easements: Public Easements—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

An individual claiming standing to appeal a § 17(b)(1) public easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b)(2) private access right.

APPEARANCES: R. Eldridge Hicks, Esq., Ruskin, Barker & Hicks, for ap-

pellant; G. Kevin Jones, Esq. and M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Richard Atuk, for Bering Straits Native Corp.

*OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD*

Summary of Appeal

In response to the Bureau of Land Management's motion to dismiss for lack of standing, the appellant is found to have standing to appeal the Bureau of Land Management's failure to reserve three (3) proposed public easements under § 17(b)(1) of ANCSA.

Appellant claims that the Bureau of Land Management's failure to reserve an airstrip he constructed on lands selected by the Native corporation, as well as two (2) existing trail easements, not only adversely affected his mining operation, as well as others in the same area, but prevented the public and governmental agencies the use of the airstrip and of access to the adjacent public lands.

The Board concludes that the appellant's ownership of patented mining claims located on public lands outside of the Native-selected lands constitutes property interest in lands affected to have standing under 43 CFR 4.902, to appeal an issue of public easement under § 17 (b)(1) of ANCSA.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation

of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Apr. 25, 1980, Patrick J. Bliss, appearing *pro se*, filed a Notice of Appeal of the Bureau of Land Management (BLM) Decision dated Mar. 27, 1980 (F-14932-A through F-14932-C; F-21915), approving for conveyance to Native Village Corp. of Shaktoolik lands included in this appeal. Appellant's statement of reasons was included with the Notice of Appeal and asserts BLM erred for the following reason:

1. Failure of the United States Department of the Interior, Bureau of Land Management to recognize those public easement requests identified as EIN 11 C,5,L Airstrip and EIN 11a C,5,L Beach-Airstrip-Public Land, Ungalik River area and shown on Exhibit A attached hereto and made a part hereof.

Appellant asserted BLM failed to comply with procedural requirements and to base its decision on appropriate information. On July 21, 1980, appellant, by and through counsel, filed an amended Statement of Facts Relied Upon for Standing.

On May 29, 1980, G. Kevin Jones, Esq., Office of the Regional Solicitor, on behalf of BLM, filed an Answer and Motion to Dismiss, as-

serting, *inter alia*: "Appellant has not claimed a property interest in land affected by the BLM decision, 43 CFR § 4.902; and he has not filed a statement of facts upon which he relies for standing, 43 CFR § 4.903 (b) (2)."

The Board, on Aug. 7, 1980, ordered segregation of land affected by the appealed easements as identified in appellant's statement of reasons. A stipulation by the appellant and the BLM clarified a question as to whether EIN 8L, L was intended to be included in the EIN 11a C5, L Beach-Airstrip-Public Land, easement. Subsequent to the stipulation, an Amended Order of Segregation was made by the Board on Aug. 22, 1980, in which the appealed easements were described as follows:

- a. (EIN 11 C5, L) a site easement for a bush airstrip, six hundred (600) feet in width and six thousand (6,000) feet in length, located in Secs. 1 and 12, T. 11 S., R. 11 W., Kateel River Meridian.
- b. (EIN 11a C5, L) An easement for a proposed access trail, fifty (50) feet in width, from site EIN 11 C5, L in Sec. 1, T. 11 S., R. 11 W., Kateel River Meridian, easterly to Sec. 6, T. 11 S., R. 10 W., Kateel River Meridian.
- c. (EIN 8L, L) An easement for an existing access trail fifty (50) feet in width from the mean high tide line of Norton Bay in Sec. 32, T. 10 S., R. 11 W., Kateel River Meridian southeasterly through Secs. 1 and 2, T. 11 S., R. 11 W., Kateel River Meridian to bush airstrip EIN 11 C5, L.

Appellant asserts that his property interests have been adversely affected by the BLM's failure to "reserve EIN 11 C5,L and EIN 11a C5,L because this airstrip is

the only runway that will accommodate [sic] large-transport category aircraft"—and by the failure of BLM to "reserve EIN 8L,L, Beach, Airstrip, Public Land, because the Appellant uses this access to haul heavy equipment and large amounts of fuel which cannot economically be shipped by aircraft."

Appellant contends that the standing requirements of 43 CFR 4.902 are met in this appeal with a showing that:

[T]he Appellant claims an ownership interest in land adjacent to the conveyed land, and that adjacent land of the Appellant is severely affected by a BLM determination to exclude the subject easements because the Appellant loses access to adjacent public and private lands.

Statement of Facts Relied Upon for Standing at 2.

Appellant specifically points out that no contention is being made to establish any of the proposed easements as a private right of access under § 17(b) (2) of ANCSA.

Appellant further describes the proposed easements as follows:

EIN 8L, L is an existing access trail which originates at a barge landing site on public lands on the coast of Norton Bay and running easterly on public lands and across Native-selected lands into the mineralized area. This route has been in general public use since 1898 as a haul road to route equipment and supplies. Since construction of the airstrip in question in 1963, the portion of this trail within the selected lands is also used for transporting

equipment to maintain the airstrip as well as to bring barged fuel and equipment too heavy or bulky for air transportation.

EIN 11 C5, L is a site easement for an existing airstrip (600' x 6,000') which is located entirely within the Native-selected lands. Appellant started building the airstrip in 1960 and construction was completed in 1963. Surface releveeing and upkeep of the field is required annually. Appellant states that it is the only airstrip in the area which is capable of accommodating large aircraft and is used by various State and Federal Government agencies as well as the public as needed in addition to serving the mining interests in the area.

EIN 11a C5, L is an existing access trail running from the airstrip easterly to public lands in T. 11 S., R. 10 W., a distance of less than one mile.

Appellant's assertions relating to the airstrip (EIN 11 C5, L) also include the following:

Construction and maintenance of this airstrip by appellant was primarily for the purpose of better serving the transportation needs of his private mining interests which could be accomplished by plane.

Since 1963 the general public has used the airstrip as needed and appellant claims that the placement of cautionary devices installed for the purpose of limiting liability to users was not intended to grant or deny permission for public use.

Appellant also states that the record on appeal reveals the fact that

the airstrip is used by many public and private interests other than the miners in the vicinity. These other uses, detailed in the statement of facts above, include the Bureau of Land Management, Alaska Department of Fish and Game, U.S. Forest Service, Federal Aviation Administration, U.S. Fish and Wildlife Service, a host of charter aircraft companies, various oil companies, guides and bear hunters, and five or six people from Nome.

Appellant vigorously argues that while the proposed easements are shown as three separate easements they are all substantially used in connection with each other by the public; that the uses for the access trails and the airstrip are not alternate access routes but complement each other as access; and that there are no practical alternative accesses to public lands.

The BLM's memorandum, filed May 29, 1980, in support of its motion asserts two reasons for dismissal of appellant's appeal.

First, appellant lacks standing to bring this appeal. He has not asserted a "property interest" in land affected by a determination by the BLM, but has identified himself as an "aggrieved party." An aggrieved party does not have standing, 43 CFR 4.902.

It is BLM's contention that dismissal of appellant's appeal for lack of standing is within previous holdings of this Board and argues that:

The test for determining whether or not a party has standing before this Board is not whether such party is an 'aggrieved party' but whether such party

'claims a property interest in land affected' by a determination appealable to the Board, or is an agency of the Federal Government or in cases, involving land selection is a Regional Corporation, *Appeal of Sam E. McDowell, et al.*, ANCAB VLS 78-2 (March 29, 1978).

BLM's Memorandum in Support of Motion to Dismiss at 2.

Also cited is "the *Appeal of Charles G. and Sara Hornberger*, ANCAB VLS 79-37 (Jan. 9, 1980)."

Second, appellant has not filed a statement of facts upon which he relies for standing as required by 43 CFR 4.903(b)(2).

BLM further asserts that a claim of private right cannot provide standing in this appeal by stating:

Appellant may have a valid existing right to the airstrip and trails incident to his mining claim. It is clear however that public easements may not be reserved under 17(b)(2) to protect private rights of access. * * * Appellant's remedy, to protect such existing rights as he may have, if any, is not to appeal to this Board but to deal directly with the Native corporation and to resort to the courts if necessary. See *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 678 (D.C. Alaska 1977).

BLM's Memorandum in Support of Motion to Dismiss at 6.

BLM rejects appellant's contention that his ownership of property adjacent to the conveyed lands can establish a sufficient property interest in land affected by a BLM determination. The BLM states:

His property is outside the conveyance area and therefore is not being conveyed by the BLM. Appellant, apparently, seeks standing on the basis of his past use of

State and Federal land to gain access to his private mining claim and such use would not confer standing to bring this appeal. In the *Appeal of Kodiak-Aleutian Chapter, Alaska Conservation Society*, ANCAB LS 77-11 (March 31, 1978) the Board held:

"The Board finds that the mere allegation of ownership and use of State and Federal lands as members of the public, does not constitute a claim of 'property interest' in land, 43 CFR § 4.902, and therefore the appellant lacks standing to bring an appeal before the Board. (*Italics added.*) Id. at 5."

BLM's Response to Brief of Appellant at 2.

Decision

The issue in this partial decision is whether appellant has standing to bring this appeal under the requirements of 43 CFR Part 4, Subpart J, 4.902, which provides:

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

Certain facts relevant to the issue of standing are undisputed in this appeal. Appellant is the owner of certain patented mining claims situated outside of the land area selected by the Native Village Corp. of Shaktoolik. These mining claims are located within T. 11 S., R. 10 W., Kateel River meridian, on public lands adjacent to and in close proximity with the appealed easements.

Appellant asserts that BLM erred in failing to make reservation in the Decision to Issue Conveyance of the three (3) proposed public easements under the provisions of § 17(b)(1) of ANCSA, which provides as follows:

[3] The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.¹

The rationale for § 17(b)(1) is described by the court in *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 674 (D.C. Alaska 1977):

As previously mentioned the Act grants to the Alaska Natives 40 million acres of land in Alaska. The specific land which comprised the grant to eligible entities was not delineated. Rather the Village and Regional Corporations were to choose their land from the areas designated in conformity with the Act. In such circumstances Congress was justifiably concerned that certain portions of the State which were to remain in the public domain would become inaccessible or land-locked by Native lands. It appears,

¹ It is noted that decisions to reserve or not reserve public easements identified by the Planning Commission are actually made pursuant to § 17(b)(3) of ANCSA, which provides: "Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary." To eliminate confusion, however, the Board uniformly refers to public easements as being established pursuant to § 17(b)(1).

therefore, that the public easements were to be reserved to provide access to the lands not selected.

Implementing regulations in 43 CFR 2650.4-7(b)(1) discuss the purposes for which public transportation easements may be reserved:

Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native corporations. Such purposes may also include transportation to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in number to constitute a public use, and government reservations or installations.

In the case of *Joseph C. Manga et al.*, 5 ANCAB 224, 88 I.D. 460 (1981) [RLS 80-1], the Board examined the issue of standing under § 4.902 when applied to the right of a private individual to appeal the reservation of a public easement pursuant to § 17(b) of ANCSA.

The Board concurs with the BLM's assertion that being a party aggrieved by a decision cannot be a basis for standing under § 4.902 to bring an appeal to ANCAB.

The Board in *Joseph C. Manga, supra*, reiterated its finding in this regard as previously set forth in the case of *Appeal of Sam E. McDowell*, 2 ANCAB 350 (1978) [VLS 78-2].

[1] Therefore, as to appellant's claim that he has standing to appeal as party aggrieved, the Board concludes he does not. The Board finds that the appropriate test of standing to appeal a decision under

ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed."

BLM asserts its reliance upon previous decisions of the Board to show that before standing under § 4.902 is allowed an appellant must "claim a property interest in land affected by a determination appealable to the Board."² BLM's position is that since appellant's only claim of interest in lands is in his patented mining claims on public lands, they cannot constitute a "sufficient property interest in land affected by a BLM determination to establish standing," because "[h]is property is outside the conveyance area and therefore is not being conveyed by the BLM."

In the case of *Joseph C. Manga, supra*, the Board, without disputing previous holdings that under § 4.902 a claim of property interest affected by the BLM's decision was required for standing,³ stated:

² *Appeal of Sam E. McDowell*, 2 ANCAB 350 (1978) [VLS 78-2]; *Appeal of Charles G. and Sara Hornberger*, 4 ANCAB 112 (1980) [VLS 79-37].

³ In cases where an appellant sought to prevent or condition conveyance of land to a Native corporation in favor of its own claim of interest in the same land, the Board has held that, to have standing, the appellant must claim a property interest in the land selected by the Native corporation. *Appeal of State of Alaska*, 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78-42]; *Appeal of Chickaloon Moose Creek Native Ass'n, Inc.*, 4 ANCAB 134 (1980) [VLS 80-11]; *Appeal of Chickaloon Moose Creek Native Ass'n, Inc.*, 4 ANCAB 250, 87 I.D. 219 (1980) [VLS 80-11].

In each of the prior appeals, the appellant sought to prevent BLM from conveying title for specific lands to a Native corporation. Neither appellant had previously selected the land.

In the present appeal, appellants do not seek to prevent conveyance to the selecting Native corporation. They are not competing for title to the land proposed for conveyance. Rather, they seek to have a public transportation easement reserved across lands to be conveyed.

There are fundamental legal differences between the effect of a decision to convey title and the effect of a decision to reserve a public easement.

88 I.D. at 466-467.

In this appeal, as in the case of *Joseph C. Manga, supra*, the lands in which the appellant claims to have a property interest are outside of the lands being conveyed by the BLM to the selecting Native corporation and only the reservation of public easements under § 17(b) (1) is being sought on the Native lands.

In *Joseph C. Manga, supra*, the Board recognized that the property interest affected by the reservation of a public easement pursuant to § 17(b) (1) of ANCSA could be distinguished from the property interest required by other provisions of ANCSA to give standing under § 4.902 to bring an appeal. The Board determined that:

The argument that an appellant must have a property interest in the land to be conveyed, regardless of the subject matter of the appeal, ignores the fact that a decision to convey land and a decision to reserve an easement across land affect property differently.

88 I.D. at 467.

The Board affirms this holding in *Joseph C. Manga, supra*, and finds that appellant's patented mining claims outside of the selection area are a property interest within this principle.

[2] The Board holds that decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.

The Board in *Joseph C. Manga, supra*, noted the findings by the court in *Alaska Public Easement Defense v. Andrus, supra*, in interpreting § 17(b)(1) and based thereon concluded:

The Board notes from the court's interpretation of the language in § 17(b)(1) that the purpose of a public easement is to allow travel 'across' lands selected by Native corporations to 'lands not selected' and not for purpose of access onto Native lands for such activity as hunting, fishing, trapping or recreation.

88 I.D. 467.

An unusual fact may be presented because this appeal involves two (2) access trail easements which appellant claims complement the site easement for use of an airstrip in order to provide access to public lands rather than a request of easement to reserve a single continuous access route. This has no effect on the issue of standing since all three easements relate to providing public access across Native-selected lands to public lands.

[3] Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, the Board concludes that a § 17(b)(1) easement necessarily affects lands other than those to be conveyed. Therefore, a member of the public who claims a private interest in land other than the land to be conveyed, in asserting standing to appeal a § 17(b)(1) easement decision, may rely on this private holding as his or her 'property interest' affected within the meaning of 43 CFR 4.902.

Appellant specifically notes that the stated basis for allowing standing to appeal BLM's failure to reserve the three (3) easements in question as public easements under § 17(b)(1) of ANCSA, is wholly separate from any private valid existing right which may exist. BLM asserts that all of appellant's claimed usage of the proposed easements reflects his own use of State and Federal lands for access to his mines and cannot be the basis to confer standing to bring this appeal. BLM further states that appellant's remedy to assert such a private right is protected under § 17(b)(2) of ANCSA.

In this case appellant claims that BLM's failure to reserve these three (3) public easements under § 17(b)(1) will not only cause a loss of means of access to his patented mining claims on public land, but will deny (over the same route) use by other property owners on the adjacent public lands, as well as other users including government agen-

cies and private commercial interests, who will have no other reasonable alternate route to access the adjacent public lands.

The file record contains documentation which affirms appellant's contention that the proposed easements have been used by the other private individuals as well as various government agencies and commercial interests to gain access to the adjacent public lands. Whether such use is sufficient to meet the factual requirements necessary to reserve a § 17(b)(1) public easement is not an issue in this partial decision.

The Board rejects BLM's contention that appellant's possible claim of private access has any effect on the issue of standing to appeal these public easements and affirms the findings in *Joseph C. Manga, supra*.

[4, 5] The Board finds that the private right of access provided to holders of valid existing rights pursuant to § 17(b)(2) of ANCSA is separate from the right provided in § 17(b)(1) of specifically-identified public access routes. Possible protection under § 17(b)(2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to satisfy the standing test of 43 CFR 4.902. However, an individual claiming standing to appeal an easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b)(2) private access right.

The Board holds that the Appellant, Patrick J. Bliss, claims an

affected property interest within the meaning of 43 CFR 4.902 to have standing to appeal BLM's failure to reserve a public easement under § 17(b)(1) of ANCSA. Unless objection is filed within fifteen (15) days from the date of this partial decision, appellant has thirty (30) days within which to file any additional brief on the merits of the issues raised in this appeal. Briefs filed thereafter by the respective parties to this appeal will be in accordance with 43 CFR 4.903, *et seq.*

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

CITY OF HOMER

6 ANCAB 203

Decided November 30, 1981

Appeal from the Decision of the Alaska State Office, Bureau of Land Management AA-41916.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

When a municipality's "interest" in a particular tract of land is based only on the possibility that some day it may acquire the land under the provisions of the Federal Property and Administrative

Services Act of 1949, *as amended*, the municipality's "interest" is too speculative to constitute a "property interest" under 43 CFR 4.902.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeals Board: Appeals: Standing

The appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party" but whether a person "claims a property interest in lands affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed."

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

The Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1145, *as amended*, was clearly an amendment to ANCSA and the standing requirements of the original Act (43 CFR 4.902) apply to the amendments.

APPEARANCES: A. Robert Hahn, Esq., Hahn, Jewell & Stanfill, for the Appellant, City of Homer; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Stephen C. Hillard, Esq., Graham & James, for Cook Inlet Region, Inc.

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD**

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43

CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Feb. 4, 1981, Cook Inlet Region, Inc. (CIRI), filed selection application AA-41916 under the provisions of sec. 12(b)(6) of the Act of Jan. 2, 1976 (89 Stat. 1151), and I.C.(2) of the Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, as clarified Aug. 31, 1976, for the surface and subsurface estates of certain lands in Homer, Alaska.

Sec. 12(b)(6) of the Act of Jan. 2, 1976, authorizes conveyance of lands to CIRI from a selection pool established by the Secretary of the Interior and the General Services Administrator.

The lands are located inside the boundaries of Cook Inlet Region. By notice dated May 20, 1980, the lands and improvements within selection AA-41916 were placed in the pool of properties for selection by CIRI, subject to valid existing rights.

The Bureau of Land Management (BLM) decision here in question was issued June 23, 1981, and held that the selection application of CIRI had been properly filed and met the requirements of the Act and of the regulations issued pursuant to it.

The lands in question are known as the FAA range site or the Homer H Marker Site within the City of Homer. Specifically, the lands are

the surface and subsurface estates located in Sec. 20, T. 6 S., R. 13 W., Seward meridian, more particularly described as:

From the $\frac{1}{4}$ corner common to Sections 19 and 20, Township 6 South, Range 13 West, Seward Meridian, in village (City) or Homer, Alaska, go East 238.5 feet to a 2 inch iron pipe and the point of beginning; thence North 834 feet to a 2 inch iron pipe; thence East 600 feet thence South 30 feet; thence East 234 feet; thence South 804 feet to a 2 inch iron pipe; thence West 834 feet to the point of beginning.

Containing approximately 15.63 acres. Appellant's Legal Description and Request to Segregate at 1.

On July 22, 1981, the City of Homer filed with the Board its Notice of Appeal from the above-mentioned BLM decision. Further, appellant submitted a statement of Standing and Interest Affected and an Initial Statement of Reasons on that same date.

On Aug. 17, 1981, the BLM filed a Motion to Dismiss and a memorandum in support of that motion. On Aug. 21, 1981, CIRI also filed a Motion to Dismiss for Lack of Standing in which it concurred in BLM's previous motion. The appellant, on Sept. 10, 1981, submitted a Memorandum in Opposition to Motion to Dismiss and CIRI followed on Sept. 28, 1981, with a Reply Memorandum in Support of Motion to Dismiss for Lack of Standing. A further Reply Memorandum was filed by appellant on Nov. 2, 1981, and on Nov. 10, 1981, CIRI submitted its Supplemental Memo-

randum in Support of Motion to Dismiss for Lack of Standing.

Decision

By virtue of the motions to dismiss filed by both BLM and CIRI, the only issue before the Board at this time is whether or not the City of Homer has the necessary property interest to appeal the BLM decision here in question.

As noted previously, the land in question is comprised of slightly over 15.5 acres and is located within the boundaries of the City of Homer. This property was originally held by the Federal Aviation Administration but on Dec. 18, 1979, it was reported excess and offered to other Federal agencies for possible utilization pursuant to the provisions contained in sec. 202 of the Federal Property and Administrative Services Act of 1949, *as amended*, 40 U.S.C. § 483, and in accordance with procedures established by the Federal Property Management Regulations 101-47.

By letter dated Feb. 12, 1980, the General Services Administration advised the State Director of BLM that the property in question had been determined surplus and thus it was appropriate for BLM to make this property available for selection by the Natives pursuant to the terms of the Alaska Native Claims Settlement Act, *as amended*.

After the enactment of ANCSA in 1971, and before the Homer H Marker Site, Nondirectional Beacon, was excessed and surplusd in

1979 and 1980, an agreement was entered into between the Department of the Interior, the State of Alaska and Cook Inlet Region, Inc. This document is entitled the "Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, December 10, 1975, as Clarified August 31, 1976" (T&C). The T&C was ratified by Congress by the enactment of P.L. 94-204. As this agreement pertains to this appeal, it states in pertinent part:

Section I.C.(2) (a) The Secretary, in conjunction with the General Services Administrator, shall promptly identify and take the necessary steps by January 15, 1978, to create a selection pool which shall consist of all the following lands, within the exterior boundaries of the Cook Inlet Region, now in existence or hereafter coming into existence by January 13, 1978:

* * * * *

(ii) Federal surplus property;

* * * * *

(c) The State shall be advised of all properties located within the exterior boundaries of Cook Inlet Region to be placed in the pool described in subparagraph I.C.(2) (a) and may require Secretarial consultation with the Joint Federal-State Land Use Planning Commission (JFSLUPC) with respect to any specific piece of property so included, except those in subparagraph I.C.(2) (a) (i) hereof, to determine whether private ownership of such property would be incompatible with reasonable land management principles; provided, that the Secretary shall not be bound by any recommendation of the JFSLUPC.

T&C at 28819.

As noted previously the only question before the Board at this

time is whether the appellant has standing to bring this appeal before the Board. To bring an appeal a person must meet the regulatory criteria of 43 CFR 4.902 which provides:

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. However, a regional corporation shall have the right of appeal in any case involving land selections.

The appellant takes the position that it either has "a property interest in land affected" as required by 43 CFR 4.902 or, if it fails to meet those requirements, then administrative review should be allowed under either 43 CFR 4.700 or 43 CFR 4.410.

In claiming a property interest under 43 CFR 4.902, the appellant relies primarily on two factors. First, from 1962 and particularly from 1969 forward, various city managers and city officials consistently and on a regular basis expressed their interest in the property for city needs.

Second, the appellant argues that the State Director of BLM recognized the appellant's interest in the property when he invited the appellant to submit any data desired before a decision was made to place the property in the pool as provided for under Sec. I.C.(a) (ii) of the T&C. The appellant, in this regard, asks the Board to recognize that a property interest includes not only traditional notions of real and per-

sonal property but also extends to those benefits to which individuals or organizations may be deemed to have legitimate claims of entitlement under existing rules of understanding.

In refuting appellant's claimed property interest, BLM argues that appellant only had a hope or an anticipation of some day acquiring the land in question. In support of this argument, BLM cites *Appeal of State of Alaska*, 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78-42], for the proposition that this type of speculative interest in land was rejected by the Board.

In its reply to the position taken by the appellant, CIRI supports BLM's contention that the interest claimed by appellant is fatally speculative. Also, CIRI argues that appellant cannot rely upon the provisions of the Federal Property and Administrative Services Act of 1949, *as amended*, because nowhere in the 44 sections cited by appellant is a municipality granted a binding option, priority, or other nonspeculative right to acquire the Federal surplus land. In addressing the appellant's argument that in asking the appellant to comment on the possible disposition of the land, the State Director, BLM, somehow waived the regulatory requirement of standing, CIRI contends that such action by the State Director was a mere courtesy and not a waiver.

[1] The Board concludes that the appellant lacks the necessary prop-

erty interest in land affected that is required by 43 CFR 4.902, and therefore does not have standing to bring this appeal. The appellant's claim to the land in question is merely a hope, desire or possibility, and nothing more. This type of speculative interest in land has been rejected by the Board as the bases for meeting the standing requirement of 43 CFR 4.902. In the *Appeal of State of Alaska*, *supra*, at 234, the State of Alaska was found to lack standing because:

[3, 4]. While a 'property interest' sufficient to confer standing under sec. 4.902 need not be a vested interest, it may not be completely speculative. It is the Board's conclusion that where the State's 'interest' in a particular tract of land is based only on the possibility of a decision, at some future time, to select such land in preference to other land under the Statehood Act, the State's 'interest' is too speculative to constitute a 'property interest' under 43 CFR 4.902.

Furthermore, the Board has reviewed the 44 sections of the Federal Property and Administrative Services Act of 1949, *as amended*, cited by the appellant, and concludes that those provisions do not establish in a municipality a binding option, priority, or other nonspeculative right to surplus Federal property. In other words, the Board finds nothing in the above-cited Act that would, as the appellant claims, make the appellant a beneficiary recipient of the property in question because that Act does not mandate a priority to local agencies to acquire lands which are deemed to be

surplus. A careful reading of the Act reveals that the Administrator of the General Services Administration has been given broad discretionary powers in disposing of surplus land.

By contrast, language in the T&C establishing the selection pool, and designating which lands shall comprise the pool, is mandatory. Sec. I.C.(2) (a) provides that:

The Secretary, in conjunction with the General Services Administrator, *shall* promptly identify and take the necessary steps by January 15, 1978, to create a selection pool which *shall* consist of *all* the following lands, within the exterior boundaries of the Cook Inlet Region.

* * * * *

(ii) Federal surplus property:
[Italics added.]

A sectional analysis of P.L. 24-204, contained in H.R. Rep. No. 94-729, 94th Cong., 1st Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 4120-4192, 4143, states with reference to the exchange pool, "The Secretary is directed to maximize a pool of federal properties available to reduce the extent of out-of-region acreage. The Region, after such properties are declared surplus, would be permitted first priority."

Under Sec. I.C.(2)(c) of the T&C, it appears that the State is the only entity which may challenge the Secretary's determination that private ownership of land is incompatible with reasonable land management principles. Although the State may require Secretarial consultation with the Joint Federal-State Land Use Planning Commis-

sion (JFSLUPC) (no longer in existence) on this point, this section of the T&C specifically provides that the Secretary is not bound by any recommendation of the JFSLUPC. Even this degree of participation is not offered to local government entities.

Therefore, the Board finds that when a municipality's "interest" in a particular tract of land is based only on the possibility that some day it may acquire the land under the Federal Property and Administrative Services Act of 1949, *as amended*, the municipality's "interest" is too speculative to constitute a "property interest" under 43 CFR 4.902.

[2] With respect to appellant's second argument that the Board should recognize that a property interest includes not only traditional notions of real and personal property but also extends to those benefits to which individuals or organizations may be deemed to have legitimate claims of entitlement under existing rules of understanding, it should be noted that the Board is bound by a restricted, as opposed to a liberal, standard with respect to the granting of standing. The appellant's contention that the Board should use its discretion and liberalize the standing requirements imposed by 43 CFR 4.902 is, the Board concludes, the equivalent of asking the Board to apply the "party aggrieved" standard:

The language in 43 CFR 4.902 is unique as a test of standing. While there is precedent for the proposition that administrative boards have, and should

have, wider discretion than the courts in determining who may appeal (*see, Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976)), it is evident that the standard in 43 CFR 4.902 was intended to be more restrictive than the test under a 'party aggrieved' standard. The Board has found that the two standards require different interpretations and that the standing test in 43 CFR 4.902 is the more restrictive. (*Appeal of Sam E. McDowell*, 2 ANCAB 350 (1978) [VLS 78-2].)

* * * [T]he appropriate test of standing to appeal a decision under ANCSA is not whether a person is an 'aggrieved party,' but whether a person 'claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed.'

Joseph C. Manga et al., 5 ANCAB 224, 236-237, 88 I.D. 460, 465-466 (1981) [RLS 80-1]. Also see the concurring opinion of Judge Bazelon in *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 614 (D.C. Cir. 1978).

The Board, therefore, reiterates its finding in *Appeal of Sam E. McDowell, supra*, that the appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in lands affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed."

Having concluded that the appellant lacks a "property interest in land affected" as required by 43 CFR 4.902, the Board must next concern itself with appellant's second contention that administrative

review should be allowed either under 43 CFR 4.700 or 43 CFR 4.410.

First, it is the appellant's position that an appropriate regulation conferring standing is 43 CFR 4.700, which only requires that a party be "aggrieved" in order to bring an appeal. This regulation provides, in pertinent part:

Any party aggrieved by an adjudicatory action or decision of a Departmental official relating to rights or privileges based upon law in any cases or proceeding in which Departmental regulations allow a right of appeal to the head of the Department from such action or decision.

[3] The appellant argues that this appeal is not an appeal from ANCSA but rather it is an appeal from a distinct and separate statute.¹ Thus, appellant contends that because CIRI would take land under the T&C and not under the actual selection process of ANCSA, the Board should look to 43 CFR 4.700 and not to 43 CFR 4.902 for its standing requirements. The Board does not agree. The Board finds that the T&C (Act of Jan. 2, 1976, P.L. 94-204, *as amended*) was clearly an amendment to ANCSA and the standing requirements of the original act apply to the amendments. Among other factors, the following seem particularly pertinent: The preamble to P.L. 94-204 provides that the statute is "[to] provide, under or by amendment of the

¹ Act of Jan. 2, 1976, P.L. No. 94-204, § 12, 89 Stat. 1150 *as amended* by Act of Oct. 4, 1976, P.L. No. 94-456, § 3, 90 Stat. 1935, Act of Nov. 15, 1977, P.L. No. 95-178, § 3(a), 91 Stat. 1369; Act of Aug. 14, 1979, P.L. No. 96-55, § 2, 93 Stat. 386.

Alaska Native Claims Settlement Act, for [certain purposes]"; the T&C, as a statute, indisputably modifies the original provisions of ANCSA and therefore amends ANCSA; and finally the T&C and its enabling statute also provide that "the provisions of [ANCSA] are fully applicable to this Act." [P.L. 94-204, § 18 (Jan. 2, 1976).]

Lastly, appellant contends that "[i]f * * * the Board determines that it can only hear appeals based on the provisions of 43 CFR 4.902, then it would seem clear that this Board has no jurisdiction in this appeal and must transfer the case to a more appropriate forum, presumably the Interior Board of Land Appeals under 43 CFR 4.410."² The Board cannot concur in this reasoning. The Board cannot comprehend the reasoning that if it can only hear appeals based on 43 CFR 4.902, then it has no jurisdiction in this appeal and must, therefore, transfer the case to another forum such as Interior Board of Land Appeals.

² 43 CFR 4.410 provides in part: [A]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administrative [sic] law judge, shall have a right to appeal to the Board."

Because the Board has found in this appeal that it arose under ANCSA or an amendment to ANCSA (Act of Jan. 2, 1976, P.L. 94-204, *as amended*), this Board has jurisdiction. Having jurisdiction, the Board was legally bound to apply 43 CFR 4.902 when the standing question was raised. When an appeal arises from ANCSA and the Board determines that the appellant does not have standing under 43 CFR 4.902 to bring the appeal, there is no legal basis for concluding that this Board lacks jurisdiction of the appeal and therefore must transfer the case to another administrative forum.

Based on the findings and conclusions herein, BLM's and CIRI's motions to dismiss for lack of standing in the appellant is granted and therefore this appeal is dismissed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

COMPLIANCE WITH STATE LAW

*September 11, 1981***NONRESERVED WATER RIGHTS—
UNITED STATES COMPLIANCE
WITH STATE LAW*****M-36914 (Supp. I)***September 11, 1981***Water and Water Rights: Federal
Appropriation—Water and Water
Rights: State Laws**

The National Park Service, Fish and Wildlife Service, Bureau of Land Management and Bureau of Reclamation must follow state substantive and procedural law when appropriating water except in the limited instances where water is necessary to accomplish the original purpose(s) of a Federal reservation or protect the navigation servitude.

**This Supplements Solicitor's Opinion
M-36914, 86 I.D. 553 (1979) and
M-36914 (Supp.), 88 I.D. 253 (1981).**

**OPINION BY OFFICE OF
THE SOLICITOR**

To: Secretary
FROM: Solicitor
SUBJECT: Nonreserved Water
Rights—United
States Compliance
with State Law

I. INTRODUCTION

Solicitor's Opinion No. M-36914 of June 25, 1979¹ (hereinafter "Prior Opinion") sets forth a partial analysis of the nature and extent of non-Indian federal water rights for the National Park Service, Fish and Wildlife Service, Bureau of

Reclamation and the Bureau of Land Management. In addition to its major conclusions concerning reserved water rights,² the Prior Opinion announced the existence of what has come to be referred to as "non-reserved federal water rights." As defined by the Prior Opinion, "non-reserved" water rights represented a class of federal appropriative water rights that may possibly be claimed by the United States for congressionally authorized programs.³ The Prior Opinion asserted that these non-reserved federal water rights are automatically appropriated by the mere application of water to a beneficial use and are acquired by the United States without regard for or compliance with state substantive law.⁴ On Jan. 16, 1981, a Supplemental Solicitor's Opinion (hereinafter "Supplemental Opinion") was issued which addressed the inapplicability of the "non-reserved" rights concept under certain federal statutes. This Opinion further analyzes the constitutional and statutory bases for the "non-reserved" water rights doctrine based upon an exhaustive review of the issues related to the so-called "non-reserved" rights theory. To the extent the Prior Opinion and the Supplemental

² This Opinion is not intended to modify or supersede any portion of the Prior Opinion dealing with the reserved water rights of the non-Indian land management agencies in the Department. I may further review those portions of the Prior Opinion at a future date as specific circumstances warrant.

³ 86 I.D. at 574-578.

⁴ 86 I.D. at 574-578, 612-616.

*Not in chronological order.

¹ 86 I.D. 553 (1979).

Opinion are inconsistent with the conclusions reached herein, they are rescinded.

II. BACKGROUND

In brief, the proponents of the federal non-reserved rights theory assert that by enactment of various land use statutes "Congress authorized the United States to appropriate unappropriated water available on the public domain" implicitly, without regard to the substantive provisions of state water law,⁵ and that such "federal non-reserved water rights are not dependent upon the substantive contours of state water law."⁶ The Prior Opinion asserts that, since the Federal government has never granted away its right to make use of unappropriated water on federal lands, "* * * the United States has retained its power to vest in itself water rights in unappropriated waters and may exercise such power independent of substantive state law."⁷ Such water rights were asserted to be available to fulfill authorized congressional purposes on the public domain, reserved and acquired lands, could be consumptive and could be used for "fish and wildlife, scenic values, and areas of critical environmental concern."⁸ The priority date was said to be the date of initial use, and the quantity of the right determined by the requirements necessary to carry out "congressionally authorized

management objectives on federal lands."⁹

The Supplemental Opinion amended and modified the prior Opinion by concluding that neither the Federal Land Policy and Management Act of 1976 (FLPMA)¹⁰ nor the Taylor Grazing Act of 1934¹¹ authorized the Bureau of Land Management (BLM) to claim water rights under the expansive "non-reserved" rights theory. The Supplemental Opinion did not, however, uniformly deny the existence of a federal "non-reserved" water right.

The concept of the "non-reserved" water rights has been the subject of continuing debate and controversy.¹² State officials have stridently criticized federal control of state water resources. There is great uncertainty concerning the practical application, if any, of the non-reserved rights theory by the federal agencies. In particular, the asserted existence of this right has hampered the ability of the State and Federal governments to quantify federal water rights and to negotiate agreements to determine the procedures and methods to be used in quantifying and adjudicating water rights. The assertion of non-reserved rights has also created a new and unnecessary cloud of ambiguity over private

⁵ 86 I.D. at 574.

¹⁰ 43 U.S.C. § 1701 *et seq.* (1976).

¹¹ 43 U.S.C. § 315 *et seq.* (1976).

¹² See, D. Freudenthal, *Federal Non-Reserved Water Rights*, 15 Land and Water L. Rev. 66 (1980); Simms, *National Water Policy in the Wake of United States v. New Mexico*, 20 Nat. Resources J. 1 (1980); Gould, *Solicitor Issues Opinion on Federal Water Rights*, 12 Rocky Mtn. Min. L. Fdn., Water L. Newsletter 1 (No. 3 1979).

⁶ 86 I.D. at 615.

⁷ 86 I.D. at 577.

⁸ 86 I.D. at 571.

⁹ 86 I.D. at 615.

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water rights dependent on water sources that are on, under, over or appurtenant to federal lands. For these reasons, the comprehensive review of "non-reserved" water rights was undertaken.

III. GENERAL AUTHORITY OF THE UNITED STATES TO APPROPRIATE WATER APPURTENANT TO FEDERAL LAND

As a starting point for reviewing the legal basis for the existence of "non-reserved" water rights, there are certain premises and conclusions in the Prior Opinion and Supplemental Opinion which are well settled. Specifically, the Prior Opinion reached the following conclusions regarding the United States right to appropriate unappropriated water with which I fully agree and therefore reaffirm:

1. The United States has the power to appropriate water pursuant to state law on federally-owned land, regardless of whether such land is classified as a reservation, acquired land or public domain. Congress also has retained the power to implement the original objective of congressional acts.¹³

2. The priority of an appropriative water right obtained by the United States, whether consumptive or non-consumptive, may not predate actual use, and it may not adversely affect prior rights established pursuant to state substantive and procedural law.¹⁴

3. Congress generally did not intend that the United States would acquire water rights for the ultimate beneficiaries of the disposed public lands or users of the non-

renewable resources thereupon (such as miners, homesteaders, or railroads) unless Congress specifically directed the United States to reserve or otherwise acquire water for such specific public use.¹⁵

4. The United States may apply to the states to secure appropriative water rights needed to meet the multiple-use management objectives set forth by Congress in land management statutes, *e.g.*, FLPMA, *supra*, and the Taylor Grazing Act, *supra*.¹⁶ In so doing, the United States must comply with state substantive and procedural laws.¹⁷

5. In the area of water rights, FLPMA mandates the maintenance of the *status quo ante* in the relationship between the states and the United States. The *status quo* is a recognition of existing laws and practices, and thus allows for (a) the continued appropriation of unappropriated non-navigable waters on the public domain by private persons pursuant to state law, (b) the right of the United States to use water for congressionally-recognized and mandated purposes set forth in legislation providing for the management of the public domain, and (c) application by the United States to secure water rights pursuant to state substantive and procedural law for these purposes.¹⁸

6. Neither FLPMA nor the Taylor Grazing Act give the BLM an independent statutory basis for water uses which are inconsistent with the substantive and procedural requirements of state law.¹⁹

IV. THE INTERRELATIONSHIP OF FEDERAL AND STATE CONTROL OF WATER RIGHTS

In reviewing the interrelationship of federal and state law gov-

¹³ 86 I.D. at 574, 613.

¹⁴ 86 I.D. at 574.

¹⁵ 86 I.D. at 612.

¹⁶ 86 I.D. at 615.

¹⁷ Supplemental Opinion.

¹⁸ 86 I.D. at 614-615.

¹⁹ Supplemental Opinion.

erning water rights, the United States Constitution empowers Congress under the Property²⁰ and Commerce Clause²¹ to control the disposition and use of water appurtenant to lands owned by the United States. That power extends to water on, under, over and appurtenant to federally-owned lands in the states.²² The power of the individual states to, at a minimum, promulgate and exercise non-conflicting state regulation.²³ Indeed, the states, as Congress clearly recognized in enacting the McCarran Amendment,²⁴ have a strong interest to regulate the water within their boundaries, including water appurtenant to federal lands. As the Supreme Court has noted "if the appropriation and use were not under the provisions of State law the utmost confusion would prevail. * * * Different water rights in the same state would be governed by different laws and would frequently conflict."²⁵ Despite the practical im-

portance of local control of water, Congress, under the Supremacy Clause²⁶ has the ultimate power to preempt state laws regarding management and disposition of the public lands and the resources thereon, including water.²⁷ As a result, it is unlikely that state law could preclude reasonable water use by a federal agency if Congress specifies a particular federal usage.²⁸ While the Constitution may grant Congress plenary power in an area, Congress may generally defer to state control thereby delegating that authority to the states.²⁹ The Supreme Court has expressly recognized that Congress has delegated broad power to the states in regulating water resources on the public lands.³⁰ Accordingly, the ultimate issue is not the existence of authority but the exercise or delegation of that authority.

The United States' control over unappropriated non-navigable water located upon the public domain arises from retention of federal property, including the streams and lakes thereon at the time of state-

²⁰ U.S. Const., Art. IV, Sec. 3.

²¹ U.S. Const., Art. I, Sec. 8.

²² *E.g.*, *United States v. Grand River Dam Authority*, 365 U.S. 229, 235 (1960).

²³ *United States v. New Mexico*, 438 U.S. 697, 702 (1978); *See also*, note, *Federal Acquisition of Non-Reserve Water Rights after New Mexico*, 31 Stan. L. Rev. 885 (1979).

²⁴ 43 U.S.C. § 666; *See*, *United States v. Eagle County*, 401 U.S. 520 (1971); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-821 (1976).

²⁵ *California v. United States*, *supra* at 667-68; *See also* Trelease, *Federal State Relations in Water Law*, (Sept. 7, 1971) (Legal Study No. 5 prepared for the National Water Commission); Public Land Law Review Commission, *One Third of the Nation's Land*, 144 *et seq.* (1970); *Report of the Task Force on Non-Indian Federal Water Rights-Task Force 5(b)*, *President's Water Policy Implementation*, 20 (1980).

²⁶ U.S. Const., Art. VI, Sec. 2.

²⁷ *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *see also*, Discussion at 86 I.D. 562-564 and cases cited therein. *But see*, discussion regarding states "exclusive sovereignty over the unappropriated waters in their streams" in *California v. United States*, 438 U.S. 645, 654-55 (1978).

²⁸ *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); *See also*, 31 Stan. L. Rev. 885 (1979) *supra*, *ftnt.* 23.

²⁹ *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946); *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 703 (1899).

³⁰ *California v. United States*, 438 U.S. 645, 654 (1978); *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

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hood.³¹ When the various western states were admitted to the Union, the title to the beds and waters of the navigable streams and lakes passed to the new states, with the United States retaining title to the non-navigable waters on the public domain.³²

Yet Congress has been said, as was earlier referenced, to have concurrently granted "exclusive sovereignty" over appurtenant non-navigable water rights when it granted statehood. In addition to the statehood acts, Congress very early on promulgated legislation which deferred to state control of water usage on the public domain. Specifically, Congress passed two statutes which, consistent with state law, recognized the rights of prior appropriators.³³ The statutory provisions in the 1866 and 1870 Acts had the effect of requiring water rights claimants on federal lands to comply with state water laws.

Since the appropriation system grew up partially as a consequence of and in conjunction with western states' mining laws, the statutory acknowledgment had the effect of placing the congressional imprima-

tur upon the water laws of the *individual* western states.³⁴ Thus, rather than exercising a constitutional prerogative of establishing a federal hierarchy of water rights and laws, these two statutes recognized the state substantive and procedural laws for the allocation of water resources on the public domain. This was an early signal to the States and Territories that the Federal government would yield to state water laws and naturally was an incentive to the new states to promulgate and apply their own water laws.

Congress reaffirmed and enlarged this implicit grant of broad control over water sources to the states in passage of the Desert Lands Act of 1877.³⁵ That Act provided homesteaders with a right to water, subject to prior appropriation, for "irrigation and reclamation usages" and further provided that surplus water would be available for later appropriation. As the Supreme Court has noted, the Desert Lands Act severed the water rights from surface rights³⁶ and directed patentees of federal lands to apply under state law to acquire water rights.³⁷

These three statutes, the Desert Lands Act, as well as the 1866 and 1871 Acts, had the effect of severing water from land on the public do-

³¹ 86 I.D. at pages 562-574 and cases cited therein. See also, Op. M-33969 (Nov. 7, 1950), "Compliance by the Department with State Laws Concerning Water Rights."

³² See, *Pollard's Lessee v. Hagan*, 3 How. 212 (1845); *United States v. California*, 332 U.S. 19, 29-30, 38 (1947); *Arizona v. California*, 373 U.S. 546, 579 (1963); Clark, *Water and Water Rights*. Vol. 2, pp. 51-52.

³³ Act of July 26, 1866, § 9 (14 Stat. 253), re-enacted at § 2339, R.S. (43 U.S.C. § 661, 1946 ed.); Act of July 9, 1870, § 17 (16 Stat. 218), re-enacted as 2340, R.S. (43 U.S.C. § 661, 1946 ed.).

³⁴ *California v. United States*, *supra* at 656.
³⁵ The Act of Mar. 3, 1877, § 1, (43 U.S.C. § 321, 1970 ed.).

³⁶ *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

³⁷ *Cappaert v. United States*, 426 U.S. 128 (1976).

main,³⁸ requiring state laws to be followed and making all non-navigable waters a part of the "publici juris" and subject to the "plenary control" of the Western States.³⁹ These statutes, which are still in effect, demonstrate the early congressional deference to state water law.

In 1902, Congress again mandated that federal agencies comply with state water laws under sec. 8 of the Reclamation Act of 1902.⁴⁰ Sec. 8 directs the Secretary of the Interior to abide by state law in acquiring unappropriated water for reclamation projects in the various states. This deference to state law is particularly noteworthy because the Reclamation Act was "a massive program to construct and operate dams, reservoirs and canals for the reclamation of the arid lands in 17 western states."⁴¹ Yet despite the provision for substantial federal action and federal expense to develop water resources within the state, Congress nevertheless maintained its commitment to allow state control of water rights.

Congress has continuously encouraged, through federal legislation, the development of state control of water within state boundaries. The four statutes cited above are merely examples of the more important early legislation. Yet, there

are many other statutes which similarly express or implicitly permit the states to control water appurtenant to federally-owned lands. As the Supreme Court has noted recently, Congress has continued its deference to state law in at least 37 statutes.⁴²

Congressional deference to states in water law is well-documented by the above-referenced Court decisions. Only in very limited instances has Congress maintained its power and not deferred to state law. For example, in *United States v. Rio Grande Dam and Irrigation Co.*,⁴³ where the Supreme Court noted that the right of the United States to restrict a state appropriation system is limited. The United States sought to enjoin an irrigation company's appropriation of water under state law because a permit had not been acquired from the Secretary of War to make a diversion from the navigable Rio Grande River. The Supreme Court held that a state in establishing its own system of water law could not, without congressional consent, "destroy the right of the United States, as the owner of lands bordering on a stream to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Governmental property."⁴⁴ In so ruling the Court upheld New Mexico's control of state water, except to the limited extent it inter-

³⁸ F. Trelease, *Federal State Relation in Water Law*, at 147d-47(f) (Sept. 7, 1971) (Legal Study No. 5 prepared for the National Water Commission).

³⁹ *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935).

⁴⁰ 43 U.S.C. § 372, 383 (1970).

⁴¹ *California v. United States*, *supra* at 650.

⁴² *United States v. New Mexico*, *supra* at 702, nt. 5.

⁴³ 174 U.S. 690 (1899).

⁴⁴ *Id.* at 703. See, Hutchins, *Water Rights Laws in the Nineteen Western States*, Vol. [1], Ch. 21 (1977).

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ferred with the navigation servitude.⁴⁵

Shortly after the *Rio Grande Dam* decision, the Court applied the "beneficial use of Government property" exception to create the reserved right doctrine in the case of *Winters v. United States*.⁴⁶ *Winters* involved the interpretation of an agreement between the United States and the Fort Belknap Indian Tribe to resolve a dispute over water rights between the tribes and a private appropriator. The Court found Congress' intent in creating the Fort Belknap reservation was to assist in transforming the Indians into a "pastoral and civilized people." The Court acknowledged that irrigation was necessary to fulfill the purpose of the reservation by making the lands productive. Without irrigation, the principal purpose of the reservation would have been frustrated. In holding that Congress had implicitly reserved water for the Indian reservation, the Court relied upon the rule of construction that ambiguities are to be resolved in favor of the Indians.⁴⁷ Only with the assistance of this rule applicable specifically to Indians did the Court ultimately conclude that the "power of the Government to reserve the waters and exempt them from appropriation under the state laws" for use on the Govern-

ment property had been implicitly exercised.⁴⁸ The Court left intact the well-recognized congressional deference to state water laws in all but the most limited circumstances.

For over half a century, the "Winters doctrine" was construed as a limited exception to the congressional deference to state control of water and applicable only to Indian water rights.⁴⁹ In 1963, the Supreme Court broadened the reserved rights doctrine in *Arizona v. California*⁵⁰ holding the "principle underlying the reservation of water rights was equally applicable to other federal establishments," specifically in that case wildlife refuges, national recreation areas, and national forests. Notwithstanding this expansion of *Winters*, the Court viewed this broadening not as a revocation or renunciation of the general deference to state water laws, but rather as an acknowledgment of Congress' power to control water where necessary to fulfill the original purpose of a reservation. In narrowly deciding the issues, the Court specifically declined to address the issue of state control of water which had not been appropriated.⁵¹ That is, could Arizona exert control over all nonappropriated water appurtenant to federal lands or did some inchoate federal right (*i.e.*, non-reserved rights) limit Arizona's power in this

⁴⁵ 174 U.S. at 709.

⁴⁶ 207 U.S. 564 (1908).

⁴⁷ *Id.* at 576-577. See also, *United States v. Winans*, 198 U.S. 371 (1905); *Colville Conf. Tribes v. Walton*, — F.2d —, — (9th Cir., 1980).

⁴⁸ *Id.*

⁴⁹ Trelease, *supra*, note 38 at 105.

⁵⁰ 373 U.S. 546 (1963).

⁵¹ *Id.* at 567-575.

regard? Since the issue was specifically not addressed by the Court, *Arizona v. California* provides no judicial basis for the exercise of federal "non-reserved" water rights.

While never reviewing the issue of federal non-reserved rights, the Courts have continued to maintain a strict requirement for application of the reserved rights doctrine and clearly regard it as an exception, and not the rule, to a general deference to state law regarding appropriation and use of water.⁵² Simply stated, there is neither a congressional nor judicial basis for the exercise of a federal non-reserved water right.

In my opinion, this issue of "non-reserved" federal water rights was definitively and directly addressed on July 3, 1978, by the Supreme Court in two separate opinions regarding the water rights of the United States. In *United States v. New Mexico*,⁵³ and *California v. United States*,⁵⁴ the Court once again acknowledged the congressional deference to state water law concluding that "this congressionally mandated division between federal and state authority worked smoothly."⁵⁵

In *California v. United States*, the United States sought declaratory relief to the effect that it could impound unappropriated water for

reclamation purposes without regard for state substantive law. In connection with the 1902 Reclamation Act, the United States alleged that while it was required under § 8 of the Reclamation Act of 1902 to apply to the state for water rights permits for the federal project, the state could not substantially condition those permits. The United States alleged that to the extent there was unappropriated water in a source, the state must grant the United States the unconditional right to use that water. The Court, however, rejected this claim and held that the state may impose any condition on the control, appropriation, use, or distribution of water in a federal reclamation project that is not inconsistent with a congressional directive respecting the project.⁵⁶ The Court made a comprehensive analysis of the history of federal deference to state water law and in this regard quotes approvingly, the opinion of experts that the states, by Constitution or statute, gained absolute dominion over their non-navigable water upon their admission to the Union. The Court went on to note that:

Congress 'effected a severance of all water upon the public domain not theretofore appropriated from the land itself'. * * * The non-navigable waters thereby severed were reserved for the use of the public under the laws of the states.^[57] (citation omitted)

The Court thus held that the United States water use is limited until it reserves the water or com-

⁵² *Cappaert v. United States*, *supra*; In the Matter of the United States of America, Water Divisions 4, 5, 6, Civil Nos. W-425, etc., (Colo. D.C., Mar. 6, 1978), appeal pending (Nos. 79-SA99 and 100, Colo. Sup. Ct.).

⁵³ 438 U.S. 696 (1978).

⁵⁴ 438 U.S. 645 (1978).

⁵⁵ *Id.* 670.

⁵⁶ 438 U.S. at 674, 678.

⁵⁷ *Id.* at 657-58.

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plies with the various state laws to appropriate that water, in the same manner as any other individual.

The Court also cited with approval its earlier opinion that a state has total control of water, limited only by the two exceptions, reserved rights and the navigation servitude:

The Court [in *Rio Grande Dam*] noted that there are two limitations to the states' exclusive control of its streams—reserved rights 'so far at least as may be necessary for the beneficial use of government property' and the navigation servitude.⁶¹

In addition to the legal basis for its opinion, the Court also acknowledged the practical necessity of having federal appropriation comply with local law in order to avoid "confusion" and "conflict."⁶²

The *New Mexico v. United States*⁶³ opinion reaffirms and expands the strong statements made in *California* as to the scope of federal water rights. Specifically, a congressional grant of "exclusive sovereignty" to the State of all non-navigable waters (not formally reserved) is once again acknowledged by the *New Mexico* opinion. The *New Mexico* case analyzed the United States' power to claim reserved water rights in a national forest for other than an "original" purpose of the national forest. The Court initially noted the deference usually provided in the area:

Where Congress has expressly addressed the question of whether federal entities

must abide by state water law, it has almost invariably deferred to the state law.⁶⁴

In reviewing the United States' use and control of water before creation of the reserved rights, the Court noted that prior to the creation of the national forest reservations, Congress was of the opinion that:

the States had exclusive control of the distribution of water on public lands and reservations.⁶⁵

The Court implies throughout the *New Mexico* opinion that the United States, without creating a reservation and thus impliedly reserving the water, had no control or means of preventing the public (or private appropriators) from appropriating all the waters in the National Forests pursuant to state laws. For example, the Court states that before the Forest Service Organic Act was passed the public had free reign to go upon the public domain and use water resources without restriction.⁶⁶ In other words, without the formal reservation of the land from the general public domain, the water resources upon the public domain could not be controlled by the United States without further action by Congress modifying, amending, or repealing the 1866, 1870, and 1877 Acts that gave the states the express right to control the disposition of water resources thereon.

⁶¹ 438 U.S. at 662.

⁶² *Id.* at 667-68.

⁶³ *Supra*, nt. 53.

⁶⁴ 438 U.S. at 702.

⁶⁵ *U.S. v. New Mexico*, *supra*, at 718, nt. 24.

⁶⁶ 438 U.S. at 705-706.

The *New Mexico* Court concluded that unless Congress expressly indicated to the contrary, "federal entities must abide by state water law,"⁶⁴ and "where water is only valuable for a secondary use [on a federal reservation] * * * Congress intended that the United States would acquire water in the same manner as any other public or private appropriator." (italics added)⁶⁵ A clearer statement of the law could not be made.

Certainly *New Mexico*, *supra*, and *California*, *supra*, reaffirm that congressional deference to state control over water arises from the 1866, 1870, and 1877 Acts, as well as the 1902 Reclamation Act and numerous other public land use statutes enacted over the years.⁶⁶ The unavoidable conclusion to be reached from these cases is that Congress gave the states broad power to provide for the administration of water rights which would only be limited where necessary to accomplish the original purpose of a congressionally mandated reservation or to protect the navigation servitude. As a result of this implicit grant of power, the presumption is that state law will control all non-reserved claims unless Congress provides otherwise. If Congress wishes to abandon its historical practice of deference it must explicitly exercise its power. While the Congress has retained the right to amend these laws and reassert legislative control over a portion or all of the remaining un-

appropriated water in a state, it has chosen not to do so. In construing land management statutes, this deference to state law rises to a presumption that the United States and its agencies must acquire water rights in accordance with state substantive and procedural law unless necessary for the original purpose of a reservation.⁶⁷

V. CONCLUSION

A review of the applicable federal constitutional, legislative and judicial authorities demonstrate the power of Congress to control the usage of water appurtenant to the federal lands. The legislative and case law authorities also demonstrate congressional intent to defer control of water to the states, in all but the most limited circumstances. Congress has chosen to displace state control of water appurtenant to federal lands only when necessary to accomplish the original purpose of formal reservations. When not necessary to accomplish such original purpose, Congress has uniformly permitted and the Supreme Court has recognized state control.

Within this framework, there is an insufficient legal basis for the creation of what has been called federal "non-reserved" water rights, especially in the wake of the Supreme Court pronouncements in *United States v. California* and *New Mexico v. United States*. I must conclude therefore that there is no federal "non-reserved" water right. Federal entities, including,

⁶⁴ *Infra*, page 702.

⁶⁵ *Id.*

⁶⁶ 438 U.S. at 702, nt. 5.

⁶⁷ Little, *Administration of Federal non-Indian Water Rights*, 27th R. Mtn. Min. Law Inst. 50.

without limitation, the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, may not, without congressionally created reserved rights, circumvent state substantive or procedural laws in appropriating water. Rather, consistent with the express language in the *New Mexico* decision, federal entities must acquire water as would any other private claimant within the various states.

Nothing in this Opinion limits federal procurement of water by other legally authorized means, if state water law prohibits the appropriation of water for the federally specified purpose. Specifically, condemnation, purchase or exchange may be used as a basis for acquiring water for use on federal lands.

WILLIAM H. COLDIRON

Solicitor

APPEAL OF MANN CONSTRUCTION CO., INC.

IBCA-1280-7-79

Decided *December 10, 1981*

Contract No. 8-07-DC-70324, Bureau
of Reclamation.

Denied.

1. Contracts: Contract Disputes Act of 1978: Interest—Contracts: Disputes and Remedies: Equitable Adjustments

A construction contractor's claim for interest under the Contract Disputes Act of 1978, is denied where the Board finds that the underlying claims for an equitable adjustment were negotiated to

settlement as evidenced by a written agreement between the parties which contained no provision postponing the finality of the settlement pending the resolution of the claim for interest.

APPEARANCES: Richard Mann, President, Mann Construction Co., Inc., Redmond, Oregon, for Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW INTERIOR BOARD OF CONTRACT APPEALS

This appeal is for interest claimed to be due the appellant under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613 (Supp. II 1978)). In the amended complaint¹ the appellant claimed interest in the amount of \$13,588.11, computed as follows:

\$100,000 (Jan. 1—April 11, 1979) ×	
10¼ % per annum	\$2,780.14
\$11,157 (Jan. 1—May 14, 1979) ×	
10¼ % per annum	\$413.57
\$171,362 (Jan. 1—August 6, 1979) ×	
10¼ % per annum	\$10,394.40 [2]

¹ The amended complaint is dated Sept. 4, 1979, but was not furnished to the Government until the day of the hearing. By order dated Oct. 17, 1979, the Board confirmed its tentative ruling permitting the amended complaint to be filed and allowing the Government 30 days to meet the evidence adduced by the appellant regarding the issues raised by the amended complaint.

² In the complaint as initially filed, the appellant had claimed interest in the amount of \$8,510.51 computed as follows:

\$100,000 (Mar. 6—Apr. 11,	
1979) × 10¼ % per annum—	\$982.88
\$11,157 (Mar. 6—May 14,	
1979) × 10¼ % per annum—	213.05
\$171,362 (Mar. 6—Aug. 6,	
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	<hr/>
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	<hr/>
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Background

Contract No. 8-07-DC-07324 dated June 27, 1978, called for the construction and completion of McKay Dam Spillway Modification in accordance with the terms of Specifications No. DC-7324 for the esti-

standard form 23A (April 1975 edition), as modified by Supplement to General Provisions dated June 1976. The bidding schedule included the following items of work³ for which the contractor had submitted bid prices as shown below:

Item	Work or material	Quantity and unit	Unit price	Amount
1	Presplitting for excavation.....	14, 500 lin. ft....	\$ 3. 70	\$ 53, 650
1a	Drilling line holes.....	500 lin. ft.....	4. 00	2, 000
*	*	*	*	*
6	Excavation for spillway chute enlargement.....	15, 000 yd.....	10. 00	150, 000

mated price of \$549,490. Prepared on the standard form for construction contracts, the contract included the General Provisions set forth in (Supplemental Notice No. 2).⁴

Some time prior to Sept. 28, 1978, the appellant received an oral directive from the Bureau of Reclamation (BOR) to widen the spillway by removing the rock by using the smooth wall method rather than presplitting prior to removal of the rock as had been originally planned (AX A). The oral directive was supplemented by other changes in the Bureau's letter to the contractor dated Oct. 13, 1978.⁵ In its response

of Oct. 24, 1978, the contractor advised the BOR that its directive had increased the cost and the time required for completion of the project; that a claim for an equitable adjustment would be asserted under Clause 3 of the General Provisions; and that upon being provided with a marked up plan, it would price out the impact of the change and inform the BOR (AX B). A request for an equitable adjustment was made in the contractor's letter to the Bureau dated Nov. 8, 1978. (AX C).

In a letter to the Bureau under date of Dec. 8, 1978, the contractor expressed increasing concern about the unsettled manner of the two changes on the job, noting (i) that it could not accept the argument of the Cle Elum office that the increased costs involved in the

⁴ Appeal File 1. Exhibits submitted as part of the appeal file are identified by the letters AF followed by reference to the particular exhibit number.

⁵ The Chief, Construction Field Division, BOR, concluded the letter by stating: "[A]ccurate and complete records of any work incurred as a result of these changes should be kept to provide data to be used in calculation of an adjustment in the contract value. Payment will be made in a future order for changes" (Govt. Exh. (hereinafter GX) 39, letter (10-13-78), at 1, 2).

³ In an affidavit under date of Dec. 11, 1979, Mr. Mann states: "4. The only items for which Mann Construction Co., Inc., is requesting reimbursement for interest are bid items 1, 1A and 6" (Appellant's Exh. (hereinafter AX) U-1).

changes were at least partially attributable to the manner in which the contractor had chosen to perform the changed work and (ii) that it had completed the first change and was well into the second change without having received any compensation for either of the two changes even though the actual cost for performing them had been sizeable. The letter stated that the contractor was willing to meet with the Chief, Construction Field Division, to negotiate the two changes. It noted, however, that if the office lacked authority to consummate a price agreement, then a meeting with the contracting officer as soon as possible was urgently requested.⁶

On Nov. 27, 1978, representatives of the BOR (Cle Elum office) met with Mr. Mann and others in the contractor's office in Redmond, Oregon. In a letter written a month later, the contractor took exception to positions advanced by the Government representatives at the meeting. Enclosed with the letter were summary sheets in which the contractor undertook to detail the additional expenses to perform the directed change for which an equitable adjustment was being sought. In connection therewith it was noted (i) that no allowance had been made for the impact on other items of work due to prolonging the spillway excavation and (ii) that

the contractor could not determine at that time what impact the change might have on yet to be completed work items (AF 23 and AX E).⁷

By letter dated Dec. 27, 1978, the contractor furnished its estimate of the cost to perform the modifications per revised drawings dated Oct. 18, 1978, and listed in the Bureau's cover letter dated Dec. 4, 1978. The letter noted that the contractor had used the same format to price out the revisions as had been requested in the Bureau's letter dated Dec. 5, 1978.⁸

A revised Construction Progress Chart was transmitted to the Bureau by the contractor's letter dated Jan. 5, 1979. The letter noted that the estimated costs shown on the left side of the chart included the contractor's claims for equitable adjustments previously forwarded to the Bureau's Cle Elum construction office.⁹

In a letter addressed to the attention of the contracting officer under date of Jan. 9, 1979, the contractor protested the action of the Cle Elum office in reducing Pay Estimate No. 5 from the estimate prepared in the

⁷ Concluding this discussion the letter stated: "[T]he only impact that can be determined at this time is that we will require 30 calendar days additional time to complete the contract" (AF 23 and AX E, contractor's letter (12-27-78) at 2).

⁸ Immediately thereafter the letter states: "In addition to the adjustment in the contract amount to perform the listed changes, we will require an additional 60 calendar days to perform the work as shown" (AX S; contractor's letter dated 12-27-78).

⁹ The letter concluded with the statement: "Once we have negotiated the actual amount of said changes, we will revise the left hand side of the progress chart to show the actual dollar amount" (AX F, contractor's letter dated 1-5-79).

⁶ The letter states: "[T]he New Disputes Act of 1978 now provides interest from the time the contractor presents his bill and therefore we will be requesting settlement in accordance with the new Act if an accord cannot be reached in the very immediate future" (AF 24 and AX D).

field of \$92,000 to \$23,518.30.¹⁰ According to the letter the main reason for reducing the pay estimate as submitted from the field was the fact that all excavation had been priced at the original unit price of only \$10. Other explanations offered by the Chief, Construction Field Division, Cle Elum office, included the following: (i) No allowance had been made for the costly toe trenching operation because no work had been done on this (this assessment was disputed by the superintendent) and (ii) the estimate had been reduced \$11,000 because no paid invoice had been supplied for fabricated reinforcing steel stored at the project site and the General Provisions require the contractor to show title to material delivered on the job when requesting payment for them.

As expressed in the letter it was Mr. Mann's view that the contractor's main obstacle to getting an equitable settlement on either of the two charges or reasonable progress payments on them was the mistaken impression of the Chief of Construction that the equitable adjustment for the changed work that had been completed was subject to some sort of test of reasonableness.¹¹ Af-

ter referring to a meeting apparently planned for soon after Feb. 1, the letter concluded by urging the contracting officer to take a hard look at the obvious cost impact the two changes in question had had on the contractor's cost and then prepare a revised estimate in an appropriate amount including \$10,954 for the reinforced steel per the paid invoice attached to the copy of the letter being furnished to the Cle Elum office (AX G).

Some time prior to Feb. 2, 1979, the contractor had requested a meeting on the regional level (AX H). The meeting was originally scheduled to be held on Feb. 7, 1979, in Denver, Colorado. It was rescheduled, however, and held on Mar. 6 and 7, 1979, in Pendleton, Oregon (AF 18-20). In anticipation of the March meeting and with the stated purpose of making the meeting more productive, the contractor wrote a letter to the BOR on Feb. 8, 1979,¹² in which the contractor set forth its position and the Government's position as it understood it. The letter noted the effects that had occurred when the Government directed a constructive change from the spec-

¹⁰ The opening paragraph of the letter reads: "Yesterday we returned Pay Estimate No. 5 in the amount of \$23,518.30 to your Cle Elum office although we do not agree that this payment is fair and equitable. We did so in order to get whatever money we can to help keep our subcontractor afloat until such time that we are able to establish with you the hard dollar figure for each of the two changes" (AX G; contractor's letter (1-9-79) at 2).

¹¹ Thereafter Mr. Mann states: "The test to be used in arriving at an equitable adjustment is *did* the change have an impact on the contractor's cost and, if so, how much" (AX G, contractor's letter (1-9-79) at 3).

¹² The opening paragraph of the letter reads:

"Your resident office would not accept the method we used in pricing the constructive change from the specified presplit to the so-called smooth wall. We are thereafter resubmitting our cost for this work herewith. This is a support for the costs we originally submitted and you will note that we have this time estimated the cost of each of the major impacts the change had on the job. Also, you will note that we have included some of the cost impact on the prime contractor's work which we had reserved on the original proposal." (AF 21, contractor's letter dated 2-8-79).

ified presplit method to a so-called smooth wall operation. Also noted was the Bureau's letter dated Oct. 13, 1978, by which the contractor was directed to proceed with modification work.

Responding to the contractor's Feb. 8¹³ and 13, 1979, letters under date of Feb. 12, 1979,¹⁴ the contracting officer said that the Government's position as outlined by the contractor was essentially correct (AF 19). The same day the contractor addressed a letter to the contracting officer in which he noted (i) that Mr. Duck and Government counsel would be the only representatives from the regional office and (ii) that while Mr. Duck had assured Mr. Mann that he had complete authority to act for the contracting officer, he had made it clear that he had little hope of reaching an equitable settlement at the March meeting and that he anticipated that several meetings might be re-

quired. In this connection, Mr. Mann stressed the importance of having personnel at the meeting who not only would have authority to negotiate a settlement on behalf of the Government but would not be inhibited from doing so by the absence of an adequate quorum of Government representatives.¹⁵

With respect to the scheduled meeting in Pendleton, Oregon, on Mar. 6 and 7, 1979, the contracting officer advised the contractor on or about March 1 that Mr. Duck would have authority to act in his behalf and that he would not be reluctant to do so. In the same communication the contractor was informed that if it were determined that the contractor was entitled to additional payment and the amount of the final adjustment could not be agreed upon, an interim payment could be made under part 1 of a two-part order for changes and that a final determination would then be made in part 2 of the order.¹⁶

In a letter written to the attention of the contracting officer under date of Mar. 5, 1979, the contractor adverted to its request for an equitable adjustment for both the first and

¹³ The contrasting position of the parties with respect to interest was stated in the following terms: "[I]nterest is due the contractor on the ultimate equitable adjustment from the time the contractor first submitted his costs. * * * [I]nterest should not start accruing on the equitable adjustment until such time as the contractor furnishes the backup information the Government has requested and is entitled to" (AF 21, contractor's letter (2-8-79) at 3, 4).

¹⁴ In the course of the letter the contracting officer stated:

"In reviewing your cost proposals, we find most of the costs are based on estimates. * * * [S]ince the majority of the work is completed, the most current and accurate data available is the data on actual cost incurred. Also, you should furnish cost and pricing data to support the claimed indirect costs of you and your subcontractor." (AF 19, BOR letter dated 2-22-79).

¹⁵ In connection with the charge that the project had not been administered in an objective manner, Mr. Mann noted that he had been a Government contractor for some 20 years and that he was not a novice in the Government contracting arena (AF 20, contractor's letter dated 2-22-79 at 2).

¹⁶ The faxogram concluded with the statement: "If agreement cannot be reached and you desire a final decision by the contracting officer in accordance with Clause No. 6 of the General Provisions, a findings of fact will be prepared upon your request. Preparation and issuance of a finding would require about 30 days" (AF 17 and GX 26, Faxogram from contracting officer dated 2-28-79 or 3-1-79).

second change on the job after which it stated that the entire method and manner of performing item 1, Presplitting for Excavation, and item 6, Excavation of Spillway Chute, was changed drastically from that specified in the contract. The letter also noted (i) that the contractor's request for an equitable adjustment was based on an actual cost basis for the majority of the phases of the work where separation of cost was possible and (ii) that in most instances the impact of the change had been computed by deducting what the work should have cost had there been no change from the actual cost of the changed work.¹⁷

The day following the Pendleton meeting on Mar. 6 and 7, 1979, Order for Changes No. 1 (part 1 of a two-part order), was issued. Dated Mar. 8, 1979, the Change Order recited that it was being issued pursuant to Clause No. 3 of the General Provisions of the instant contract and provided in part as follows:¹⁸

¹⁷ After calling attention to the fact that detailed computations with support data for both its subcontractor's costs and its own were attached, the letter stated: "[W]e will stand firm on these figures unless a complete satisfaction and accord cannot [sic] be reached at this coming meeting. We request that interest as provided by the new Disputes Clause of 1978 [sic] be added as appropriate at the time of settlement" (AF 16 and AX I, contractor's letter dated 3-5-79 at 2).

¹⁸ Order For Changes No. 1 (part 1 of a two-part order) also contains the following provisions relating to progress payments:

"Because data available at this time are insufficient to determine the amount of the final equitable adjustment, the following is provided solely for the purpose of making progress payments. The final determination of the contracting officer will be made in part 2 of this order after complete data are available.

"a. As an adjustment for smooth-wall blasting and additional excavation resulting from

[T]he following changes in the drawings and/or specifications are hereby ordered:

1. In lieu of performing blasting work using "pre-splitting" techniques in accordance with specifications paragraph 15-11, perform blasting using "smooth-wall" techniques as directed in the field.

2. In lieu of excavating the spillway to vertical lines as shown on specifications drawings No. 30-D-138 and 30-D-139, excavate to 3/4:1 slope between stations 4+00 and 7+47.89 and transition from 3/4:1 to vertical between stations 4+00 and 3+20.

In a letter to the BOR dated Mar. 12, 1979,¹⁹ the contractor noted that the actual cost for performing the mucking had been arrived at by adding all of the direct charges attributable to the mucking operations²⁰ as shown in the text of the

the change in excavation slopes in accordance with items No. 1 and 2 above, the amount due under the contract is increased by—\$176,656.80.

"Payment in the amount of \$33,906.80 and \$42,750 have been made under specifications schedule items 1 and 6, respectively. Total payment under this order includes those payment amounts. Thus, additional payments under this order amount to \$100,000." (AF 5, Findings of Fact and Decision by the Contracting Officer dated 6-12-79, Exh. A).

¹⁹ The opening paragraph of the letter states:

"[T]he presentation we made relative to the cost impact on the prime contractor's work arising from the change on our subcontractor's drilling and blasting operations was not accepted at our meeting in Pendleton because you were not able to correlate the time loss impact we were claiming to the actual time periods in the various work zones. I pointed out that we had presented it in this manner in an attempt to give you a ballpark breakdown of the impact in the three different areas." (GX 35, contractor's letter (3-12-79) at 1).

²⁰ Concerning the amount of overhead claimed the letter stated:

"The 8625 figure we have shown for overhead was computed at 15% of prime's cost (excluding sub), but I strongly suspect this is far below our actual overhead allocable to this job. However, if we can settle this matter without further haggling, I'll leave it stand, and in addition I'll forego the sizeable interest that has been accumulating." (GX 35, contractor's letter (3-12-79) at 3).

letter and in accordance with support data attachments A through K. Addressing a question raised by a Government representative at the Mar. 6 and 7, 1979, meeting, as to why the contractor's own impact claim had not been presented on the same basis as it had presented that of the subcontractor, Mr. Mann stated that it had not occurred to him until after the meeting that the cost impact on the prime contractor's operations could be more clearly presented by making a separate presentation from the subcontractor but by using the same formula, *i.e.*, actual cost of performing the mucking versus the "should have been cost" doing the mucking.²¹

Supplementing the Mar. 12, 1979, submission, the contractor wrote to the Bureau on Mar. 13, 1979, to say: (i) That the request for equitable adjustment had been restructured as suggested by the BOR;²² (ii) that one sentence considered very germane had been omitted from page 3 of the March 12 letter;²³ (iii) that

²¹ With respect to the cost and pricing data shown in the letter, Mr. Mann stated: "I have personally audited and reaudited the above cost and pricing data and hereby certify these costs to be correct and properly chargeable to the mucking operations as shown, to the very best of my knowledge" (GX 35, contractor's letter (3-12-79) at 3).

²² As to the costs included, the letter states: "These costs cover all changed work which had been computed through Dec. 31, 1978 but does not cover the uncompleted portion of the change or the impact the change may have on unchanged work" (AF 15, contractor's letter (3-13-79) at 1).

²³ The following sentence had been omitted from page 3 of the Mar. 12, 1979 letter: "I would think your auditors could audit this data more readily from their office than from ours, but if they wish to come here, I'll be glad to make all our records available upon 48 hours notice." (AF 15, contractor's letter (3-13-79), supplemental revision to original letter at 3).

including the bond premium in the computations on page 2 had also been overlooked; and (iv) that the formula for computing the entire equitable adjustment was being revised to the actual cost of performing the change work versus what it would have cost had there been no change.²⁴

On Apr. 3, 4, and 5, 1979, a third meeting was held between the parties at the contractor's office in Redmond, Oregon. A representative of the subcontractor, A & W Rock Drilling, Ltd., attended the meeting and actively participated in the discussion (AF 13). By letter dated Apr. 9, 1979, the contractor complained to the contracting officer's representative of the actions or inactions on the part of the Bureau which it was said had caused or contributed to the delays in reaching an equitable settlement on the job (AF 14 and AX L). Responding by letter dated Apr. 24, 1979, the Bureau denied that its actions or inactions were responsible for the delay in reaching an equitable settlement and asserted that a review of the record shows a far different picture than the one the contractor has presented. In the same letter the Bureau set forth a chronology of events beginning on Sept. 28, 1978. It also undertook to offer specific

²⁴ The penultimate paragraph states:

"I believe that the date for accumulating interest was triggered at the very outside when I handed you our cost proposal of Mar. 5. Even if you don't agree with this, I would hope that you would at least agree that upon receipt of this support data (unless proven grossly erroneous) that the interest date has now indeed been triggered." (AF 15, contractor's letter (3-13-79) at 2).

comments on each of the contractor's complaints (AF 12).

Additional cost data requested by the Bureau's negotiating staff was forwarded by the contractor's letter of Apr. 12, 1979, in which it stated that before meeting again, it would be imperative for the parties to agree on two important issues which were stated to be (i) the total cost figure the BOR could accept for the subcontractor, including his overhead and profit as well as the figure the Bureau could accept for the prime contractor's actual cost, exclusive of profit and overhead and (ii) a commitment from the Bureau to negotiate with the contractor in an earnest attempt to discover what its total mucking costs would likely have been had there been no change.²⁵

The principal matters discussed at the meeting in Redmond, Oregon, on Apr. 3, 4, and 5, 1979, were confirmed in a seven page letter from the Bureau to the contractor dated Apr. 12, 1979. The letter noted that the subcontractor's breakdown of actual costs (\$145,971) as presented in the contractor's letter of Mar. 5, 1979, had been reviewed and that the BOR had asked for clarification of cost elements or requested additional data in nine areas which were listed in the letter. Also noted was the fact that the BOR had reviewed the contractor's breakdown of actual cost (\$186,024), as presented in a letter dated Mar. 12, 1979, and that

requests for clarification of cost elements for additional data had been made in 12 areas which were listed in the letter. Items enumerated as having been discussed were the following: (i) "should have been cost" for mucking; (ii) the requirement for cost and pricing data to support the proposed prices totaling \$109,469 for changes related to the 3/4:1 slope layback; (iii) the payments-to-date versus total-costs-to-date for drilling, blasting and excavation; (iv) the necessity for a meeting in Denver with the contracting officer to attempt to resolve issues on which no agreement had been reached, principally the "should have been cost" for mucking and the quantity to be paid under the original bid price; and (v) the need for providing interim payments for the changes related to the 3/4:1 slope layback (estimated total cost of \$109,469), plus an interim adjustment under Order for Changes No. 1.²⁶

Acknowledging the Bureau's Apr. 12, 1979, letter, under date of Apr. 23, 1979, the contractor stated that it concurred with the summary of the discussion at the meeting in Redmond, Oregon, on Apr. 3, 4, and 5, 1979, except for the comments of-

²⁵ Apropos of these items, the letter states: "Based on a credit for deletion of 25 cubic yards of concrete in the right wall at the rate of \$400 per cubic yard, the total net estimated interim adjustment for these items will be \$109,469. Also, an additional lump sum progress payment of \$11,157 will be made for work under items 1 and 2 of Order for Changes No. 1. These interim adjustments are based on information presently available and will be subject to a final determination after complete data are available" (AF 13, BOR letter (4-12-79) at 6, 7).

²⁶ Immediately thereafter the letter stated: "If we can now finally agree on the above two issues, this will leave the 'would have' cost figure, the overhead and the profit as the primary three numbers yet to be negotiated" (GX 28, contractor's letter (4-12-79) at 2).

ferred on particular items.²⁷ The items listed as involving differences of opinion included: (i) the contractor and subcontractor recalled that the consensus of the meeting had been that the subcontractor had supplied adequate information as to his overhead costs to more than verify the 15 percent overhead being claimed, (ii) contractor considered the subcontractor's profit should be allowed at 10 percent, although agreeing that the prime contractor's profit should be negotiable; (iii) some of the reductions in the subcontractor's costs involved trivial matters as to which the subcontractor would accept whatever arbitrary adjustments were deemed appropriate; (iv) while a minor amount of surveying should be treated as incidental to excavation rather than being prorated, a minor adjustment could be made on this item if warranted by the treatment accorded the contract on upward adjustments where applicable; (v) the reason the Bureau considers the bid estimate pertinent should be stated prior to the time it is furnished; and (vi) the use of the average bid price for four low bidders under item 6 excavation was unfair to the contractor for the reason stated in its letter of Apr. 12, 1979. In addition, the letter stated that the contractor did not wish to discuss or entertain the idea of proceeding with the balance of the change un-

til such time as an agreement could be reached on the equitable adjustment due the contractor for the change and work completed to date.²⁸ Assuming agreement could be reached on outstanding matters previously outlined, the contractor proposed that the parties meet on May 7, 1979.

By Findings of Fact dated May 4, 1979, the contracting officer extended the time for performance of the contract work by 136 calendar days. This was the aggregate figure for the time extensions requested by the contractor consisting of 90 days requested for completion of the contract as a result of (i) the changes in the blasting method from "presplit" to "smoothwall" and (ii) the 3/4:1 slope layback and related changes, together with a time extension requested of 46 calendar days as a result of the changes having forced the work into inclement weather.²⁹

Final negotiations between the parties took place in Denver on May 7 and 8, 1979. The results of the negotiations were finalized in a Memorandum of Understanding executed by the parties under date

²⁸ Subsequently, the subcontractor, A & W Rock Drilling, Ltd., furnished the contractor additional data pertaining to equipment insurance (\$714.84) and freight on a D-5 Cat. (\$1,230) (GX 33, subcontractor's letter dated 4-27-79).

²⁹ The contracting officer found that all of the delays for which the contractor had requested time extensions were beyond the control and without the fault or negligence of the contractor and therefore excusable. The concluding paragraph of the findings states that it is a final decision and that it is being made in accordance with the Disputes Clause (GX 27, Findings of Fact by the Contracting Officer dated 5-4-79, at 3).

²⁷ Additional data pertaining to the subcontractor was enclosed with the letter as attachment L. Other additional data had been transmitted with the contractor's letter of Apr. 12, 1979 (GX 29, contractor's letter dated 4-23-79).

of May 9, 1979, the full text of which is quoted below:

(Contract No. 8-07-DC-07324, for McKay Dam Spillway Modification, Specifications No. DC-7324, Umatilla Project)

Mann Construction Company, Inc., agrees to accept and the Bureau of Reclamation agrees to pay \$510,926 for all costs incurred for changes directed under items 1 and 2 of Order for Changes No. 1 (Part 1) dated March 8, 1979, except for items of work described in item 2 of Unilateral Interim Adjustment of Order for Changes No. 1 (Part 1) dated April 16, 1979. This payment is for all costs incurred to date and all future costs, including impact costs on unchanged work, and is in lieu of any payment under items 1, 1a, and 6 of the bidding schedule of the contract and previous progress payments made under Order for Changes No. 1. The parties further agree that the unit prices and lump sum amounts, as described in the Bureau's letter to the contractor dated March 26, 1979, and stated in items b, c, d, e, f, g, and h of Unilateral Interim Adjustment of Order for Changes No. 1 (Part 1) dated April 16, 1979, are now firm fixed prices to be paid for work under item 2 therein, and such payments (presently estimated to be \$109,469) will be for all costs incurred including any impact cost on unchanged work. These adjustments in contract price will be made final under Order for Changes No. 1 (Part 2).

Mann Construction Company, Inc., acknowledges receipt of Findings of Fact in the Matter of Delay in Completion, dated May 4, 1979, on the date of this agreement, May 9, 1979.³⁰

On May 11, 1979, the contractor wrote the Bureau to say that the Memorandum of Understanding reflected a substantial mistake it had made and that the mistake was

not a judgmental error (AF 11). On May 14, 1979, however, the contractor advised the Bureau that after much deliberation and in the interest of settling the matter without the need of further negotiations, it had decided to bite the bullet on the mistake.³¹

Order for Changes No. 1 (Part 2 of a two-part order) is dated May 9, 1979, but was not presented to the contractor for signature until on or about June 6, 1979. The contractor refused to sign the change order at that time, however, on the ground that it contained unfair restrictions. In a telephone conversation between Mr. Mann and Mr. Lyle Carden on June 6, 1979, the latter agreed to the contractor inserting an exclusion in the release covering two pay items which he agreed had been overlooked but he would not agree to making an exception on the release for interest. In its letter to the BOR dated June 8, 1979, the contractor stated that at all times its letters had expressed its entitlement to interest in accordance with the 1978 Disputes Act. More specifically the letter states: "[I]n requesting this exception on the release, I was not

³¹ The letter then stated:

"[I]t is most important to us, however, to receive payment for the changed work promptly, especially for the portion that was completed last year. According to our records, there is still over \$100,000 due for extra work performed through December. Interest should be added at the appropriate rate in accordance with the new law, from the 5th day of March until the date that you would expect us to receive payment. Of course, consideration should be given to the \$100,000 for the changed work received in this office on April 11 and the \$11,157 portion for the change received this morning." (AF 10, contractor's letter dated 5-14-79).

³⁰ AF 5, Findings of Fact and Decision by the Contracting Officer, dated May 9, 1979, Exh. C.

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demanding interest be included in the change, nor was I asking for an admission that interest was due. I only asked that the door not be closed on my appeal rights by insisting I sign the change order without this reservation."³²

By letter dated June 13, 1979, the contractor transmitted a signed copy of Order for Changes No. 1 (part 2 of a two-part order) which referred to exceptions contained in the cover letter.³³ By Findings of Fact and Decision by the Contracting Officer dated June 22, 1979,³⁴ the contractor's claim for interest

was denied. In especially pertinent part the decision states:

7. It is the Government's position that the agreement on the price adjustment for work under Order for Changes No. 1 reached with the contractor on May 9, 1979, was all encompassing except for the two items discussed in paragraphs 4a and 5 above. Although the contractor had mentioned payment of interest in correspondence, there was no discussion of the subject in the final negotiations meeting of May 7, 8, and 9, 1979. Furthermore, in considering applicability of the Contracts Disputes Act of 1978, to the price adjustment for work under Order for Changes No. 1, section 12 of the act states in part: "Interest on amounts found due contractors shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof." Section 6(a) states in part: "All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." Section 6(c) (1) states: "A contracting officer shall issue a decision on any submitted claim of \$50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than \$50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable. [³⁵]

* * * * *

³⁵ Commenting upon the nature of the substantiation submitted in support of costs claimed by reason of the changes, the contracting officer states:

"Changes in the work were directed under clause No. 3 (Changes) of the General Provisions of the contract and the contractor during the period from November 8, 1978, to

—Continued

³² The contractor also raised a question concerning certification, stating:

"[T]he change order contained a requirement that I certify the complete accuracy of all costs connected with the change. I believe this is an intolerable burden to place upon me. I have no qualms with certifying my own data but I am not in a position to attest to the accuracy of my subcontractor's cost data. * * * I have absolutely no reason to suspect that my sub's costs are not accurate but I don't know this for certain and I am not in a position to so certify." (AF 7 and AX 0, contractor's letter dated 6-8-79 at 2).

³³ The cover letter states:

"[W]e are taking exception to the two items that were left off the change order but which were included in the final negotiations. These two items were the first two items listed on your resident's letter to us of March 26 and our letter to them of March 21. Also, we are taking exception to the accrued interest that had developed from the time of our March 6 statement of costs until the bill would be paid. * * * Even if you don't agree that interest is applicable, I'm sure you would have no objection to my pursuing this matter under the Disputes Clause so that then I would only be paid if in fact it was proven entitlement was due." (AF 6, contractor's letter dated 6-13-79).

³⁴ The contracting officer stated that the amount agreed to in the Memorandum of Understanding dated May 9, 1979, did not include any payments for items 1 and 2 of the Government's letter of Mar. 26, 1979 (*n.33 supra*), and that such items would be the subject of a separate final determination. (AF 5, Findings of Fact and Decision by the Contracting Officer dated 6-12-79 at 2).

8. Based on the above, I find that the price adjustment as agreed in the Memorandum of Understanding dated May 9, 1979 (Exhibit C) and as stated in Order for Changes No. 1 (Part 2) dated May 9, 1979 (Exhibit D), is firm and final except for a separate final determination at a later date on the allowable costs for work described in items 1 and 2 of the Governments' letter to the contractor dated March 26, 1979. By this findings, Order for Changes No. 1 (Part 2) dated May 9, 1979 (Exhibit D), is issued unilaterally. The amounts found due and payable in this findings and under Order for Changes No. 1 (Part 2) will be paid upon receipt of a certificate of current cost or pricing data from the contractor, substantially in compliance with 41 CFR 1-3.807-4, which certifies that cost or pricing data submitted were accurate, complete, and current as of May 9, 1979. It is further found that the contractor's claim for payment of interest on the price adjustment under Order for Changes No. 1 is without merit and is hereby denied.

(AF 5, Findings of Fact and Decision by Contracting Officer dated 6-12-79, at 3, 4.)

The contractor timely appealed the denial of its interest claim by letter dated July 3, 1979 (AF 4). By letter of July 5, 1979, the contractor furnished the contracting officer with a certification of cost

and pricing data from its subcontractor, A & W Rock Drilling, Ltd., together with executed certificate GPO 834-263. The date stamp on the letter indicates that it was received by the BOR on July 9, 1979 (AF 3 and AX P). Receipt of the July 5, 1979, letter was acknowledged by a faxogram dated July 13, 1979,³⁶ in which the Bureau stated: "Preparation and processing of a pay voucher and supporting documents are presently being expedited so that payment can be made to you in the very near future for items of previously performed extra work covered by Order for Changes No. 1 (Part 2) dated 5-9-79" (AF 2). The record shows that the contractor was paid the sum of \$171,362.20 under the instant contract on Aug. 6, 1979 (AX R).

The Hearing

For the most part the testimony adduced at the hearing merely elaborated upon the positions taken by the parties as shown by the written record³⁷ discussed above. The president of the appellant corporation, Mr. Richard Mann, testified that at the meeting in Pendleton, Oregon,

May 9, 1979, submitted numerous cost proposals, some of which were incomplete and erroneous. Also, cost and pricing data in support of claimed increased costs for the changes were not furnished complete until the meeting of May 7, 8, and 9, 1979. At any rate, at no time did the contractor indicate that he considered this matter a dispute or request a final decision of the contracting officer, either in writing or orally. It is the Government's position that direction of the changed work, submittal of cost proposals and cost and pricing data and final negotiations of a price adjustment did not involve a dispute and, therefore, the Contract Disputes Act of 1978 is not applicable in this case." (Findings, n.34, *supra* at 3, 4).

³⁶ The faxogram refers to the certification of current cost or pricing data having been executed by the subcontractor on 6-12-79 (AF 2, BOR faxogram dated 7-13-79).

³⁷ According to Mr. Mann the certification of costs made in the letter of Mar. 12, 1979 (n. 21, *supra*), embraced not only the contractor's own costs but those of its subcontractor as well and that such certification complied with the requirements of the Act (Tr. 77-78, 156-58). If so, a natural question arises as to why almost 2 months later the contractor would say that it was not in a position to attest to the accuracy of the subcontractor's cost data (n.32, *supra*).

on Mar. 6 and 7, 1979,³⁸ he had handed Mr. Duck of the BOR a claim in the amount of \$212,516 and had told him that the contractor would be expecting interest on the claim under the 1978 Disputes Act. Mr. Duck responded by saying that they (BOR) were not sure as to what triggered the interest date and that they had no track record on it. He did agree that the contractor was owed something for the changed work, however, and he stated that upon his return to Denver a progress payment would be made to the contractor for \$100,000. Subsequently, on Apr. 11, 1979, a check in that amount was received by the contractor.

Following the March meeting³⁹ the contractor restructured the claim and sent it to the Bureau by letter dated Mar. 12, 1979, supported by cost and pricing data. Another meeting between the parties took place in Redmond, Oregon, on Apr. 4, 5, and 6, 1979.⁴⁰ Mr. Mann testified to being exasperated by the failure of the Government representatives attending the meeting to have reviewed the cost and pricing data previously submitted to the

BOR and the fact that they were not empowered to negotiate a settlement (Tr. 26-32, 67-68). The Government's witness Morrisette testified however, (i) that the purpose of the BOR representatives coming to Redmond, was to review the cost and pricing data previously submitted by the contractor and its cost records; (ii) that the contractor had been advised of that purpose before they came; and (iii) that they had no authority to negotiate a settlement on behalf of the Government (Tr. 50-51, 98-100).⁴¹

The parties met again in Denver, Colorado, on May 7, 8, and 9, 1979. Concerning this meeting Mr. Mann testified (i) that at the conclusion of the meeting on May 8, 1979, he had agreed on a settlement amount of \$510,926;⁴² (ii) that that figure included the impact that the changed work might have on unchanged work; (iii) that cost and pricing data for overhead was not submitted in the Mar. 12, 1979, letter

⁴¹ Mr. Morrisette had refused to say what figures he would recommend to the contracting officer, as he considered an attempt was being made to pressure him into negotiating an amount for some aspects of the claim which he was not authorized to do, and he could not speak for the contracting officer as to the acceptability of the figures but could only state to him what their findings were from their review (Tr. 117).

⁴² At the May meeting the figure finally agreed to for the changed work totaled \$287,020. Mr. Mann states that the three payments on which the contractor was asking interest only adds up to \$282,000. While he did not know where the other \$5,000 went, Mr. Mann thought it would drift into the contractor by way of progress payments because the progress payments do have \$510,926 written on them (Tr. 75). The amended complaint shows that sum of the three payments in question to be \$282,519.

³⁸ The meeting was initially planned for about Feb. 1, 1979, but the plans for a meeting early in February were abandoned when the contractor requested a delay of 4 or 5 days (Tr. 59-60).

³⁹ Mr. Mann acknowledged that only preliminary figures had been given to the contracting officer of Dec. 27, 1979, and that no cost or pricing data had been provided prior to the March meeting (Tr. 42-43, 65-66).

⁴⁰ The meeting could have been held a week earlier if it had not been for the contractor's spring vacation coming at that time (Tr. 68-69).

and may not have been submitted until the May meeting in Denver; (iv) that on May 9, 1979, Mr. Mann signed a memorandum of understanding which stated that all costs were included in the settlement;⁴³ (v) that interest that had not been claimed as a part of cost and Mr. Mann did not consider that the Contract Disputes Act contemplated treating interest as a cost figure; (vi) that in the May 14, 1979, letter, the contractor had reminded the contracting officer that it was claiming interest; and (vii) that the only release the contractor had signed contained an exception to the failure to provide for interest.

Mr. James Morrisette (a civil engineer and, at the times in question, Head of Division of Procurement and Contracting at the E & R Center in Denver) testified as a BOR witness, as did Mr. Robert Folle, a contract price analyst in the Contract Administration Branch of the Division of Procurement and Contracts, Bureau of Reclamation, E & R Center in Denver. When called as a witness for the appellant, Mr. Morrisette testified (i) that he had attended the meetings in Pendleton and Redmond, Oregon, and Denver, Colorado; (ii) that agreement on the settlement amount was reached at the conclusion of the meeting on May 8; (iii) that the memorandum of agreement was executed by the parties on the following day; and (iv) that nothing was included in the figures for interest.

In the course of his testimony as a BOR witness, Mr. Morrisette stated that at the Pendleton meeting, the Bureau had acknowledged that changes had been made and that the contractor was entitled to an equitable adjustment. He also testified that the contracting officer was desirous of avoiding a complete audit of the claim by the Inspector General if possible and that one of the methods used in the Denver office was to have an accountant on its staff review the contractor's cost records and the cost and pricing data and determine whether or not a full-blown audit was necessary. On direct examination, Mr. Morrisette stated that in reviewing the contractor's claim and cost data the BOR had "short circuited" some of the procedures normally followed in the interest of speeding up the whole process. He also testified (i) that it did not appear to him that the contractor's claims for an equitable adjustment involved a dispute;⁴⁴ (ii) that no request was made by the contractor for a final decision, although it had been advised that if the parties were unable to reach an agreement it could request such a decision; (iii) that at the Redmond meeting, the contractor was told of the additional data required to support the claim; (iv) that thereafter additional data was provided by the contractor in support of its claims including that

⁴³ In his testimony, Mr. Mann described the agreement reached as a "satisfaction and accord" (Tr. 56).

⁴⁴ Mr. Mann considered that a claim had been submitted to the contracting officer on Dec. 27, 1978, and that the claim was in dispute from Dec. 27, 1978, until the May settlement, the Memorandum of Understanding (Tr. 74-75).

furnished at the May meeting; (v) that at that meeting final agreement was reached on the amount of the equitable adjustment for all costs related to the changes the BOR had directed; (vi) that he considered correspondence between the parties was handled in an expeditious manner; and (vii) that a great deal of Morrisette's time had been spent in handling the matter, including a number of hours of his own, working on responses to the contractor's correspondence relating to these matters, reviewing his proposals, and trying to expedite payment under the change order (Tr. 79-110).

Mr. Robert Folle testified that in his capacity of contract price analyst (BOR) he had been involved in review of the contractor's records in Redmond, Oregon, in early April for the purpose of determining whether the cost and pricing data submitted was adequately supported by the cost records. He noted that audits were required for any changes or modifications in excess of \$100,000 except in cases where the contracting officer certifies that he had adequate cost or pricing data and therefore waives audit. Mr. Folle also testified: (i) That based upon his analysis he had concluded that approximately 36 percent of the contractor's costs and approximately 36 percent of the subcontractor's costs had not been totally supported when the BOR personnel left the contractor's office in April of 1979; (ii) that at the meeting in Redmond, the BOR personnel had gone through step by step the addi-

tional data needed to satisfy the cost and pricing requirements such as, for example, the overhead costs, for which the Bureau had been furnished no breakdown; and (iii) that thereafter the supporting data flowed in on an occasional basis but at the last meeting in May, the contractor had furnished the BOR with the additional data required to support the final amounts that were negotiated (Tr. 122-26).

Discussion

Before addressing the issues raised by this appeal we shall first examine the relevant provisions of the Contract Disputes Act of 1978, and a number of the cases which have construed the provisions of the Act as they relate to the payment of interest. The applicable provisions of the Contract Disputes Act as they pertain to interest are:

Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board. [41 U.S.C., § 611.]

Sec. 6. (a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. [41 U.S.C. § 605.]

In the case of *A.L.M. Contractors, Inc.*, ASBCA 23792 (Aug. 31, 1979), 79-2 BCA par. 14,099, the Armed Services Board had occasion to consider the application of the interest

provisions of the Contract Disputes Act of 1978, in a context where the contractor's complaint was that the Government had delayed in making progress payments to which it was entitled. There the Board stated at page 69,357:

The appellant's claim for interest, based solely upon the Government's delays in making progress payments, runs counter to the established rule that[,] absent a statute or contract provision specifically authorizing such interest, it cannot be allowed. *United States v. Thayer-West Point Hotel Company*, 329 U.S. 585, 91 L.Ed. 521 (1947), *Komatsu Manufacturing Company, Ltd. v. United States*, 132 Ct. Cl. 314 (1955); *Memco*, ASBCA No. 18731, 74-1 BCA ¶ 10,626; *Ramsey v. United States*, 101 F. Supp. 353, 356 (Ct. Cl. 1951); *The Diomed Corporation*, ASBCA No. 20899, 75-2 ¶ 11,491. [45]

Neither the provisions of this contract nor the terms of the Contract Disputes Act of 1978, under which the appellant has elected to proceed, affect the prohibition against the award of the interest for mere delay on part of the Government in making payments. [46]

⁴⁵In *Diomed*, text, *supra*, the Board had held that the contract clause "Payment of Interest on Contractor's Claims" did not afford a basis for an award of interest for delayed payments. The rationale for the decision reached was stated in the following terms:

"[T]he clause makes a clear distinction between a claim arising under the contract which is denied by the contracting officer, and interest on the amount of that claim which is finally determined to be owed by the Government. Here the claim itself is for interest. There is no dispute over appellant's entitlement to recover the invoiced amount of \$90,104.16. Thus, there is no 'claim,' as that term is used in the clause, to which interest can attach. We do not read the clause as providing board authorization for payment of interest notwithstanding the absence of an underlying claim, other than for interest, which has arisen under the contract and has become the subject of an appeal." (75-2 BCA par. 11,491 at 54,822.)

⁴⁶*Of. Dawson Construction Co., Inc.*, GSECA 5777 (Dec. 5, 1980), 80-2 BCA par. 14,817 at 73,134 ("Any determination of

A different aspect of the question of when is interest payable under the provisions of the Contract Disputes Act was considered in the case of *Nab-Lord Associates*, PSBCA 714, 718, and 736 (July 15, 1980), 80-2 BCA par. 14,585. In that case a finding favorable to the contractor on the question of entitlement and a remand to the contracting officer for the purpose of determining the amount due the contractor resulted in a negotiated settlement of the quantum claims. In denying the contractor's claim for interest on the claims settled by negotiation after remand, the Postal Services Board stated at 71,917-18:

The Act does not expressly define the word "claim" as used therein. However, the context makes it clear that "claim" is intended to mean a request or demand for relief disputed by the Government as to entitlement or amount as to which the Contractor has demanded a final decision of the Contracting Officer. The context referred to appears in Section 6 of the Act (41 U.S.C. § 605) which says that "all claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the Contracting Officer for a decision."

This intention is reflected in the implementation of the Act by OFPP in 45 F.R. No. 92 (*supra*) which defines claims under the Act as involving disputed demands for relief or demands not acted on within a reasonable time as to which a contracting officer's decision is demanded.

* * * * *

The quantum requests filed with the Contracting Officer after remand did not

when a delay in payment becomes unreasonable must be made on an ad hoc basis. * * * That portion of appellant's claim seeking recovery of interest as damages on unreasonably delayed payment of the negotiated settlement is granted * * *.)

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achieve the status of claims under the Act because they were settled in negotiation without dispute. Consequently, there were not and are not any Disputes Act quantum claims to which these Disputes Act interest claims can attach. That being the case, Appellant cannot have Disputes Act interest.

On reconsideration the Postal Services Board affirmed its holding in *Nab-Lord Associates*, denying the contractor's claim for interest. Addressing two of the questions raised in the motion for reconsideration, the Board stated:

Appellant makes much of the fact that the basic quantum settlement in each case was for less than the amount originally demanded. Appellant says this evidences the fact that the quantum requests were disputed and, therefore, were claims within the meaning of the Act. As we pointed out in our original decision, to constitute a claim under the Act a demand must not have been acted upon within a reasonable time by the Contracting Officer or must have been disputed and submitted to the Contracting Officer for a decision. Although the Contracting Officer obviously did not accept Appellant's original basic quantum demands, nevertheless they were negotiated to settlement. Therefore they did not become claims under the Act. And, as we decided, Appellant may not have interest under the Act, absent underlying quantum claims.

* * * In both the letters confirming the "reconciliation" (settlement) of the demands and the letters transmitting the signed settlement modifications to the Contracting Officer, Appellant was careful to set forth specific reservations from each settlement. Among the reservations was the right of Appellant to claim interest. But there is no proviso in any of the settlement documentation postponing finality or effectiveness of the settlement modifications pending final resolution of

the interest claims which at the time had not been filed. As stated in the *Monaco* dictum, only a specific provision for absence of finality could have kept the basic quantum claims alive. The simple reservation of a claim for some unspecified kind or kinds of interest, a matter only incidental or collateral to the purpose of the modifications, was not sufficient to achieve that result.

(80-2 BCA par. 14,793 at 73,013-014).

We now turn to consideration of the case before us for a decision. At the hearing on the instant appeal Mr. Mann stated that the "whole guts of the case is, was there a dispute or not (Tr. 118). In his closing argument Mr. Mann stated: (i) That the mere fact a contractor submits a claim shows that there was dispute; (ii) that by referring to the Disputes Clause in his decision of May 4, 1979 (n.29, *supra*), the contracting officer had admitted that here was a dispute before the meeting ever occurred in Denver; (iii) that the contractor had requested a final decision; (iv) that the amount provided for in the May 9, 1979, agreement did not include interest; (v) that the contracting officer knew the contractor was expecting interest; (vi) that Mr. Mann could find no correspondence from the Government in which the contractor's right to interest had been contested; and (vii) that nothing in the Act ties the start of interest to the furnishing of cost and pricing data or certification of the accuracy of the costs submitted (Tr. 130-33).

The Government's position as stated at the hearing was (i) that

an accord and satisfaction had been reached at the time the contractor signed the agreement on May 9, 1979, and (ii) that at no time was there a dispute within the meaning of the Contract Disputes Act of 1978, or the Disputes Clause of the General Provisions. In his closing statement Department Counsel stated that the contractor did not qualify for interest in the circumstances of this appeal because the contractor had not complied with the regulations requiring the submission of cost and pricing data, a certificate as to the accuracy of such data, as well as there being no dispute within the meaning of the Disputes Clause. An alternative argument advanced by the Government was that assuming, *arguendo*, that the appellant were to be found to be entitled to some interest, it could not start running until the date that the BOR had received the cost and pricing data from the contractor and the certificate of current cost and pricing data required by the regulations,⁴⁷ it being noted that the latter had not been submitted until July 5, 1979. Also emphasized by the Government was that what was involved was a change and that interest was not allowable on changed work (Tr. 136-56).

With respect to the appellant's arguments as enumerated above, the Board agrees with its assessment

that the principal question to be decided in this case is whether there was a dispute or not. Under the authorities cited and quoted from above it is clear that the mere fact a contractor submits a claim does not show that there was a dispute. Moreover, the language employed by the contractor up to the execution of the Memorandum of Understanding on May 9, 1979, are inconsistent with the position now advanced that the contractor considered that there was a dispute (nn.10, 11, 25, & 33, *supra*).

While it is true that in extending the time for performance of the instant contract by 136 calendar days the contracting officer cited the Disputes Clause as his authority for so doing, it appears that he simply used that as a vehicle for accomplishing the desired result since from the record made in these proceedings, it appears that under the decision of May 4, 1979, the contractor received the entire amount of time it had requested. More importantly, however, is the fact that sec. 12 of the Contract Disputes Act of 1978 specifically conditions the allowance of interest to claims received by the contracting officer pursuant to sec. 6(a) and that sec. 6(a) refers to claims submitted to the contracting officer for a decision. There is no evidence in this record indicating that the contractor had ever requested a final decision on any of the three payments on which interest is now being claimed, even though it had been specifically advised of its right to do so (n. 16, *supra*).

⁴⁷ Cited in support of this position was 41 CFR 1-3.807-4 requiring any modifications of a contract in excess of \$100,000 to be supported by written cost and pricing data, or, if actual submission of the data were impracticable, then a certificate be furnished that the data submitted or identified was accurate, complete, and current (Tr. 146).

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It is clear that the amount agreed upon in the Memorandum of Understanding executed by the parties on May 9, 1979, did not include any allowance for interest. Neither Government witness who testified at the hearing contended that it did. Whether the contracting officer knew that the contractor was expecting interest is a question not susceptible to an answer from the record before us. It is unquestionably true that both before and after the meeting on May 7 and 8, 1979, which culminated in the execution of the Memorandum of Understanding on the day following, the contractor had made it clear that it was claiming interest.

Also, undisputed, however, is the fact that at the May meeting the contractor did not raise the subject of interest. While not dispositive of the question of whether the contractor was claiming interest on the amount agreed upon, it is at least conceivable that the contractor's silence during the May meetings respecting interest was construed by the contracting officer as indicating an abandonment of the claim for interest. In any event, it is clear that long before the May 9 meeting the contractor knew that the BOR had a different view of when and in what circumstances interest commenced than did the contractor (n.13, *supra*).

As to the contention that the Act does not tie the start of interest to the furnishing of a certificate, we note the decisions which have held (i) that a contracting officer need not consider a claim over \$50,000

until it has been certified⁴⁸ and (ii) that interest is not payable where the contractor has failed to certify a claim in excess of \$50,000 as required by a contract provision implementing sec. 12 of the Contract Disputes Act of 1978.⁴⁹

In support of its interest claim, the appellant calls the Board's attention to the case of *Inland Service Corp. & Weldon Smith, A Joint Venture*, ASBCA 24,043 (Dec. 31, 1979), 80-1 BCA par. 14,247. *Inland* has no precedential value on the principal question involved in this appeal, as it is clear from the opinion that the contractor's quantum claims for discounts taken had been denied. While the *Inland* decision allowed interest on amounts found due for periods antedating the effective date of the Contract Disputes Act of 1978,⁵⁰ it has since been reversed by the Court of Claims,⁵¹ and is a precedent no longer followed by the Armed Services Board of Contract Appeals.⁵²

We have summarized the record in this case and have quoted from the applicable provisions of the

⁴⁸ See *Gentex Corp.*, ASBCA 24040 (July 30, 1979), 79-2 BCA par. 14,007 at 68,779, where the Board stated that the requirement of Sec. 6(c)(1) of the Act that claims over \$50,000 be certified was "a *sine qua non* to the contracting officer's obligation under the Act to issue a decision on these claims."

⁴⁹ *Patock Construction Co.*, ASBCA 25345 (Feb. 19, 1981), 81-1 BCA par. 14,993, *aff'd on reconsideration*, 81-2 BCA par. 15,184.

⁵⁰ In *Brookfield Construction Co., Inc. & Baylor Construction Corp. (A Joint Venture) v. United States*, Ct. Cl. No. 555-79C, the Court of Claims determined that the Act was not to be construed as imposing pre-Act interest liability.

⁵¹ *United States v. Inland Service Corp.*, Court of Claims Order dated Oct. 27, 1981.

⁵² *Swissair Photo & Surveys Ltd.*, ASBCA 24553 (Oct. 26, 1981), 907 FCR B-2.

Contract Disputes Act of 1978, relating to interest as well as from cases construing such provisions of the Act. We now undertake to consider the instant appeal in the light of those provisions and the principles enunciated in the decided cases to which we have referred.

The record clearly shows that the parties were in a negotiating posture from the time the contractor submitted preliminary figures in support of the claimed costs on Dec. 27, 1978, until they negotiated a final amount due the contractor for Government directed changes on May 8, 1979, and confirmed the negotiated settlement so reached on the following day by the execution of the Memorandum of Understanding dated May 9, 1979. The negotiating posture was maintained even though at midpoint in the negotiations the contracting officer informed the contractor of its right to request a final decision from him if an agreement could not be reached on the claimed costs, estimating that the preparation of such a decision would take 30 days.

Perhaps the most perplexing question in this entire record is why an experienced contractor such as the appellant should have so frequently raised the question of the interest to which it considered itself entitled under the Contract Disputes Act of 1978, both before and after the final negotiating conference of May 7 and 8, 1979, and yet have said absolutely nothing about the subject during the 2 days of negotiations or at the time the Memorandum of Understanding was

signed by the parties on May 9, 1979. Although the evidence is insufficient to permit a finding, the record suggests an answer to the question posed. It is clear that going into the final negotiating conference the appellant knew that up until that time it had failed to satisfy the Bureau's request to substantiate the claimed costs (*e.g.*, overhead) and that the BOR's position was that "interest should not start accruing on the equitable adjustment until such time as the contractor furnishes the backup information the Government has requested and is entitled to." (n.13, *supra*)

It is undisputed that the backup information including that pertaining to overhead was not furnished until May 7 or 8, 1979, and that final agreement as to its sufficiency did not occur until May 8, 1979. Giving effect to the Government's view of what "triggered" interest under the Contract Disputes Act of 1978, this would mean that no interest would be payable to the contractor (*i.e.*, final settlement of the underlying claims would have occurred on the same day that the contractor supplied the Bureau with the backup information required to substantiate the final figures agreed upon).

Whatever the case may have been, it is clear that the contractor proceeded to the final settlement of its claims for equitable adjustment without having submitted them to the contracting officer for decision. It is also clear that when the Memorandum of Understanding formalizing the agreement reached the

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previous day was submitted to the contractor for signature, no request was made that the agreement include a provision postponing finality of the settlement reached pending the resolution of the interest question.

That the contractor wished to stand on the settlement reached as final is borne out by the fact that it abandoned its claim of mistake without any indication in this record that the Government would have refused to seriously consider the mistake claim or would have failed to provide or seek whatever relief it considered to be warranted. The Government was also interested in maintaining the finality of the agreement for it promptly acknowledged that payment for two work items—either inadvertently omitted or left out of Order for Changes No. 1 (Part 2) because they involved work items not yet completed—should be the subject of separate negotiations.

The Government's position of what "triggered" interest had apparently been crystalized by June 6, 1979, for in a telephone conversation with Mr. Mann on or about that date, the contracting officer was adamant in his refusal to acquiesce in the contractor reserving a claim for interest as a condition of signing Order for Changes No. 1 (Part 2). It was the contractor's insistence upon including such a reservation in the copy of the change order it signed that resulted in the issuance of the change order unilaterally and the decision denying the claim for

interest from which the instant appeal was taken.

In a number of important respects this case is closely akin to the situation in *Nab-Lord Associates, supra*. In that case, as in this, quantum claims were negotiated to settlement without any provision having been included in the written agreement postponing finality of the settlement of the underlying quantum claims pending final resolution of the claim for interest.

One of the positions apparently taken by the appellant which may merit further discussion is the view that interest should be payable on claims for equitable adjustment from the time they are submitted, even if they were settled by negotiation as they were in this case. If interest is not allowed in such cases, then, according to the appellant, the contracting officer can demand whatever information he wants as substantiation for the asserted claims without the need for adhering to any standard of reasonableness.

Except for the serious question raised by the BOR directing changes in writing at a time when funds to pay for the changed work were not available,⁵³ there is no evi-

⁵³ Although written changes were directed by the Bureau in mid-October of 1978, it does not appear that funds available for payment of any costs incurred for such changes were available until some time after the meeting on Mar. 6 and 7, 1979. The Contractor has filed no claim for funds not being available at an earlier time; nor has it been shown that the time required to arrive at a negotiated settlement would have been shorter if funds had been available throughout the period of negotiation.

Nevertheless, the funding situation may have placed the Chief, Construction Field Di-

—Continued

dence in this case that the Bureau personnel concerned proceeded in a high-handed manner or that their requests for information were either arbitrary or capricious. It is true, of course, that situations similar to those envisioned by the appellant may be expected to be encountered in Government procurement from time to time. If they are, the answer would appear to lie in the contractor concerned promptly requesting a final decision by the contracting officer on the claims asserted and taking a timely appeal therefrom or, alternatively, initiating an appeal without a finding if the contracting officer fails or refuses to issue a written decision within the time specified in the Act or within a reasonable time if that is the standard the Act prescribes.

Decision

For the reasons stated and under the authorities cited, the appellant's claim for interest is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

vision, Cle Elum Office, in the unenviable position of having to conduct negotiations with the contractor at a time when he presumably knew that there were no funds currently available to pay for the changed work and that they would not be, unless as a temporary measure they could be transferred from other sources including perhaps unexpended funds on the instant contract needed for completion of the original work.

DOYON, LIMITED

6 ANCAB 219

Decided *December 14, 1981*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-19155-20.

Dismissed.

1. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Administrative Procedure: Decisions

Where, in a Bureau of Land Management decision to issue conveyance, a water body excluded from the selection application on the basis that it is navigable is expressly "considered" nonnavigable and the underlying submerged lands thus deemed selected by the applicant, the Bureau of Land Management has made a navigability determination with regard to the subject water body.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Alaska Native Claims Settlement Act: Administrative Procedure: Generally

In the absence of an issue regarding error in the decision itself, allegations of irregularities or deficiencies in the predecision procedure, such as noncompliance with the pertinent section of ANCSA and its implementing regulations, do not provide a basis for appeal to this Board.

3. Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally—Submerged Lands

The Bureau of Land Management under provisions of ANCSA and regulations in 43 CFR has both the authority and responsibility to determine which

lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

4. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Navigable Waters

The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to the navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

5. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Navigable Waters

When the State of Alaska's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the Decision to Issue Conveyance.

APPEARANCES: James Q. Mery, Esq., for Doyon, Limited; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Shelly J. Higgins, Esq., Department of Law, for State of Alaska (listing limited to persons addressing the issue decided).

**OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD**

Summary of Appeal

The primary issue raised by Doyon, Limited and herein decided is whether the Bureau of Land Management erred in approving for conveyance to Doyon, and charging against the corporation's acreage entitlement under ANCSA, submerged lands to which the State of Alaska claims title. As to this issue, the decision of the Bureau of Land Management is affirmed.

The Board concludes that the Bureau of Land Management acted within its authority and responsibility to determine what lands are "public lands" under § 3(e) of ANCSA and therefore available for selection by a Native corporation when it made a determination of the nonnavigability of a water body.

The Board further finds that when the State of Alaska's claim of ownership of the submerged lands is based solely upon the State's own conclusions as to the navigability of the water body, the Bureau of Land Management is not bound either to accept the State of Alaska's conclusions or to recognize the State's claim as an interest leading to a fee title which requires exclusion of land under ANCSA.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I

1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Apr. 2, 1975, pursuant to § 12 (c) of ANCSA, Doyon, Limited (Doyon) filed selection application F-19155-20 for lands located near the Native Village of Northway. In response, the Bureau of Land Management (BLM) issued, on June 23, and 26, 1978, two decisions to issue conveyance of land to Doyon. Each decision concerned a portion of the lands selected by Doyon.

Doyon appealed the above-designated decisions of the BLM in a single appeal filed on July 27, 1978. In its Statement of Reasons and supporting memorandum, the appellant raised, *inter alia*, several issues relating to the navigability of Lake Nuziamundcho:

- (1) BLM erred in requiring the conveyance of the submerged lands in question to Doyon when BLM had actual knowledge of the State's claim of ownership to said lands. * * * BLM should be required either to adjudicate the State's claim of title prior to the decision for interim conveyance, or else be held to be estopped to deny the State's ownership of the land in question.
- (2) BLM erred in failing to make a determination of navigability as required by ANCSA and its implementing regulations.
- (3) BLM erred in determining, if it has done so, that the water bodies in question are non-navigable. * * * [T]he subject water bodies are navigable as a matter of fact and of law.

Following a Jan. 21, 1980, conference with the other parties and the Board, the BLM on Mar. 28, 1980, filed its Review and Basis for Navigability Determinations. The BLM therein affirmed its earlier determination that Lake Nuziamundcho is nonnavigable.

On Nov. 2, 1981, the Board queried Doyon as to its intentions of pursuing its appeal with regard to the legal and factual navigability of Lake Nuziamundcho. On Nov. 30, 1981, Doyon replied that it has no intention of contesting navigability *per se*.

Decision

The Board finds that Doyon has withdrawn that portion of its appeal regarding the navigability *per se* of Lake Nuziamundcho. Accordingly, the only issues remaining in this appeal are:

(a) whether BLM erred in requiring the conveyance of the submerged lands in question to Doyon when BLM had actual knowledge of the State of Alaska's (State's) claim of ownership to said lands, and whether BLM should be required either to adjudicate the State's claim of title prior to the decision to issue conveyance, or else be held to be estopped to deny the State's ownership of the land in question;

(b) whether BLM erred in failing to make a determination of navigability as required by ANCSA and its implementing regulations.

With regard to issue (b), Doyon declared that BLM had not made a determination as to the navigability

of Lake Nuziamundcho, and that if BLM had made such a determination, it had not complied with the pertinent regulations.

In its application, Doyon excluded from its selection the beds of several water bodies, including Lake Nuziamundcho. In the decision to issue conveyance of the lands in which Lake Nuziamundcho is situated, the BLM noted:

The application excluded several water bodies as being navigable. As these are considered nonnavigable and as section 12(c) (3) and 43 CFR 2652.3(c) require the region to select all available lands within the township, these water bodies are considered selected.

* * * * *

There are no inland water bodies considered to be navigable within the selected area.

[1] Where, in a BLM decision to issue conveyance, a water body excluded from the selection application on the basis that it is navigable is expressly "considered" nonnavigable and the underlying submerged lands thus deemed selected by the applicant, the BLM has made a navigability determination with regard to the subject water body.

[2] Further, in the absence of an issue regarding error in the decision itself, allegations of irregularities or deficiencies in the predecision procedure, such as noncompliance with the pertinent section of ANCSA and its implementing regulations, do not provide a basis for appeal to this Board. Thus, Doyon's failure to maintain and pursue the

issue as to the factual and legal navigability of Lake Nuziamundcho nullifies Doyon's appeal as to BLM's alleged predecision procedural deficiencies.

The remaining issue in this appeal is the same as that raised by Doyon in *Doyon, Limited & State of Alaska*, 5 ANCAB 324, 88 I.D. 636 (1981) [VLS 80-21(C)]. Doyon here asserts, as it did in the cited appeal, that BLM erred in failing to exclude from conveyance the submerged lands of which the State claims ownership and in charging the acreage of such lands against Doyon's entitlement under ANCSA.

Inasmuch as this issue is the same as the sole issue raised by Doyon in *Doyon, Limited & State of Alaska*, *supra*, the Board concludes that the discussion and the following findings made in that appeal are appropriate as the basis for decision in this appeal.

[3] The BLM has both the authority and the responsibility, under ANCSA and regulations in 43 CFR, to determine which lands, including submerged lands, are public lands within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

[4] The BLM is not bound to make its navigability determinations in conformity with information provided by the State pursuant to 43 CFR 2650.1(b) as to the navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

[5] When the State's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires BLM to exclude such lands from the decision to issue conveyance.

In *Doyon, Limited & State of Alaska, supra*, the Board found the issue raised by Doyon to be without merit, and accordingly dismissed it.

The parties to this appeal have asserted no factual circumstance and cited no authority which would prevent the decision in *Doyon, Limited & State of Alaska, supra*, from governing this decision.

Therefore, the Board adopts as its findings in this decision those listed above from *Doyon, Limited & State of Alaska, supra*, and holds that this portion of this appeal is without merit and is hereby dismissed. Since all other issues in this appeal have been resolved by prior action, this appeal is hereby dismissed in its entirety.

This represents a unanimous decision of the Board.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

REFUNDS AND CREDITS UNDER THE OUTER CONTINENTAL SHELF LANDS ACT

M-36942

December 15, 1981

Accounts: Refunds—Outer Continental Shelf Lands Act: Refunds

Sec. 10 of the Outer Continental Shelf Lands Act does not authorize refunds to purchasers of royalty oil.

Sec. 10 of the Outer Continental Shelf Lands Act does not authorize refunds to persons who have paid a civil penalty under sec. 24 of the Act.

Outer Continental Shelf Lands Act: Refunds

Before allowing refunds or credits against future payments, the Secretary must report them to Congress.

The request for a refund or credit must be in writing, must ask for a specific amount, and must explain why the lessee considers the amount to have been excessive. Except under certain circumstances, the lessee must request the refund or credit within two years after making the payment. Those circumstances are when the lessee both has acted to verify his account within two years and has given the Department enough information to estimate the potential amount of the refund or credit.

An excess net profit share payment, to be credited under 10 CFR 390.034(c), must be reported to Congress before crediting.

Generally, when one co-lessee files a request for repayment, his request does not toll the two-year limit for other co-lessees. But if the co-lessee has the authority to make all lease payments for the other co-lessees, then his request protects all of them.

A lessee may receive a refund or credit of an overpayment even though he did not pay the excess under protest.

Upon discovering an overpayment and an underpayment in a lease account the Sec-

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retary may properly offset the two without regard to sec. 10. But when an excess remains after the offset, the Secretary must comply with sec. 10 in giving a refund or credit.

*OPINION BY OFFICE
OF THE SOLICITOR*

TO: SECRETARY
FROM: SOLICITOR
SUBJECT: REFUNDS AND CREDITS
UNDER THE OUTER CON-
TINENTAL SHELF LANDS
ACT

This office has received several questions in recent months about the application of sec. 10 of the Outer Continental Shelf (OCS) Lands Act. The Department has published only two decisions on sec. 10 in the past twenty-eight years. So, for the guidance of the U.S. Geological Survey, lessees, and the public, I have prepared a review of this statute.

Background

Sec. 10 was a part of the original OCS Lands Act of 1953. It has never been amended. It provides:

(a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953. The Secretary shall certify the amounts of all such repayments

to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title [sec. 9 of this Act] and to issue his warrant in settlement thereof.

(b) No refund or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively: *Provided*, That if the Congress shall not be in session on the date of such submission or shall adjourn prior to the expiration of thirty days from the date of such submission, then such payment or credit shall not be made until thirty days after the opening day of the next succeeding session of Congress. [43 U.S.C.A. § 1339.]

The statute has prompted questions from the Department of Energy, the U.S. Geological Survey, lessees, and small refiners. For example, does it apply when the Director, USGS, remits a civil penalty assessed by a Reviewing Officer? Does it apply to overpayments by small refiners under OCS royalty oil contracts? Does it apply to an overpayment made in a given month under a fixed net profit share lease? What does the statute mean by "request for repayment?" Can the two-year limit on filing the request ever be extended? Does the two-year limit apply to requests for credits, or only to requests for refunds? How does sec. 10 apply to

overpayments and underpayments discovered by the Department's audit of a lessee's account?

The questions raise most of the issues presented by the statute. They defy a brief answer. To put these problems in perspective, I discuss separately the three purposes of sec. 10.

I. *Authority to Draw on the Treasury*

The first purpose of sec. 10 is to solve a problem created by sec. 9. Sec. 9 directs the Secretary to deposit in the Federal Treasury the money paid to him "under any lease on the Outer Continental Shelf." 43 U.S.C. § 1338. Sec. 9, however, is of limited scope. Other statutes govern the deposit of other funds received from OCS activities. For example, the administrative fee charged to small refiners under 10 C.F.R. § 391.110(b) (2) must be deposited in the Treasury, 31 U.S.C. § 483a, as must civil penalties, OCS royalty oil proceeds, and right-of-way rentals.¹ 31 U.S.C. § 484. What these three stat-

utes share is the requirement that the deposits be credited to "miscellaneous receipts," not to the Department's appropriation account.

The problem is that once the money is deposited, the Constitution requires that an agency have authority from Congress to get the money back out. "No money shall be drawn from the Treasury but in consequence of appropriations made by law." U.S. Const. art. I, § 9, cl. 7.² The Department of the Interior has recognized this requirement in many decisions³ and has gone to Congress four times in this century to get the statutory authority it wanted.⁴

The need to find express legislative authority has led to a strict interpretation of repayment statutes. The law watches jealously over the Treasury.⁵ Many decisions of the

² *Knote v. United States*, 94 U.S. 149, 154 (1877) ("Moneys once in the treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, . . . it cannot touch moneys in the treasury of the United States"); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) (court cannot compel Secretary of Treasury to pay a judgment for which no appropriation has been made); 4 Op. Atty. Gen. 227, 229-30 (1843) (no refund of overpayment without Congressional authorization); 1 Op. Atty. Gen. 405 (1820).

³ See, e.g., *Heirs of Isaac W. Talkington*, 5 Pub. Lands Dec. 114, 115 (1886) ("The power of repayment by the Secretary of the Interior is limited and defined by statute"); *Thomas Foster*, 24 Pub. Lands Dec. 159 (1897); *Frank W. Hull*, 9 Pub. Lands Dec. 60 (1889); *Sarah D. Smith*, 7 Pub. Lands Dec. 295 (1888); *Joseph Brown*, 5 Pub. Lands Dec. 316 (1886).

⁴ First in 1908: 35 Stat. 48 (1908); H. R. Rep. No. 679, 60th Cong., 1st Sess. (1908). Next in 1919: 41 Stat. 366-67 (1919); 59 Cong. Rec. 22-23 (1919). Then again in 1930: 46 Stat. 822 (1930); H. R. Rep. No. 1949, 71st Cong., 2d Sess. (1930). Finally in 1960: 74 Stat. 506-07 (1960); [1960] U. S. Code Cong. & Admin. News 3147-54.

⁵ The law is as strict on appropriations as it is on repayments. See 31 U.S.C. §§ 627, 628.

¹ Civil penalties are collected under 30 C.F.R. § 250.80-1(o), royalty oil proceeds under 10 C.F.R. § 391.142, and right-of-way rentals under 43 C.F.R. § 3340.1(a).

31 U.S.C. § 484, a statute over 130 years old, reflects "the general policy of the United States to require that all moneys collected in behalf of the United States . . . be paid into the Treasury." 17 Op. Atty. Gen. 592, 593 (1883). Unless a statute allows an agency to credit the money received to its appropriation account, the money must go to miscellaneous receipts in the general fund of the Treasury. 56 Comp. Gen. 275 (1977); 52 Comp. Gen. 125 (1972); 47 Comp. Gen. 70 (1967). Some exceptions exist. See e.g., 56 Comp. Gen. 275 (1977) (fees collected from other agencies under 31 U.S.C. § 686); 50 Comp. Gen. 545 (1971) (insurance payments to agency funded solely by fees from the regulated industry).

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Comptroller and the Comptroller General illustrate this point, but let me discuss only a few. Former Revised Statute § 3689 was a permanent annual appropriation allowing agencies to refund "moneys received and covered into the Treasury before the payment of legal and just charges against the same." This section was read restrictively. It applied to overpayments credited to the general fund only, not to special funds. 11 Dec. Comp. 300 (1904). It did not allow the Secretary of the Treasury to remit a fine *after* it had been paid into the Treasury, because at the time the fine was deposited, there was no charge against it. 10 Dec. Comp. 239 (1903). Similarly, this section could not be used to pay informers' fees when the fees were set only after the money had been deposited. 10 Dec. Comp. 47 (1903).

The interpretations of this Department have also been strict. For example, under sec. 2 of the repayment statute of Mar. 26, 1908, the Secretary was authorized to refund overpayments made "under the public land laws." The Department was soon invited to read the phrase "public lands" broadly, but it declined. The Department denied it could refund an overpayment on the purchase of Indian lands sold by the Government as trustee. The lands were not public lands. *Charles C. Van Wormer*, 37 Pub. Lands Dec. 714 (1909). See also *John W. Blee*, 36 Pub. Lands Dec. 265 (1908) (1880 repayment statute limited to canceled entries; no refund of

money paid when entry was never allowed); *Circular of April 2, 1907*, 35 Pub. Lands Dec. 492 (1907).

When the Department once read the 1908 repayment statute liberally, the Comptroller General intervened.⁶ The issue was whether the statute, as amended in 1919, authorized refunds of overpaid royalties under the Mineral Leasing Act. The Department thought it did, but was overruled:

The repayment laws are in such broad terms that they cover all cases of excess payments under the public land laws, including homestead laws, preemption laws, town site laws, timber and stone laws, desert land laws, and even mineral land laws under which there is authorized an alienation of the land by patent or its equivalent. It is not believed, how-

⁶ In light of the legislative history of the 1908 law, the Comptroller General's strict interpretation was the better one. In a letter accompanying the proposed law, Secretary Garfield wrote:

"Heretofore and until recently all moneys deposited with applications and proofs for public lands have been retained temporarily by the receivers of public moneys at the United States land offices and finally covered into the Treasury when the entries were allowed or returned by the receivers to the applicants in case their applications and proofs are rejected.

"The fact that these moneys accumulated in the hands of the receivers largely in excess of their bonded liability called for a change in this practice, and to safeguard these funds all moneys of this kind are now and will hereafter be covered into the Treasury as soon as they are received. Under the existing law there is no means of withdrawing any of these from the Treasury for repayment to the persons whose applications and proofs are finally rejected, and I, therefore, herewith submit a proposed bill authorizing their repayment and recommend that it be enacted into a law."

H.R. Rep. No. 679, 60th Cong., 1st Sess. 1 (1908). Senator Clark explained on the floor of the Senate that "the bill is to cover those cases and only those cases." 42 Cong. Rec. 2307 (1908) (remarks of Sen. Clark).

ever, that it was intended to include a mineral land law such as that of February 25, 1920, under which there is no alienation of the land but merely a lease for a term of years . . . Dec. Comp. Gen. A-28366 (Sept. 5, 1929).

Consequently, the Department went to Congress and had the law amended. See H. R. Rep. No. 1949, 71st Cong., 2d Sess. (1930).

Given this pattern of interpretation of repayment statutes, it is no surprise that the Solicitor's Office has construed sec. 10 of the OCS Lands Act strictly. The issue in Opinion M-36425 was whether the Bureau of Land Management could refund an overpaid rental on an OCS pipeline right-of-way. The Acting Associate Solicitor said it could not.

The provision in section 10 of the act for refunds of excess payments made to the United States "in connection with any lease" obviously could not apply to an excess payment made in connection with a right-of-way by a right-of-way application or grantee who held no lease. I find nothing in section 10 warranting the conclusion that an excess payment made in connection with a right-of-way acquired under section 5(c) of the act may be considered an excess payment "in connection with any lease" and, therefore, within the scope of section 10 also, notwithstanding the fact that the right-of-way holder, or applicant therefor may be a lease holder. Excess payments made in connection with the right-of-way are separate and distinct from those made "in connection with any lease" and not within the scope of section 10. Solicitor's Opinion M-36425 (Mar. 4, 1957).

With this guidance, I may now respond to two of the questions raised: whether sec. 10 applies to repayments of civil penalties and

overpayments under OCS royalty oil contracts.

Under current regulations, one who is fined by a Reviewing Officer must pay the fine within thirty days after the decision. The payment is due even though an appeal is filed. 30 C.F.R. § 250.80-1(o)(3). On appeal, however, the fine may be reduced by the Director or nullified by the Board of Land Appeals. 30 C.F.R. § 250.80-1(m)(2). If it is, the party has made an overpayment into the Treasury. With royalty oil contracts the situation is different, but the problem is the same. The Department takes the public's share of oil royalties in kind, then sells it under contracts with small refiners. 10 C.F.R. Part 391. Small refiners may discover overpayments only after they are in the Treasury.

Sec. 10 is inapplicable here. Neither of these kinds of overpayments is made "in connection with any lease." Civil penalties may be imposed against lessees, right-of-way holders, holders of exploration permits, and even persons with no permits at all, such as diving contractors. The Department's civil penalty authority is independent of the oil and gas lease. The question is more difficult when we turn to overpayments on purchases of royalty oil, but these too fall outside the scope of sec. 10. First, these are not payments "under any lease" within the meaning of sec. 9. This suggests that they are not made in connection with a lease, but are made in connection with a royalty oil contract. In other words, because re-

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funds under sec. 10 are drawn on the special account created by sec. 9, the two sections must have equal scope. 43 U.S.C. § 1339(a). Second, before amended in 1978, sec. 5(a) (1) of the OCS Lands Act distinguished between leases and sales of royalty oil. 43 U.S.C.A. § 1334(a) (1) (1964 ed.); Assistant Solicitor Elliott's memorandum of Aug. 13, 1975, to Director, USGS. This distinction persists. *Compare* 43 U.S.C. § 1337 with 43 U.S.C. § 1353. Third, although the Department does have authority to refund overpayments for onshore royalty oil, the onshore statute is different. It allows refunds for overpayments "under any statute relating to the . . . lease . . . of public lands," 43 U.S.C. § 1734 (c), a more flexible category than payments "in connection with any lease."

Sec. 10, then, is no broader than sec. 9. It applies only to bonus payments made to get a lease, rental on the lease, minimum royalty, royalty paid in value, any substitute for royalty created by alternative bidding regulations, and similar payments by the lessee. *See, e.g.*, 30 C.F.R. § 250.33(b). *See also* S. Rep. No. 411, 83rd Cong., 1st Sess. 2 (1953) ("all revenues accruing to the Government from mineral operations on the outer shelf are paid into the Federal Treasury Such revenues include royalties . . . and bonuses and rentals").

Although sec. 10 does not apply to civil penalty refunds or royalty oil

refunds, other remedies may be available. For example, two statutes applicable to all agencies may grant the Secretary authority to refund money "erroneously received and covered into the Treasury." 31 U.S.C. §§ 725q and 725q-1. 55 Comp. Gen. 243 (1975). However, if these sections do not apply, the Department lacks authority to draw on the Treasury to repay persons fined and refiners receiving OCS royalty oil. *See Matanuska Valley Lines, Inc.*, 62 I.D. 243, 251-52 (1955).

Royalty oil overpayments may be repaid by crediting the excess against future payments due. The Department has consistently ruled that when the overpayment is outside the scope of a repayment statute, it may credit the excess.⁷ As a practical matter, however, crediting remitted civil penalties may be difficult. Once penalized, the violator should sin no more. But the Department could amend its civil penalty regulations to permit the Director to stay the payment of the fine pending appeal. This will solve the problem in most cases. In no event, however, should the Director credit a lessee's overpaid fine against payments to be deposited under sec. 9. This practice would frustrate the purpose of sec. 10(b), as I will now explain.

⁷ Solicitor's Opinion M-36425 (Mar. 4, 1957); Dec. Comp. Gen. A-28366 (Sept. 5, 1929); *Joseph Adler*, 9 Pub. Lands Dec. 429 (1889); *Elizah M. Dunphy*, 8 Pub. Lands Dec. 102 (1889).

II. Congressional Review of Re-payments

The authority to repay found in § 10(a) is common in the public land and mineral leasing laws, but § 10(b) has a provision which is unique. It requires the Secretary to report to each house of Congress before allowing a refund or credit, and to give the Congress at least thirty days to review the report.

Sec. 10(b) was not part of the bill originally introduced in the Senate. In its early versions S. 1901 contained only what was to become § 10(a). But at the hearings on the bill, three Senators were concerned that the Secretary was receiving too broad a grant of authority, despite assurance from the Solicitor's Office that he had not abused this authority under the onshore laws.

Senator LONG. Does that not seem to be very general in that when it appears to the satisfaction of the Secretary that any person has made overpayments, and so forth, in any amount that he was lawfully required to pay. Should there not be some standards beyond just the satisfaction of the Secretary that the payment was in excess?

Senator CORDON. Is this not the language in the Mineral Leasing Act?

[Assistant Solicitor] EDELSTEIN. It is sections 95 to 98(a) of title 43 of the code, from which section 10 of S. 1901 . . . was taken, and it applies to public lands generally. There is no change of substance between those provisions of title 43 and this. I do not happen to have title 43 with me, but that is a fact.

Senator WATKINS. You will find it in many reclamation contracts.

Senator CORDON. I am not certain it is sound law, but I am certain that there is a provision in the code at the present time.

Senator MILLIKIN. Has there been any controversy over that in other directions?

Mr. EDELSTEIN. We have had no problems on that.

Senator LONG. It seems to me that you have left it wide open for the Secretary to decide almost on whim or caprice that he has been satisfied.

Mr. EDELSTEIN. There are many people dealing with us, and they sometimes pay small amounts of money in excess of what is required, and to require them to go through the red tape that they would otherwise not have to go through, this statute was requested in connection with public lands generally and it has worked out very satisfactorily.

Senator KUCHEL. It is an accounting problem; is it not?

Mr. EDELSTEIN. Yes Sir.

Senator MILLIKIN. It is an amazingly broad grant of power. In our refund procedure in tax matters, we require a filing of the intention to refund with the Joint Committee on Internal Revenue Taxation, where we can take a look, and there is some kind of a check on refunds. But as the gentleman says, there has never been any trouble over this one and I do not feel like messing with a law that has been working all right.

Mr. EDELSTEIN. The amounts involved are nowhere near as large here as they would be in the case of internal revenue.

Senator CORDON. What would you say about granting that power to the Secretary up to a prescribed maximum amount?

Mr. EDELSTEIN. We would have no objection, but there is no limitation in the sections in title 43.

Senator LONG. It does occur to me that you are going to be dealing with amounts far larger than you have had up to this point.

Mr. EDELSTEIN. We have the Mineral Leasing Act in which large amounts are also involved, the oil- and gas-leasing provisions of it. Of course, the General Accounting Office keeps an eagle eye on

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all of our fiscal operations, and we have had no problem in connection with it.

Senator CORDON. If I were the Secretary of the Interior, or any other officer, clothed with that authority, I think that I would come before the committee and ask for a maximum to be fixed in there. *Hearings Before the Committee on Interior and Insular Affairs, United States Senate, on S. 1901, 83rd Cong., 1st Sess. 638-39 (1953). [1953 Hearings].*

Apparently motivated by this concern, the Congress adapted the review provisions from § 710 of the Revenue Act of 1928. 45 Stat. 882; 26 U.S.C. § 6405(a). The procedure serves two purposes. It provides public scrutiny of and a potential Congressional check on the Secretary's decision to repay. *1953 Hearings*, 638-39. *See also* 69 Cong. Rec. 9073-74 (1928) (remarks of Sen. Smoot). It also alerts Congress to changes in current and future revenue from OCS leasing. *Cf.* 69 Cong. Rec. 8515-16 (1928) (remarks of Sen. Simmons) (criticism of Treasury's estimates of tax revenue).

The review procedure applies to all credits against future payments due. This answers the question presented by Shell Oil Company and the Department of Energy: whether an excess net profit share payment must be reported to the Congress before crediting. *See* 10 C.F.R. § 390.034(c). Worried about the burden reporting places on lessees and the USGS, Shell believes sec. 10 may be avoided by characterizing these credits "as adjustments, not refunds." Sec. 10, however, applies to refunds and credits both.

And as for the burden of reporting, Congress knew from Assistant Solicitor Edelstein that the Department would be handling many requests for small repayments. *1953 Hearings* at 638. Yet Congress did not limit the kind or dollar value of the repayments it was to review. *Cf.* 26 U.S.C. § 6405(a) (only review credits or refunds exceeding \$200,000). The credit described in 10 C.F.R. § 390.034(c) is precisely the sort of repayment Congress has asked to see.

III. Two-Year Limitation on Claims

Congress has limited the Secretary's authority to make repayments. The lessee must file a request for repayment "within two years after the making of the payment." 43 U.S.C. § 1339(a).

The two-year limit was created in 1919 when Congress amended the 1908 repayment statute. The debate in the House revealed the reason for the limitation.

Mr. SINNOTT: . . . At the present time he [the overpayer] has the right under the first part of section 1 of this bill, which is the present law, to put in his application for a return payment, with no time limit. They are putting in applications in the Interior Department today for payments that were made 30 years ago. Attorneys are gleaning over the records of the Interior Department and ascertaining what excess payments were made 30 and 40 years ago, and are presenting applications for repayment and for a refund to the Secretary of the Interior; and all that this bill does is to put a

statute of limitations to require applicants within two years to present their applications, and not let them have 50 or 100 years. It seems to me this is a bill that should be enacted into law for the protection of the Treasury. Otherwise, these men can have 50 years to demand these repayments. . . .

Mr. GARD. I would like to know whether the matter before the department might not be so continuous that the limitation of two years would be too narrow a limitation?

Mr. SINNOTT. No; I think that is an ample limitation. It is the same limitation as is placed upon the Government in issuing a patent. The Government has to issue a patent within two years unless there is some adverse proceeding taken. I certainly can see no objection. It is a protection to the Treasury. [59 Cong. Rec. 22-23 (1919).]

The Department interprets the limitation to be "obviously against the claim and not merely against the remedy." *Instructions*, 49 Pub. Lands Dec. 541, 544 (1923); *Anthony, Legal Representative of Middlebrook (on rehearing)*, 51 Pub. Lands Dec. 333 (1926).

What effect this limitation had on crediting is unclear. Twice before 1919 the Department had claimed an independent authority to credit overpayments (*See note 7, above*), and the 1908 repayment statute was enacted solely to authorize repayments from the Treasury. If, however, the limitation in the 1919 amendment barred the claim as well as the remedy, then the remedy of crediting may have been barred too. No onshore repayment case between 1919 and 1960 offers evidence on this point: that is, in no case did the Department allow a credit when a refund would have been barred. *See, e.g., Carter Oil Co.*, 53 I.D. 474, 475 (1931). The question no longer

arises under the onshore law, the limitation having been repealed in 1960. 74 Stat. 506-07 (1960).

The Congress resolved this issue in sec. 10 of the OCS Lands Act. Both refunds and credits must be requested within two years. We can infer Congress's reasoning from the legislative history. As I explained in Part II, Congress adapted sec. 10 (b) from sec. 710 of the Revenue Act of 1928. Under the revenue laws, the Secretary of the Treasury is limited in repaying refunds and credits, 26 U.S.C. § 6402(a), and must report certain refunds and credits to the Congress. Like the Treasury Department, which estimates tax revenues, the Interior Department estimates OCS royalty revenues for the Office of Management and Budget and the Congress. Credits, like refunds, mean that less money will be available from OCS revenues than the Department predicted. Because Federal budget planners must rely on these predictions in preparing the budget, Congress apparently wished to limit this potential loss of revenue.⁸

Although Congress did not express itself with precision in sec. 10, its intention to place a two-year limit on requests for credits shows through clearly enough. Sec. 10(a) directs the Secretary to repay "excess" payments, "subject to the provisions of subsection (b) of this section." Sec. 10(b) in turn refers to the "refund of or credit for such excess payment." This alone is strong

⁸ See S. Rep. No. 411, 83rd Cong., 1st Sess. 37 (1953) (Asst. Atty. Gen. Rankin concerned about availability of money to make appropriations). Mr. Rankin's letter was written before Congress added § 10(b), clarifying that credits were also to be limited.

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evidence that both refunds and credits are "repayments" under sec. 10(a). Additionally, the Senate report's discussion of sec. 10 says that sec. 10(b) imposes "the additional requirement of notice to Congress in advance of repayment." S. Rep. No. 411, 83rd Cong., 1st Sess. 26 (1953). If the Senate considered refunds and credits to be repayments under sec. 10(b), they must be repayments under sec. 10(a). Only one point casts doubt on this conclusion: the use of the phrase "such repayments" in the second sentence of sec. 10(a). In its context there the phrase refers solely to refunds drawn on the Treasury. I am satisfied, however, that the two-year limitation on repayments applies to credits as well as refunds.⁹ To say otherwise is to isolate the words "such repayments" and to ignore Congress's purpose in adding sec. 10(b) to the Act. The Act is not a hermitage for a solitary phrase; it is a crowded house in which the sentences must live together.

A. Meaning of "Request for Repayment"

To claim a refund or credit, a lessee must file a request for repayment. The request must be in writing, must ask for a specific amount, and must explain why the lessee considers the amount to have been excessive.

⁹ This is the Comptroller General's reading of § 10. Dec. Comp. Gen. B-156603 (July 8, 1974, supplement). See also Asst. Solicitor Ferguson's memorandum, Oct. 12, 1972, to Director, USGS ("reimbursements . . . can be effected if claimed within the two year period . . . through the use of credits against future royalty payments").

Under the onshore statutes, the Department has always required that requests be written. *Instructions*, 39 Pub. Lands Dec. 146, 148 (1910); 43 C.F.R. § 217.5 (1954). Congress expressly patterned sec. 10 after these statutes. S. Rep. No. 411, 83rd Cong., 1st Sess. 26 (1953). Furthermore, the use of the word "filed" in sec. 10 implies that the request must be in writing. *Reich v. Dow Badische Co.*, 575 F.2d 363, 368-69 (2d Cir. 1978), *cert. denied* 439 U.S. 1006 (1978) ("filed" in ADEA implies writing); *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *International Arms & Fuze Co. v. United States*, 69 Ct. Cl. 142, 149 (1930) (oral demands are not claims for tax refunds).

The Department has also required applicants to request specific amounts and explain the basis for the request. 43 C.F.R. § 217.7 (1954). The request must give the Department enough information to rule on it.¹⁰ One lessee has recently provided a good illustration of what is not a proper request. In August 1980, the company filed 144 "re-

¹⁰ Several years ago, the Solicitor conferred with the Solicitor General on this point under § 10. The Solicitor General agreed with the Department's longstanding view. "Requests for refunds under section 10 should state the amount requested and the basis for the request. A *pro forma* request . . . which gives the Secretary no information as to what is requested or why it is claimed, cannot be regarded as adequate compliance with Section 10." Letter from Solicitor General Griswold to Solicitor Barry, Dec. 6, 1967. See also Memorandum of May 30, 1978, from Assistant Solicitor Elliott to Director, USGS, *Accord, Lincoln Cotton Mills Co. v. United States*, 100 Ct. Cl. 507 (1944) (statement on tax return, "paid under protest and refund demanded," is not specific enough to be a claim for a refund).

quests for refunds" for each of its 144 offshore leases. Each letter said:

You are respectfully asked to consider this letter as such a request for any refund, which may be determined to belong rightfully to [the company] and its co-lessees of the subject lease, as to any payment made in excess of the amount required.

The letters do not ask for specific amounts or give reasons why the payments are excessive. They are not requests within the meaning of sec. 10. A more difficult illustration comes from the Comptroller General's decision A-9422. There the attorney had described the land and the amount of overpayment, but added: "I understand the question has been settled so that upon proper application the department will order a refund of the excess. If so, please advise me, so that application may be made for refund." Calling this "a request for information", the Comptroller General ruled it was not a request for repayment under the 1919 repayment statute. 4 Comp. Gen. 1033 (1925).

B. When the Two-Year Period May Be Extended

"[N]o officer of the government has the power to waive the statute of limitations." *United States v. Garbutt Oil Co.*, 302 U.S. 528, 534 (1938). However, sec. 10 does not always require us to apply the two-year limit rigidly. Whenever a court is asked to apply a statute of limitations, "the basic inquiry is whether [the] congressional purpose is effectuated by tolling the statute of limitations in given circumstances."

Burnett v. New York Central R. Co., 380 U.S. 424, 427 (1965). "In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed from the enforcement of the rights given by the Act." *Id.* But only one part of this three-part examination can help us under the OCS Lands Act. Unlike the Federal Employers' Liability Act in *Burnett*, the OCS Lands Act is not a remedial statute. The purposes of the Act itself do not help us either. These are spelled out in 43 U.S.C. § 1802; none bear on the problem of refunds. We are therefore left with the purposes and policies behind the limitation provision.

The Board of Land Appeals has interpreted the policy behind the two-year limitation. *Phillips Petroleum Co.*, 39 IBLA 393 (1979), says its purpose is to require lessees to verify their accounts promptly. This view is analogous to the traditional justification for statutes of limitation: to keep plaintiffs from sleeping on their rights. *Burnett*, 380 U.S. at 428. It is also alert to the main problem about which Congress seems to have been worried: the problem of having funds available to repay the lessees. See S. Rep. No. 411, above, at 37 (letter from Asst. Attorney General Rankin). The Congress added the two-year limitation to limit the government's potential liability under § 10.

Consistent with § 10's purpose, the Department has recognized some situations in which the period

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is extended beyond two years. The Assistant Solicitor's memorandum of May 30, 1978, ruled that the period was extended by the length of time it took the Geological Survey to rule on a lessee's request for a transportation allowance. An earlier memorandum, dated Nov. 4, 1976, ruled that the period was extended by the time it took the Geological Survey to rule on an appeal of an alleged excessive royalty payment. Part of the rationale behind these two rulings was that "the lessee was not in a position to . . . request a refund until the Geological Survey informed him of its decision that there were excessive payments and specified the exact amount of them." Additionally, in both cases the lessee had acted within two years to challenge the amount he was required to pay. In the first case, the lessee asked for the allowance within two years of making the payment. In the second case, he paid the amount under protest and filed an appeal.¹¹ Both

¹¹ What mattered here was that the lessee pressed his challenge to the payment, not that he paid "under protest." Under sec. 10, paying under protest is an empty formality.

The practice of paying under protest appears to come from some early customs and tax cases and the common law's "voluntary payment" rule. The rule was that, unless a statute gave the overpayer a right of recovery, he could not recover overpayments made voluntarily. *Railroad Co. v. Commissioners*, 98 U.S. 541 (1878). See also *Little v. Bowers*, 134 U.S. 547 (1890); *Ward v. Love County*, 253 U.S. 17, 24 (1920); Note, "Recovery of Taxes Under General Principles of Quasi-contracts", 7 Colum. L. Rev. 601 (1907). The protest was needed to give "notice that the payment is not to be considered as admitting the right to make the demand [against the payer]." *Railroad Co.*, above, at 544.

The Supreme Court has long recognized that the Department's repayment authority is an

lessees acted to verify their accounts within the period allowed by Congress. *Phillips Petroleum Co.*, 39 IBLA 393, 396 (1979).

Here it may be helpful to summarize the workings of the extension rule. The two-year period begins when the Department receives the payment. It is interrupted (or "tolled") when the Department receives a fully documented request for an allowance or a documented challenge to the legality of an order to pay. It resumes when the lessee receives the Department's letter approving the allowance or reversing the order.¹² A special case is pre-

exception to the voluntary payment rule. *United States v. Edmondston*, 181 U.S. 500, 513-14 (1901). Lack of a protest is irrelevant. 55 Comp. Gen. 243, 244 (1975) (protest irrelevant under 31 U.S.C. § 725q-1). When the facts show an overpayment (and the claim is timely), the Department must repay. *United States v. Laughlin*, 249 U.S. 440, 443 (1919) (1908 statute); Solicitor's Opinion M-36839 (Oct. 28, 1971) (interpreting former 43 U.S.C. § 1374, the 1960 onshore repayment law).

Does the voluntary payment rule survive? The Supreme Court pronounced it alive in 1973, but cut its visit short in a footnote. *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 n. 11 (1973). So we cannot be sure whether the rule is well or whether the Court was merely flattering the dowager on her deathbed.

¹² In his July 8, 1974, supplement to B-156603, the Comptroller General approved a credit requested within two years of the approval of a unit agreement. Taken out of context, some remarks in the supplement might seem to conflict with my interpretation of tolling: that is, one could argue that a lessee always has two years from the date of an approval or decision to file the request. This would misinterpret § 10, which sets the date of payment as the starting date. In the instances discussed by the Comptroller General, the statute was tolled on the date of the earliest payment. Thus, no time had yet run when the statute resumed following the decision. So the lessees had two full years from the date of decision, it being the same as the date of payment with the statute tolled.

sented by a retroactive change in the regulated price of oil or gas. Suppose, for example, that a lessee has paid royalty on gas based on an unregulated price. Another petitions the Federal Energy Regulatory Commission challenging this price, and the Commission agrees, ordering the lessee to charge a lower, regulated price and to reimburse its purchasers. The two-year limit still applies from the date of payment; but the lessee can interrupt the period by notifying the Department in writing of the challenge and of the approximate difference in the price should the challenge succeed. Here the statute is tolled when the Department receives the notice, and it resumes when the final agency or judicial decision is issued.

The final question on tolling concerns leases owned by more than one lessee. If one co-lessee files a request for repayment, does this toll the statute for the other co-lessees having similar claims. Decisions of the Comptroller General under the 1919 statute suggest the filing does not toll the statute. In those cases the question was how the limitation applied to the several heirs of a dead overpayer. "Individually", answered the Comptroller General, meaning that one could file for all only if the request were "accompanied by a properly executed power of attorney." 3 Comp. Gen. 810, 811 (1924), *disapproving Ernest F. Stembbridge*, 49 Pub. Lands Dec. 533 (1923) and *Emma R. Hume*, 49 Pub. Lands Dec. 652 (1923). This principle is easily applied to OCS leases. Under 30

C.F.R. § 250.31, co-lessees can name an operator to fulfill their duties. If this operator has the authority to make lease payments for all the co-lessees, then his request protects all of them. If, however, the co-lessees make separate payments to the Department, then the two-year limit applies individually. This ruling is consistent with the policy behind sec. 10. If a co-lessee keeps a separate account with the Department, he needs this incentive to make him verify the account promptly.

I conclude, then, that the two-year period in sec. 10 may be extended in some cases: generally speaking, when the lessee both has acted to verify his account within two years and has given the Department enough information to estimate the potential amount of the refund or credit. So interpreted, the statute still protects the budget planning process and limits the number of old claims to be reviewed. Yet it gives relief to the conscientious lessee.

C. Audits and the Two-Year Limit

When the Department audits a lessee's account over a period of several months, it raises still another question about the application of sec. 10. For if the audit reveals that the lessee has made both overpayments and underpayments in the audit period, must the Department treat each overpayment separately? An example will illustrate the problem. Suppose a lessee overpaid its royalty by \$1,000 in January 1980, and by \$2,000 in February. Then in March it under-

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paid its royalty by \$2,500. An audit in September 1980, reveals these errors. Must each overpayment be given a separate credit, or should the Department credit and report only the net overpayment of \$500 for the three-month period?

This question was partly answered in *Shell Oil Co.*, 52 IBLA 74 (1981). There the Department's Inspector General audited payments four years after they were made. Shell had overpaid \$11,000 in one month and underpaid \$12,000 the next. The USGS demanded that Shell pay the \$12,000 and ruled that repayment of the \$11,000 was barred by the two-year limit. The Board reversed.

Had Shell initiated a request in 1979 for a refund of its November 1974 overpayment, we believe Survey would have been correct in denying such request as untimely. In *Phillips Petroleum Co.*, 39 IBLA 393 (1979), we so held. Where, however, Survey undertakes to audit a producer some 4 years after the payments at issue have been made, we hold that a sense of fundamental fairness requires Survey to recognize both a producer's underpayments and overpayments of royalty. We believe Survey should have properly offset Shell's underpayment by the amount of its overpayment. We do not believe that the 2-year period of limitations was established to give Survey a procedural advantage in computing royalty payments. [*Id.* at 78.]

When we consider the purposes of sec. 10, we see the Board was correct. The statute permits "offsetting"¹³ within the auditing period,

¹³ "Offsetting" is crediting overpayments against past payments due. "Crediting" in sec. 10 is crediting against future payments due. The distinction is justified in the text below.

whether or not that period is within two years of the date of the audit. To begin with, offsetting has nothing to do with refunds. The excess to be offset will not be withdrawn from the Treasury. Next, although the two-year limit protects the Department from the burden of reviewing old claims, this protection need not apply to offsetting in an audit made beyond the limit, such as the one in *Shell*. When the Department has decided to shoulder the burden of reviewing monthly payments during the audit period, offsetting within that period imposes no extra burden. (Repayments, on the other hand, would impose extra burdens of reporting to Congress and paying or bookkeeping, both outside the scope of the audit. Auditing never waives the two-year limit on filing for repayments.)

Shell is also compatible with the purposes behind the limitation on and duty to report credits. The first purpose is to aid the accuracy of estimates of future revenue. Because offsetting, as I defined it, affects only past payments, it poses no threat to the estimates. The second purpose is to provide an informal Congressional check on the Secretary's authority to allow credits. This purpose, one might argue, could be frustrated by offsetting: the Congress would learn of the offsets only if the audit revealed a net overpayment. On this point, however, I find the practice under the tax laws to be instructive. Overpaid

tax installments may be credited against unpaid installments without reporting the credit to the Joint Committee on Taxation. Only the net overpayment, based on all the installments, is subject to reporting. 26 U.S.C. §§ 6403, 6402, and 6405. (Revenue Act of 1928, §§ 321, 322, and 710). Here again, Congress appears concerned only with credits against future payment due.¹⁴

A few examples will clarify how offsets and credits are affected by sec. 10. First, consider a lessee who overpays \$1,000 in January and underpays \$300 in February. The errors are discovered in June. The lessee should apply for a refund or credit of \$700, and the request must be reported to Congress. Second, consider an audit covering twelve months: July 1979, through June 1980. The audit reveals an overpayment of \$500 in October and an underpayment of \$1,700 in March. The audit is completed on Jan. 2, 1982, more than two years after the October overpayment. Nevertheless, USGS should offset the \$500 against the \$1,700 and demand payment of \$1,200. No report to Congress is required. Third, using the same dates as in the second example, assume the October overpayment was \$1,700 and the March underpayment was \$400. Here USGS should offset the two payments, but must deny the lessee's request for a \$1,300 repay-

ment. The overpayment was made over two years before the lessee files his request.

The fourth example is a more complicated variation on the third. The audit covers July 1979, through June 1980. The audit is completed on Jan. 2, 1982, and the lessee files a request for repayment that day. Thus, the lessee is entitled to repayment only for payments made after Jan. 2, 1980. The audit reveals the following errors:

July 1979—\$1,500 overpayment
September 1979—\$300 underpayment
December 1979—\$200 overpayment
February 1980—\$1,200 underpayment
May 1980—\$400 overpayment

After offsetting, the audit reveals a net overpayment of \$600. The problem is to decide how much of the net the lessee can recover. Here the lessee can recover the \$400 overpaid in May, but no more. The July and December overpayments were made more than two years before repayment was requested. Given sec. 10's purpose to make lessees verify their accounts promptly, it would be improper to attribute all of the net overpayment to May.

Conclusion

Sec. 10 allows the Secretary to refund money deposited in the Treasury under sec. 9 only. It gives no authority to refund civil fines or overpayments under royalty oil contracts. The section creates a single procedure for refunds and credits. Lessees must request them in writing, usually within two years after

¹⁴ Tax accounting and lease accounting are not identical. Under the tax laws, a net overpayment is to be credited against other taxes already owed by the taxpayer. 26 U.S.C. § 6402. OCS lease accounts, however, are kept separately.

making the payment. Before allowing refunds or credits, the Secretary must report them to Congress.

WILLIAM H. COLDIRON
Solicitor

DOYON, LIMITED

6 ANCAB 242

Decided *December 16, 1981*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-19155-16.

Partial decision; affirmed in part.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally—Submerged Lands

The Bureau of Land Management under provisions of ANCSA and regulations in 43 CFR has both the authority and responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

2. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska Native Claims Settlement Act: Navigable Waters

The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to the navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

3. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska

Native Claims Settlement Act: Navigable Waters

When the State of Alaska's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the Decision to Issue Conveyance.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Administrative Procedure: Decisions

Where, in a Bureau of Land Management decision to issue conveyance, a water body excluded from the selection application on the basis that it is navigable is expressly "considered" nonnavigable and the underlying submerged lands thus deemed selected by the applicant, the Bureau of Land Management has made a navigability determination with regard to the subject water body.

5. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally—Alaska Native Claims Settlement Act: Administrative Procedure: Generally

In the absence of an issue regarding error in the decision itself, allegations of irregularities or deficiencies in the procedure, such as noncompliance with the pertinent section of ANCSA and its implementing regulations, do not provide a basis for appeal to this Board.

APPEARANCES: James Q. Mery, Esq., for appellant; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Shelley

J. Higgins, Esq., Office of the Attorney General, for the State of Alaska.

OPINION BY ALASKA
NATIVE CLAIMS APPEAL
BOARD

Summary of Appeal

One issue raised by Doyon, Limited, in this appeal is whether the Bureau of Land Management erred in approving for conveyance to Doyon, and charging against the corporation's acreage entitlement under ANCSA, submerged lands to which the State of Alaska claims title. As to this issue, the decision of the Bureau of Land Management is affirmed.

The Board concludes that the Bureau of Land Management acted within its authority and responsibility to determine what lands are "public lands" under § 3(e) of ANCSA and therefore available for selection by a Native corporation when it made a determination of the nonnavigability of a water body.

The Board further finds that when the State of Alaska's claim of ownership of the submerged lands is based solely upon the State's own conclusions as to the navigability of the water body, the Bureau of Land Management is not bound either to accept the State of Alaska's conclusions or to recognize the State's claim as an interest leading to a fee title which requires exclusion of land under ANCSA.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation

of authority to administer the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

On Apr. 2, 1975, pursuant to § 12 (c) of ANCSA, Doyon, Limited (Doyon) filed selection application F-19155-16 for lands in the vicinity of the Native Village of Kaltag. The application excluded Tsurorturna Slough, Yukon Creek, and the South Fork of the Nulato River as being navigable.

On Oct. 3, 1979, the Bureau of Land Management (BLM) issued its above-designated decision to convey the selected lands to Doyon. The decision specified that within the lands approved for conveyance only the Khotol River was considered navigable. The above-specified water bodies excluded from Doyon's selection application were expressly considered nonnavigable and thus selected.

In its Statement of Reasons, filed on Nov. 26, 1979, Doyon declared, *inter alia*, that:

1. BLM erred in its decision to convey, and to charge against Doyon's acreage entitlement, submerged lands to which the State asserts title, which lands "are more particularly described on Exhibit A attached hereto and incorporated herein by reference." The attached

Exhibit A was the above-designated decision of the BLM to convey lands to Doyon.

2. The subject submerged lands should be excluded from the interim conveyance and not charged against Doyon's acreage entitlement, pending an adjudication of the State's title interest in the lands.

3. No determination of navigability or nonnavigability of the South Fork of the Nulato River was made by the BLM, but if such a determination was made, it was arbitrary and capricious, and was made in violation of the law and the regulations.

4. The South Fork of the Nulato River is navigable as a matter of fact and law.

In its Memorandum in Support of Statement of Reasons, Doyon referred exclusively to the submerged lands underlying the South Fork of the Nulato River as the lands under appeal, and stated that the basis for its appeal was that the State claims title to those lands. In support of its appeal, Doyon adopted and incorporated by reference three documents filed in other ANCAB appeals. Copies of the documents were attached as Exhibit D. The referenced documents made clear that the fundamental ground for the appeal was the State's assertion of title to lands approved for conveyance, or inversely, "the attempted conveyance of lands when there is [an unadjudicated] third party claim of title, on record, to those very same lands." Exhibit D-3, page 5. Doyon declared that

"[i]t is, quite simply, irrelevant to Doyon whether these water bodies are navigable or nonnavigable." Exhibit D-2, page 3. Asserting a right to appeal on alternate grounds, Doyon argued that the Secretary had not followed the applicable law or the regulations in making navigability determinations prior to approving conveyance of submerged lands to Doyon, but that resolution of the issues raised by such argument would be unnecessary if the Board orders the exclusion of the submerged lands from conveyance pending an adjudication of the State's claim of title.

BLM answered that Doyon had not addressed the ultimately dispositive substantive issue—whether or not the South Fork of the Nulato River is navigable. BLM argued that it is required to convey submerged lands which have been administratively determined to be in Federal ownership, regardless of the State's conflicting claim to title and the Department's inability to guarantee title. Further, BLM argued that a determination of non-navigability of the South Fork of the Nulato River had been made, and the bureau answered in detail Doyon's arguments regarding procedural deficiencies. Finally, referring to Doyon's statement that navigability is not the "real issue" in this appeal, BLM declared that Doyon must either accept its burden of proof on the substantive issue of navigability or accept conveyance of the disputed submerged lands.

In its Reply, Doyon reasserted

that the basic issue on appeal is not navigability, but rather the BLM's attempt to convey, and to charge against Doyon's entitlement, submerged lands to which the State claims title. Doyon declared that it is irrelevant whether the disputed submerged lands are navigable, and that the real issue in this appeal is certainty of title. Doyon stated that it has no intention of participating in a *de novo* factual determination of navigability before this Board, and that Doyon will not, and should not, bear the burden and expense of proving to BLM that the Federal Government does not own the submerged lands it is attempting to convey. Doyon reiterated its contention that the disputed lands should be excluded from conveyance pending an adjudication of the State's claim of title.

The State, on motion by Doyon, was joined as a necessary party by the Board's order of Dec. 13, 1979. The State has not filed a brief in this appeal.

Decision

The primary issue addressed in this decision is the same as that raised by Doyon in *Doyon, Limited & State of Alaska*, 5 AN CAB 324, 88 I.D. 636 (1981) [VLS 80-21(C)]. Doyon here asserts, as it did in the cited appeal, that BLM erred in failing to exclude from conveyance the submerged lands of which the State claims ownership and in charging the acreage of such lands against Doyon's entitlement under ANCSA.

Inasmuch as this issue is the same as the sole issue raised by Doyon in *Doyon, Limited & State of Alaska, supra*, the Board concludes that the discussion and the following findings made in that appeal are appropriate as the basis for decision in this appeal.

[1] The BLM has both the authority and the responsibility, under ANCSA and regulations in 43 CFR, to determine which lands, including submerged lands, are public lands within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.

[2] The BLM is not bound to make its navigability determinations in conformity with information provided by the State pursuant to 43 CFR 2650.1(b) as to the navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.

[3] When the State's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires BLM to exclude such lands from the Decision to Issue Conveyance (DIC).

In *Doyon, Limited, State of Alaska, supra*, the Board found the issue raised by Doyon to be without merit, and accordingly dismissed it.

The parties to this appeal have asserted no factual circumstance and cited no authority which would prevent the decision in *Doyon, Limited, State of Alaska, supra*, from governing this decision.

Therefore, the Board adopts as its findings in this decision those listed above from *Doyon, Limited, State of Alaska, supra*.

Doyon in this appeal also asserted that no determination of the navigability or nonnavigability of the South Fork of the Nulato River was made by the BLM, but if such a determination was made, it was arbitrary and capricious, and was made in violation of the law and the regulations. Further, Doyon asserted that the South Fork of the Nulato River is navigable as a matter of fact and law.

In the DIC here appealed, the BLM noted:

The [Doyon's selection] application excluded the following water bodies as being navigable:

South Fork Nulato River;
Tsurotlurna Slough;
Yukon Creek.

As these are considered nonnavigable and as Sec. 12(c) (3) and 43 CFR 2652.3 (c) require the region to select all available lands within the township, the beds of these water bodies are considered selected.

The DIC went on to specify that, within the lands approved for conveyance, the Khotol River was the only inland water body considered to be navigable.

[4] Where, in a BLM decision to issue conveyance, a water body ex-

cluded from the selection application on the basis that it is navigable is expressly "considered" nonnavigable and the underlying submerged lands thus deemed selected by the applicant, the BLM has made a navigability determination with regard to the subject water body.

Doyon, in its Statement of Reasons, declared that the South Fork of the Nulato River is navigable as a matter of fact and law. However, in its Memorandum in Support of Statement of Reasons, Doyon declared that navigability is not the "real issue" in the appeal, and that it is irrelevant whether the subject water body is navigable or nonnavigable. Further statements in Doyon's Reply manifest Doyon's withdrawal of any issue as to the factual or legal navigability of the disputed water body.

[5] In the absence of an issue regarding error in the decision itself, allegations of irregularities or deficiencies in the predecision procedure, such as noncompliance with the pertinent section of ANCSA and its implementing regulations, do not provide a basis for appeal to this Board. Thus, Doyon's failure to maintain and pursue an issue as to the factual and legal navigability of the South Fork of the Nulato River moots Doyon's allegations regarding the arbitrariness and capriciousness of BLM's navigability determination and predecision procedural deficiencies.

Further, in the absence of an issue as to legal and factual navigability,

the Board rejects Doyon's argument that the DIC should have included a written statement of reasons for any determination of navigability or nonnavigability. In the absence of an issue as to navigability, BLM's failure to include in the DIC a statement of reasons for any determination of navigability or nonnavigability does not provide a basis for appeal to this Board.

Based upon the above findings and conclusions, this Board hereby dismisses that portion of the above-designated appeal relating to navigability.

Those portions of the above-designated appeal relating to unpatented mining claims and public easements will be resolved by future action of this Board.

This represents a unanimous decision of the Board.

JUDITH M. BRADY

Administrative Judge

ABIGAIL F. DUNNING

Administrative Judge

JOSEPH A. BALDWIN

Administrative Judge

SCOTT Q. ADAMS

60 IBLA 288

Decided December 17, 1981

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application M-50524.

Affirmed.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Filing

An applicant for a simultaneous oil and gas lease who is legally a minor at the time he executes and files the application is not qualified to hold a lease under the regulations, and the application is properly rejected.

APPEARANCES: George K. Stearns, Esq., Stowe, Vermont, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Scott Q. Adams has appealed the decision of the Montana State Office, Bureau of Land Management (BLM), dated Sept. 17, 1981, rejecting his simultaneous oil and gas lease application, M-50524, drawn with first priority for parcel MT-108 at the March 1981 simultaneous drawing held Apr. 18, 1981. BLM rejected the application because appellant was a minor under Montana law at the time he submitted the application and therefore unqualified to be an oil and gas lease applicant.

In his statement of reasons, appellant argues that, although he was a minor at the time he submitted the application, he was not unqualified to do so under Montana law which does not void a minor's act or render a minor's contract illegal. He also contends that 43 CFR 3102.1 only prohibits minors from

acquiring or holding leases and that he became 18 on Apr. 12, 1981, before the drawing was held, and therefore before he would have to submit a lease offer as a result of his first priority. He notes that the prohibition against a minor holding a lease is regulatory, not statutory, and thus the regulation must be strictly construed. He suggests that if the Secretary of the Interior had intended to prohibit minors from filing an application, the regulations would have so stated.

[1] The Montana Code Annotated (MCA), sec. 41-1-101 (1979) defines minors as "(a) males under 18 years of age; (b) females under 18 years of age." The fact that Montana permits minors to make contracts, subject to disaffirmance (*see* MCA 41-1-302 (1979)), has no bearing here as appellant was nevertheless considered a minor under Montana law at the time he submitted his application. Departmental regulation 43 CFR 3102.1 reads: "(c) *Minors*. Leases shall not be acquired or held by one considered a minor under the laws of the State in which the lands are located, but leases may be acquired and held by legal guardians or trustees of minors in their behalf."

Appellant seeks to distinguish between a person who files an application and a person who is issued a lease and argues that only the latter need be the requisite age. We disagree. We find that, even if we strictly construe the regulation, the phrase "[l]eases shall not be ac-

quired" must be read to cover the process of obtaining a lease, in contrast to the word "held" which clearly refers to a lease which has been issued. *See Black's Law Dictionary* 23 (5th ed. 1979); *Webster's Third International Dictionary* 18 (1966).

This conclusion is confirmed by examination of certain other regulations. Specifically, 43 CFR 3112.6-1(b) reads: "(b) *Unqualified applicants*. The application of any applicant who is unqualified * * * shall be rejected." The inference is that applicants as such must be qualified to acquire and hold a lease. A minor is not so qualified. Even more significantly, we note that regulation 43 CFR 3102.2-2 requires: "The applicant, offeror, or agent * * * shall *certify as to age*, citizenship and compliance with the acreage limitations * * * *on the lease application* if leasing is in accordance with Subpart 3112 [Simultaneous Filings] of this title." (Italics added.) Thus, the age certification on the simultaneous oil and gas lease application states: "UNDER-SIGNED CERTIFIES AS FOLLOWS: * * * (b) Applicant is not considered a minor under the laws of the State in which the lands covered by this application are located." Appellant's application was signed and dated Mar. 5, 1981. The language of the age certification is in the present tense.

The Board has often held that an applicant certifies to the statements on the application as of the date that

he signs and dates the card. The certification represents that circumstances are as they are stated on the application on the date of the application and that the applicant has met the statutory and regulatory requirements for holding a lease as of that date. *H. L. McCarroll*, 55 IBLA 215 (1981); *C. H. Coster Gerard*, 41 IBLA 74, 75 (1979); *Ray Flamm*, 24 IBLA 10 (1976).¹

We find that an applicant for a simultaneous oil gas lease must be qualified to hold the lease when he submits the application and therefore BLM properly rejected appellant's lease application because he was a minor at the time it was executed and submitted. *Cf. Jean Alling*, 52 I.D. 242 (1927) (application for oil and gas prospecting permit rejected because applicant was a minor).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is affirmed.

DOUGLAS E. HENRIQUES

Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

BRUCE R. HARRIS

Administrative Judge

WILLIAM M. JOHNSON

3 IBSMA 377

Decided December 18, 1981

Appeal by the Office of Surface Mining Reclamation and Enforcement for review of the Nov. 20, 1980, decision of Administrative Law Judge Tom M. Allen, in Docket No. NX 0-160-R, vacating two notices of violation under the holding that the inspectors responsible for the issuance of the notices failed to present their credentials in accordance with 30 CFR 721.12(a).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

OSM inspectors are not required by sec. 517(b)(3) of the Act and 30 CFR 721.12(a) to present their credentials prior to inspecting an inactive minesite at which no one associated with the mining operation is present.

APPEARANCES: Carol S. Nickle, Attorney, Office of the Field Solicitor, Knoxville, Tennessee, Glenda Hudson, Attorney, and Marcus P. McGraw, Assistant Solicitor for Enforcement, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement; Herman N. Lester, Esq., Combs and Lester, P.S.C., Pikeville, Kentucky, for William M. Johnson.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM)

¹ A false statement on an oil and gas lease application is also a proper basis for rejection of the application. 43 CFR 1821.3-1(c).

has appealed a decision of the Hearings Division vacating two notices of violation issued by OSM to William M. and Malvary Johnson pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).¹ The notices were vacated on the basis of the Administrative Law Judge's determination that the OSM inspectors whose inspection resulted in the issuance of the notices did not present their credentials as required under sec. 517(b) (3) of the Act, 30 U.S.C. § 1267(b) (3) (Supp. II 1978), and the Department's regulation at 30 CFR 721.12(a).

Factual and Procedural Background

On Mar. 6, 1980, two inspectors from OSM inspected property owned by William M. and Malvary Johnson along the Fleming Branch at Dorton, in Pike County, Kentucky.² There was no mining activity at this site on the date of OSM's inspection. The inspectors presented their credentials to Paul Daniels, who was found to be operating a deep mine adjacent to the property, and proceeded to inspect the Johnson property.³ On the basis of this

¹ Act of Aug. 3, 1977, P.L. 95-87, 91 Stat. 445.

² The inspection was initiated on the basis of a citizen complaint and state reports of noncompliance with applicable regulations (Tr. 50, 100-01).

³ There was testimony presented during the review hearing concerning whether Mr. Daniels was in any way associated with mining operations on the Johnson property (Tr. 86-89). It appears that he was not involved with those operations (*id.*); however, this fact is not material to our holding in this case.

inspection a notice of violation and cessation order were issued; these documents were sent to William M. Johnson by certified mail on Mar. 10, 1980.⁴ Johnson sought review of this enforcement action before the Hearings Division and a hearing was conducted on Oct. 21, 1980.

The basic issue presented for hearing was whether OSM has regulatory authority over operations on the Johnson property. During the course of the hearing, however, the Administrative Law Judge raised the issue of OSM's compliance with the provisions of the Act and regulations concerning presentation of credentials by OSM inspectors. The decision below is based only on a ruling that the inspectors did not comply with these regulatory provisions.

Discussion and Conclusion

The provision for presentation of credentials as an element of inspections conducted by OSM is set forth in 30 CFR 721.12:

(a) Authorized representatives of the Secretary, without advance notice and upon presentation of appropriate credentials and without a search warrant, shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained are located. [⁵]

⁴ Tr. 107; OSM Exhs. 13 and 14. The cessation order issued by OSM was subsequently vacated and a notice of violation was issued in its place (Tr. 4-8; OSM Exhs. 14 and 15).

⁵ Essentially the same language is found in sec. 517(b) (3) of the Act, 30 U.S.C. § 1267(b) (3) (Supp. II 1978).

The Board has previously analyzed this provision in two cases: *Consolidation Coal Co.*, 1 IBSMA 273, 86 I.D. 523 (1979), *on appeal following remand*, 2 IBSMA 21, 87 I.D. 59 (1980); and *Capitol Fuels, Inc.*, 2 IBSMA 261, 87 I.D. 430 (1980).

In the first of its *Consolidation* decisions, above, the Board reasoned that the presentation-of-credentials requirement derives from the interest of mine operators in being aware of the presence of non-employees at a minesite, to facilitate the safe and orderly conduct of mining operations.⁶ 1 IBSMA at 276, 86 I.D. at 525. While recognizing this interest, however, the Board held that OSM may inspect a mine without presenting credentials under extraordinary circumstances, as when such an inspection is deemed necessary, on the basis of objective indications, to preclude concealment of a violation of the Department's regulations. 1 IBSMA at 275-78, 86 I.D. at 524-26; 2 IBSMA 23-24, 87 I.D. at 60-61.

In *Capitol Fuels*, the enforcement action by OSM was challenged on the ground that OSM's inspectors failed to present their credentials until after concluding their initial inspection of a mining operation. Noting that prior to their inspection the OSM inspectors had made a diligent effort to locate a mine employee "with some degree of man-

agement or supervisory responsibility" at the minesite, the Board held the inspectors had complied with the presentation requirement of 30 CFR 721.12(a). 2 IBSMA at 266-67, 81 I.D. at 433.

As is indicated in the preceding discussion, our decisions concerning the presentation-of-credentials requirement in 30 CFR 721.12(a) have struck a balance between a mine operator's interest in the safe and orderly conduct of mining operations, and the Department's interest, on behalf of the public at large, in avoiding operator subterfuge or unwarranted delays in mine inspections. With this balance in mind, we examine the circumstances of the instant case.

[1] Most noteworthy of the facts of this case, as regards the operation of 30 CFR 721.12(a), are that during the time of OSM's inspection there was no mining activity in progress at the Johnson minesite, nor was there anyone associated with previous mining activity present at the site. Accordingly, there was no risk of interference with the safe and orderly conduct of mining operations by the OSM inspectors. Appellant has asserted no other interest protected by the regulation that may have been transgressed by the OSM inspectors; therefore, we conclude that it was an error for the Administrative Law Judge to vacate the notice of violation issued by OSM on the basis that the inspectors violated 30 CFR 721.12(a).

For the foregoing reasons the decision below is reversed and this

⁶ This requirement is a limited restriction on OSM's general authority under 30 U.S.C. § 1267(b)(3) (Supp. II 1978) and 30 CFR 721.12(a) to conduct inspections without advance notice or search warrants. See comment 11 to Part 721, 42 FR 62664 (Dec. 13, 1977).

case is remanded to the Hearings Division for further review.⁷

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

HAVLAH GROUP

60 IBLA 349

Decided December 22, 1981

Appeal from decision of Cottonwood Resource Area Headquarters, Bureau of Land Management, Cottonwood, Idaho, disapproving plan of operations for mining claim within proposed wilderness study area.

⁷ We decline to rule whether coal removed from the Johnson property affected interstate commerce. OSM has expressed concern over the Administrative Law Judge's statement, made at the conclusion of the review hearing, "I have to find at least at this point that the coal taken by Dr. Johnson and Malvary Johnson from the site in question has not been shown to enter interstate commerce" (Tr. 210-11). There was, however, no ruling related to this statement in the Administrative Law Judge's written decision; therefore, any ruling by the Board in this regard would be premature. We do note, however, for the guidance it may provide in the further course of proceedings to review OSM's enforcement actions against the Johnsons, that the burden of proving an exception from the coverage of the Act, such as that recognized in 30 CFR 700.11 (a) concerning the extraction of coal for non-commercial use, lies with the party claiming the exception and not with OSM. See, e.g., *Hardly Able Coal Co.*, 2 IBSMA 332, 338, 87 I.D. 557, 560 (1980); *Daniel Brothers Coal Co.*, 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980); *James Moore*, 1 IBSMA 216, 223-24, 86 I.D. 369, 373-74 (1979).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Generally

The Bureau of Land Management is directed by sec. 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that the continuation of existing mining uses in the same manner and degree in which they were being conducted on the date of enactment of FLPMA (Oct. 21, 1976) is allowed. Such grandfathered use is properly regulated to prevent unnecessary or undue degradation of the land and its resources.

2. Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Generally

The existence of mining operations actually being conducted on the land on Oct. 21, 1976, and not mere statutory right to use is required to authorize subsequent mining activities in the same manner and degree.

3. Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Generally

A mining claim located prior to the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976) on which a valid discovery has existed from Oct. 21, 1976, to the present constitutes a valid existing right. The owner of such a claim on land under wilderness review will be allowed to continue mining operations to full development even if operations will impair wilderness suitability, subject to regulation to preclude unnecessary or undue degradation of the land and its resources.

APPEARANCES: Claude Marcus, Esq., Boise, Idaho, for Havlah Group; Roger W. Nesbit, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

*OPINION BY
ADMINISTRATIVE JUDGE
GRANT
INTERIOR BOARD OF
LAND APPEALS*

Havlah Group, a limited partnership, brings this appeal from a decision of the Cottonwood Resource Area Headquarters, Bureau of Land Management (BLM), Cottonwood, Idaho, dated Aug. 20, 1980, disapproving the plan of operations of mining claims filed in accordance with Departmental regulations at 43 CFR Subpart 3802,¹ issued pursuant to sec. 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976).

The background of the decision is provided by documents in the record on appeal. The record contains a copy of a letter dated July 28, 1980, from the BLM Area Manager to Gerald Kooyers, general partner of Havlah Group. Enclosed with the letter was a notice of noncompliance, also dated July 28, 1980, advising appellant that mining operations being carried out in connection with the claims were in violation of regulations at 43 CFR

Subpart 3802 for failure to obtain prior BLM approval of a plan of operations for mining activities in the proposed Marshall Mountain Wilderness Study Area (WSA).² The notice also warned appellant that conduct of further operations without compliance would be enjoined by court action.

The letter further notified appellant that:

If you feel you have a "valid existing right," meaning a valid discovery on October 21, 1976, and continuing to the present time on any of your claims, please submit data supporting this contention. For BLM to determine whether you have a "valid existing right" as defined by 43 CFR 3802, you will be required to show evidence of such discovery as of the 1976 date (43 CFR 3802.0-5(k)). Supporting data might include assay reports, engineers' reports, or other pertinent data substantiating the discovery on each claim.

Subsequently, pursuant to a complaint filed in the United States District Court³ an injunction was issued on Aug. 20, 1980, enjoining appellant from certain activities related to the mining claims within the proposed WSA, including road building, logging of trees over 2 inches in diameter, and construction of a tailings pond, unless such activities are conducted in accordance with a plan of operations approved by BLM.

Havlah Group's plan of operations filed with BLM outlined certain planned activities in conjunc-

¹ Departmental regulations in 43 CFR Subpart 3802, Exploration and Mining, Wilderness Review Program, were published in the *Federal Register* (45 FR 13968) on Mar. 3, 1980, and were effective Apr. 2, 1980.

² Inventory unit Idaho 62-10, Marshall Mountain, consisting of 6,524 acres, has subsequently been designated a wilderness study area. 45 FR 75587 (Nov. 14, 1980).

³ *United States v. Havlah Group*, Civ. No. 80-2065 (D. Idaho, filed Aug. —, 1980).

tion with its mining claims. The public lands affected by the plan were described as portions of secs. 8, 9, and 17, T. 24 N., R. 5 E., Boise meridian, Idaho. The proposed activities included a waste rock dump, construction of roads, tailings pond, millsite, hydroelectric plant, campsite, and sawmill.

The BLM decision appealed from found that the claims in issue are located within the proposed Marshall Mountain WSA to be reviewed for suitability or nonsuitability for preservation as wilderness. No grandfathered existing uses under sec. 603 of FLPMA, 43 U.S.C. § 1782 (1976), or valid existing rights as defined in 43 CFR 3802.0-5(k) were recognized in this case. Accordingly, BLM held that the public lands under review are subject to interim management to prevent impairment of the area's wilderness suitability.

Regarding Havlah's proposed activities, the BLM decision concluded, based on an environmental assessment, that the anticipated impacts are such that the waste rock dump and construction of roads, tailings pond, and millsite would impair the suitability of the proposed WSA for preservation as wilderness. The Area Manager estimated that it would take about 30 years to properly reclaim the area and, therefore, it would be impossible to reclaim the area to the non-impairment standard by the time the wilderness study is scheduled to be completed and recommendations submitted on the suitability of the

area. The decision held that the hydroelectric plant, campsite, and sawmill are proposed activities which would not impair wilderness suitability with proper mitigating measures, but that it is impossible to separate these activities from the total plan to make them allowable.

On appeal Havlah contends that its claims were located prior to Oct. 21, 1976, that they have been kept in good standing since that time, and that appellant presently has a crew of 9 to 10 men working the claims. Further, appellant contends that the decision is arbitrary, inequitable, without support in law or fact, and an abuse of BLM's discretionary authority. It is alleged that appellant has "grandfather" rights for the mine operation and is not required to submit a plan of operations. Appellant asserts that the decision violates the mining rights of appellant, that the decision misinterprets and violates applicable Federal statutes and regulations concerning restrictions on mining within the WSA, that BLM has no authority under applicable law to require a plan of operations, and, that if BLM does have the authority, it does not have the power to reject a plan which is reasonable and does not violate any laws pertaining to mining or wilderness areas.

In response, the Government states that Havlah purchased certain mining claims adjacent to and within the proposed WSA sometime after Oct. 21, 1976. It is asserted that activities on these claims ter-

minated about February 1942 and they had remained dormant through Oct. 21, 1976, until Havlah commenced operations in the fall of 1979. It is alleged that Havlah does not qualify for "grandfather" rights because the use must be actual and existing on Oct. 21, 1976, and that a mere entitlement to mining use of the land is not sufficient. Finally, a hearing is requested by the Solicitor on the issue of whether appellant has a "valid existing right" which would allow it to develop the claims even if it would impair wilderness characteristics.

The Secretary of the Interior is directed by sec. 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), to review those roadless areas of 5,000 acres or more identified during the inventory of the public lands as having wilderness characteristics⁴

⁴ Secs. 103(i) and 603 of FLPMA, 43 U.S.C. §§ 1702(i) and 1782 (1976), incorporate by reference the definition of wilderness characteristics embodied in section 2(c) of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1976), set forth as follows:

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

and to make a recommendation to the President regarding the suitability or nonsuitability of each such area for preservation as wilderness. Specific guidance with respect to management of those identified lands pending completion of the review and action by Congress in response to the recommendations is provided by sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), which states in pertinent part:

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: *Provided*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

This management mandate for wilderness review lands is further tempered by the provision of sec. 701(h) of FLPMA that all actions of the Secretary under the Act shall be subject to "valid existing rights." 43 U.S.C. § 1701 note (1976).

Regulations implementing this management authority require an approved plan of operations for mining activities on lands under wilderness review prior to conducting operations which might impair wilderness values such as construc-

tion of access roads, cutting of trees over 2 inches in diameter, or use of mechanized earthmoving equipment such as bulldozers. 43 CFR 3802.1-1. An approved plan of operations is not required for operations continued in the same manner and degree as operations existing on Oct. 21, 1976, unless they are causing undue or unnecessary degradation of the land and its resources. 43 CFR 3802.1-3.

Three critical issues are raised by this appeal. The first is whether rejection of appellant's plan of operations on the ground of impairment of wilderness characteristics is contrary to the express exception in sec. 603(c) of FLPMA allowing "continuation of existing mining * * * uses * * * in the manner and degree in which the same was being conducted on the date of approval of this Act." (43 U.S.C. § 1782(c) (1976)). A second issue is whether the BLM decision rejecting the plan of operations on the ground of impairment is reasonable and supported by the record. Finally, this case presents the issue of whether rejection of appellant's plan of operations for mining claims located prior to enactment of FLPMA on the ground of impairment of wilderness characteristics is contrary to sec. 701(h) of FLPMA, 43 U.S.C. § 1701 note (1976), which requires that all actions of the Secretary of the Interior under the statute shall be subject to "valid existing rights."

[1, 2] Sec. 603(c) of FLPMA provides a bifurcated standard for management of tracts of land of

5,000 acres or more identified as having wilderness characteristics. BLM is authorized to manage the lands so as to prevent impairment of wilderness characteristics unless the lands are subject to an existing mining, grazing, or mineral leasing use. Sec. 603(c) authorizes continuation of such existing uses in the same "manner and degree" as they were being conducted on Oct. 21, 1976. In the case of such an existing use conducted in the same manner and degree, BLM is authorized to regulate only so as to prevent unnecessary or undue degradation of the environment. *State of Utah v. Andrus*, 486 F. Supp. 995, 1005 (D. Utah 1979); 43 CFR 3802.1-3. The existence of some operation which is actually being conducted on the land on Oct. 21, 1976, is a prerequisite to authorization of subsequent activities in the same manner and degree. The statute is referring to actual existing uses, as distinguished from statutory rights to use the land, when it authorizes continuation of existing uses in the same manner and degree. *State of Utah v. Andrus*, *supra* at 1006.

The record supports the finding of BLM that the development of appellant's claims detailed in the plan of operations exceeded the manner and degree of any mining use of the claims existing on Oct. 21, 1976, and, accordingly, did not constitute a grandfathered use. Although assessment work as required by law was apparently carried on prior to Oct. 21, 1976, there is no indication of development work in

the nature of the work detailed in the rejected plan of operations.

Further, the record supports the BLM determination that the operations proposed in the rejected plan would impair the suitability of the subject area for wilderness designation contrary to the interim management guidelines provided in sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976).

"Impairment of suitability for inclusion in the Wilderness System" is defined in 43 CFR 3802.0-5(d) as follows:

(d) "Impairment of suitability for inclusion in the Wilderness System" means taking actions that cause impacts, that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make a recommendation to the President on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System or have degraded wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness.

The environmental assessment prepared by BLM in order to evaluate Havlah's plan of operations sets forth the impact of implementation of such operations in detail. For example, with respect to the ore processing mill it was found that:

An area of about one acre in size would be cleared for the mill, terraced down the mountain. Most of the area cleared would be grand fir, 6-20" in diameter. Access would require the construction of about 400' of new road. The road width is assumed to be 12-14 feet wide, which would accommodate the trucks Havlah plans to use. The area disturbed from road construction could easily exceed 30 feet wide

due to steep topography and the extensive cut and fill required.

(Environmental Assessment at 2). Regarding the mine tailings pond, the assessment found that approximately 11½ acres would have to be cleared for the pond and a 30-foot high dike constructed requiring substantial earthmoving. The assessment found that the waste rock dump would entail dumping approximately 22,000 cubic yards of rock in an area of steep topography resulting in a "long downcast area of several hundred feet" (Environmental Assessment at 5). Accordingly, the record supports the decision of BLM that the activities proposed in the plan of operations would impair the suitability of the area for wilderness designation.

[3] The final issue is whether rejection of appellant's plan of operations for mining claims located prior to FLPMA (Oct. 21, 1976) is consistent with the provision of sec. 701(h) of FLPMA, 43 U.S.C. § 1701 note (1976), to the effect that all actions of the Secretary of the Interior under the Act shall be subject to "valid existing rights." The term "valid existing right" is defined in the regulations as requiring a valid discovery on a mining claim as of Oct. 21, 1976, which discovery continues to be valid at the time of exercise of the right. 43 CFR 3802.0-5(k). The interim management policy developed by BLM for management of lands under wilderness review provides that mining claimants who located claims on or before Oct. 21, 1976, and are able to demonstrate a discovery as of that date under the Mining Law of 1872, as

amended, 30 U.S.C. §§ 22-24, 26-28, 29, 30, 33-35, 37, 39-42 (1976), "will be allowed to continue their mining operations to full development even if the operations are causing or will cause impairment." U.S. Department of the Interior, Bureau of Land Management, *Interim Management Policy and Guidelines For Land Under Wilderness Review*, 44 FR 72013, 72031 (Dec. 12, 1979) (hereinafter cited as *Interim Management Policy*); *Solicitor's Opinion*, M-36910 (Supp.), 88 I.D. 909 (1981).⁵ The interim management policy further provides that the operator will be required to show evidence of such a discovery prior to any BLM grant of approval and that BLM may verify the data through field examination and, if necessary, initiate contest proceedings. *Interim Management Policy*, *supra* at 72031. The interim management policy further notes that reasonable access will also be granted to valid pre-FLPMA claims and that such access will be regulated to prevent or minimize impairment of the area's wilderness suitability to the extent possible consistent with enjoyment of claimant's rights.

⁵ Mining activities in connection with pre-FLPMA claims where "valid existing rights" are established are subject to regulation by the Secretary of the Interior to prevent unnecessary or undue degradation of the lands and their resources. 43 U.S.C. § 1782(c) (1976); *Solicitor's Opinion*, M-36910 (Supp.), 88 I.D. 909 (1981). Since this regulation extends only to activities which are not necessary or which are excessive or unwarranted in mining development, no constitutional issue of a taking is presented. *Solicitor's Opinion*, *supra*. Further, the right to develop locatable mineral resources on the public lands under the Mining Law of 1872 was expressly made subject to "regulations prescribed by law." 30 U.S.C. § 22 (1976).

Interim Management Policy, *supra* at 72031. Accordingly, the regulations and the interim management policy expressly recognize and protect valid existing rights of mining claimants within wilderness study areas.

It is not unreasonable to require a claimant to make a preliminary showing of facts which support a valid existing right. Upon such a showing, BLM may elect either to contest the validity of the claim with notice to claimant and opportunity for a hearing or to permit operations in connection with the claim even though they may impair wilderness characteristics. Although appellant was invited by letter of BLM to make such a showing, the record does not reveal that any supporting evidence has been tendered to BLM at this time. In the absence of tender to BLM of a preliminary showing of factual data supporting the existence of a discovery, the decision is properly affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. RANDALL GRANT, JR.

Administrative Judge

WE CONCUR:

GAIL M. FRAZIER

Administrative Judge

DOUGLAS E. HENRIQUES

Administrative Judge

ISLAND CREEK COAL CO.**3 IBSMA 383**

Decided *December 23, 1981*

Petition for discretionary review by Island Creek Coal Co. of that part of a June 27, 1980, decision by Administrative Law Judge Tom M. Allen upholding a violation of 30 CFR 715.17(a) described in Notice of Violation No. 79-I-13-25 (Docket No. CH 0-78-P).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharge From Disturbed Areas

Effluent limitations are applicable under 30 CFR 715.17 to discharges of drainage from areas disturbed by surface coal mining and reclamation operations, and not only to discharges of drainage from an "active mine area," as defined in the U.S. Environmental Protection Agency's regulations for effluent limitations under the coal mining point source category, set forth at 40 CFR Part 434.

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

Under the provisions of 30 CFR 715.17, the effluent limitations are not applicable to any discharge or overflow caused by precipitation or snowmelt in accordance with the regulations of the U.S. Environ-

mental Protection Agency in 40 CFR Part 434.

3. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

Entitlement to an exemption from the application of effluent limitations to discharges from a sedimentation pond resulting from a precipitation event is conditioned on a demonstration that the sedimentation pond was constructed and has been maintained to contain or treat the volume of water which would run off into the pond during a 10-year 24-hour or greater precipitation event.

4. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

The U.S. Environmental Protection Agency's provisions, at 40 CFR 122.63(g) and (h), for a credit for pollutants in discharges attributable to intake waters, if applicable under 30 CFR 715.17, require that the credit be authorized in a permit for a surface coal mining and reclamation operation on the basis of a demonstration that the intake water is drawn from the same body of water into which discharges are made.

5. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

December 23, 1981

Under 30 CFR 715.17, the effluent limitations are to be applied at the point of discharge from a sedimentation pond or the last pond in a series of sedimentation ponds, absent express prior approval to the contrary by the regulatory authority.

APPEARANCES: George S. Brook II, Esq., Lexington, Kentucky, for Island Creek Coal Co.; James M. McElfish and Mark Squillace, Attorneys, Division of Surface Mining, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

*OPINION BY INTERIOR
BOARD OF SURFACE
MINING AND RECLAMATION
APPEALS*

Island Creek Coal Co. (Island Creek) has petitioned the Board to review the June 27, 1980, decision by Administrative Law Judge Tom M. Allen upholding a violation of 30 CFR 715.17(a) in Notice of Violation No. 79-I-13-25. The violation concerned an alleged failure to comply with the numerical effluent limitations of 30 CFR 715.17(a) for total suspended solids at five sampling points. For the reasons stated below, the decision is affirmed.

*Factual and Procedural
Background*

On July 26, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),¹ two inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited Island Creek's Rebel No. 2 mine in Logan County, West Virginia. The Rebel No. 2 mine covers approximately 340 acres under West Virginia permit

66-77 (Tr. 13-15). Island Creek is the permittee, Rebel Coal Co. the contract miner (Tr. 15). Drainage from the permit enters Trace Fork from three principal drainage areas: Dave White Hollow (drainage area A); the hollow behind Rhodes Souther's home (drainage area B); and Stone Hollow (drainage area C) (Exhs. R-2, R-3; Tr. 135-36).²

The maximum allowable concentration for total suspended solids is 70 mg/l. 30 CFR 715.17(a). Analyses of samples taken by the OSM inspectors on July 26 showed total suspended solid levels:

Sample 1: 4845 mg/l (Tr. 37)

Sample 2: 2785 mg/l (Tr. 39)

Sample 3: 700 mg/l (Tr. 39)

Sample 4: 940 mg/l (Tr. 39)

Sample 5: 240 mg/l (Tr. 39).

Samples 1 through 4 were taken at the points of discharge from four separate sedimentation structures located on the bench of the Dorothy coal seam (Exh. R-2; Tr. 37-40, 62). These structures (bench ponds) were located in drainage area B. Sample 5 was taken at the point of discharge from pond 1 in drainage area A (Exh. R-3; Tr. 33). While an OSM inspector testified that all five samples were taken at the permit boundary (Tr. 33, 64), a witness for petitioner indicated that the permit boundary actually ranged from approximately 40 to 136 feet away from the locations where sample 1 through 4 were taken (Tr. 159-60). The Administrative Law

² The inspectors had observed a muddy condition in Trace Fork near the OSM field office in Holden, West Virginia. They followed the condition upstream to Island Creek's mine.

¹ 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

Judge found in favor of petitioner in this regard (Decision at 4-5), and OSM has not seriously challenged this finding on appeal (Brief for OSM at 3, 5-6). Rock riprap and vegetation existed between sample sites 1 through 4 and the permit boundary (Tr. 160). Petitioner's witness testified that the riprap and the vegetation would have filtered out some of the suspended solids (Tr. 182).

An OSM inspector stated that on the date of inspection the four bench ponds were all heavily silted and provided little or no detention time (Exh. R-4A-K; Tr. 25, 29-30). During the inspection there was a light drizzle. A heavy rain occurred on July 26 after the inspection (Tr. 59). OSM produced the rainfall records for an area approximately 5 miles northeast of the minesite (Tr. 56-57) which showed the following amounts of rainfall: July 21—.03 inches; July 22—none; July 23—.16 inches; July 24—.46 inches; July 25—none; July 26—.62 inches (Exh. R-10; Tr. 57). Petitioner's Director of Engineering testified that the company recorded more than one-half inch of rain on July 25 and 1.28 inches of rain on July 26 at the minesite (Tr. 165, 168-69). Petitioner's Corporate Director for Environmental Affairs testified that a 10-year, 24-hour precipitation event would be 4 inches in 24 hours (Tr. 215).

Discussion

Petitioner has presented three defenses against the applicability of the Department's effluent limitations to the discharges sampled by the

OSM inspectors; each of these defenses is based on the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980). Before addressing petitioner's arguments we summarize the relevant aspects of that decision.

The Circuit Court examined the Department's interim effluent limitations to determine whether they conformed with sec. 702(a) of the Surface Mining Act, 30 U.S.C. § 1292(a) (Supp. II 1978), which provides: "Nothing in this chapter shall be construed as superseding, amending, modifying, or repealing * * * (3) The Federal Water Pollution Control Act (79 Stat. 903), as amended (33 U.S.C. 1151-1175) * * * the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality."³ Appellants

³ The Circuit Court explained the basis of its analysis in the following language:

"Congress certainly recognized in the Surface Mining Act that the EPA's existing regulatory authority under the Federal Water Pollution Control Act was deficient with respect to surface coal mining, in that EPA could not directly regulate discharges from abandoned and underground mines or from nonpoint sources (i.e., discharges not emanating from a 'discernible, confined, and discrete conveyance'). Congress also knew that EPA lacked statutory authority to establish standards 'requiring comprehensive preplanning and designing for appropriate mine operating and reclamation procedures to ensure protection of public health and safety and to prevent the variety of other damages to the land, the soil, the wildlife, and the aesthetic and recreational values that can result from coal mining.' H.R. Rep. No. 45, * * * [94th Cong., 1st Sess. 134 (1975)]. The Act gave the Secretary authority to regulate in these areas because the Federal Water Pollution Control Act was silent in regard to them, but where the Secretary's regulation of surface coal mining's hydrologic impact overlaps EPA's, the Act expressly directs that the Federal Water Pollution Control Act

in the litigation had challenged the interim effluent regulations on the grounds that there were omitted from them three "vital" elements of the regulatory framework imposed by the Environmental Protection Agency (EPA) under the Federal Water Pollution Control Act: (1) A provision for modification of the effluent limitations for a particular mining operation upon a showing of good cause; (2) an exemption from effluent limitations for discharges attributable to abnormal levels of drainage; and (3) a provision for a credit in the measurement of suspended solids for the amount of suspended solids in discharges attributable to sources other than the mining operation. 627 F.2d at 1366. The Circuit Court agreed that the identified elements of EPA's regulatory framework must be included in the Department's effluent limitation regulations, in accordance with sec. 702(a)(3) of the Surface Mining Act, and remanded the issue to the District Court for proceedings consistent with its opinion. *Id.* at 1366-69.⁴

and its regulatory framework are to control so as to afford consistent effluent standards nationwide."

627 F.2d at 1367.

⁴ The Circuit Court expressed its holding:

"We hold that the EPA variances and exemptions at issue here are substantive elements of regulation under the Federal Water Pollution Control Act, and not 'gaps' in EPA's statutory authority or administration, and that the Secretary, pursuant to section 702(a)(3), may not alter these variances and exemptions by promulgating more stringent provisions insofar as the variances and exemptions apply to surface coal mining operations. Thus, sections 715.17(a) and 717.17(a) are 'inconsistent with law' if they do, in fact, conflict with EPA practice."

627 F.2d at 1369 (footnote omitted).

The District Court issued its judgment decree on May 13, 1981, which included the following:

ORDERED that 30 C.F.R. §§ 715.17(a) and 717.17(a) are remanded to the Secretary for revision to provide that the Secretary shall accept the variances, exemptions and related practice applied by EPA under the authority of the Federal Water Pollution Control Act with respect to a discharge classified as a Coal Mine Source Category; and it is further

ORDERED that 30 C.F.R. §§ 715.17(a) and 717.17(a) are remanded to the Secretary for revision according to the provisions of 40 C.F.R. §§ 434.22(c), 434.25(c), 434.32(b), 434.35(b), 434.42(b), and 434.45(b), and it is further

ORDERED that pending revision of 30 C.F.R. §§ 715.17(a) and 717.17(a) according to the previous two paragraphs, the Secretary shall apply 30 C.F.R. §§ 715.17(a) and 717.17(a) in a manner which is consistent with the revisions required to be made under the previous two paragraphs.

In re Surface Mining Regulation Litigation, No. 78-0162 (D.D.C. filed May 13, 1981).⁵

[1] Petitioner first argues on the basis of the Circuit Court's decision that the Department's effluent limitations are not applicable to the discharges sampled by OSM because these discharges were not of drainage from "active mining area[s]," as defined by EPA in 40 CFR 434.11, and, under EPA's regulations, 40 CFR 434.32(c), 434.42(c), and 434.45(c), drainage which is not from an "active mine area" is not subject to effluent limitations. We take a different view of the import

⁵ In response to the District Court's judgment decree, the Department proposed certain amendments to sec. 715.17(a). 46 FR 34784-89 (July 2, 1981). Final rules have not been issued.

of the Circuit Court's decision in this regard.

In evaluating the Department's effluent limitation regulations, the Circuit Court did not expressly consider whether their application must be limited to drainage from an active mining area. 627 F. 2d at 1366-69. On remand, the District Court did not refer particularly to the EPA regulatory provisions now invoked by petitioner. Accordingly, we are not constrained by these Federal court pronouncements to accept petitioner's argument. Moreover, we conclude that the Circuit Court's decision supports a contrary view from that of petitioner.

The Circuit Court determined that, consistent with sec. 702(a) (3) of the Act, the Secretary could augment EPA's regulatory framework for surface coal mining in respects in which EPA's authority is deficient.⁶ One such deficiency acknowledged by the Circuit Court was EPA's lack of statutory authority to establish reclamation procedures to ensure protection of public health and safety.⁷ The requirements in sec. 715.17(a) that drainage from disturbed areas, "including disturbed areas that have been graded, seeded, or planted," must be passed through a sedimentation pond and that discharges from such disturbed areas must meet effluent limitations are a part of such reclamation procedures which, under the Circuit Court's reasoning, properly complement EPA's regulatory authority under the Federal Water Pollution

Control Act.⁸ For this reason we reject petitioner's argument that effluent limitations are applicable only to discharges of drainage from an "active mine area" as defined by EPA.⁹

[2, 3] Petitioner also argues that the effluent limitations are not applicable to the discharges sampled by OSM, under the Circuit Court's

⁶ In this regard we note that in the amendments to sec. 715.17(a) proposed by the Department (referenced in n.5, *supra*) the requirement for control of effluents in drainage from disturbed areas through the reclamation phase of a mining operation has been retained. 46 FR 34789 (July 2, 1981).

⁷ We note, further, that if we were to accept petitioner's argument that effluent limitations are only applicable to drainage from an "active mine area" we would hold that drainage sampled by OSM was from active mining areas.

The term "active mining area" is defined by EPA in 40 CFR 434.11(b) as "a place where work or other activity related to the extraction, removal, or recovery of coal is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun." The Administrative Law Judge examined this definition in the context of the drainage area for pond 1 and correctly determined that because the area above Island Creek pond 1 was constantly in use as a haul and service road to the mining facilities, it came within the definition of an active mining area (Decision at 5). The evidence discloses that an office, trailers, and equipment were also located above pond 1 (Tr. 155-56). Petitioner argues that since the area is regraded, it falls within the exception in 40 CFR 434.11(b). However, that subsection excepts only those areas on which "grading has been completed to return the earth to desired contour and reclamation work has begun." 30 CFR 715.17(1) requires removal and regrading of all haul and access roads. 30 CFR 715.14 requires restoration to approximate original contour of office and shop sites on the disturbed area. Since such removal and regrading were not completed, nor such restoration begun, the area above pond 1 does not fall within the exception. Thus, it remains an "active mining area."

Petitioner's Director of Engineering testified that there was backfilling activity taking place in the drainage area controlled by the Dorothy bench ponds at the time of OSM's sampling (Tr. 164-68); therefore, it may be concluded in accordance with EPA's definition that these ponds also received drainage from active mining areas.

⁶ Footnote 3, *supra*.

⁷ *Id.*

decision, *supra*, because these discharges were the result of a precipitation event and thus were not subject to effluent limitations under EPA's regulations. We agree with petitioner that EPA's precipitation event exemption must be taken into account in the application of effluent limitations by the Department; however, we hold that petitioner has not shown itself to be entitled to the exemption under the facts of this case.

On Dec. 31, 1979, the Department suspended 30 CFR 715.17(a)(1), which exempted from the coverage of the effluent limitations all discharges resulting "from a precipitation event larger than a 10-year, 24-hours frequency event" (44 FR 77448 (Dec. 31, 1979)), and indicated that it would rely on EPA's exemption regulations published on Dec. 28, 1979, at 44 FR 76791. EPA's exemption regulations provide:

(b) Any overflow, increase in volume of a discharge or discharge from a bypass system caused by precipitation or snowmelt shall not be subject to the limitations set forth in paragraph (a) of this section. This exemption shall be available only if the facility is designed, constructed and maintained to contain or treat the volume of water which would fall on the areas covered by this subpart during a 10-year 24-hour or larger precipitation event (or snowmelt of equivalent volume). *The operator shall have the burden of demonstrating to the appropriate authority that the prerequisites to an exemption set forth in this paragraph have been met.* [Italics added.]

40 CFR 434.32(b), 434.35(b), 434.42(b), and 434.45(b). OSM has described an operator's burden of

demonstrating entitlement to the exemption as follows:

In order to show this the mine operator must show, first, that he or she has designed, constructed, and maintained the facility to contain or treat the volume of water which would run off into the pond during a 10-year 24-hour or greater precipitation event. Second, the mine operator must show that there has been an actual overflow, increase in volume of a discharge, or discharge from a by-pass system caused by a precipitation event. 44 FR 77450 (Dec. 31, 1979).

It is questionable whether the evidence in this case can support the conclusion that there was sufficient rainfall during and immediately preceding July 26 to cause an increase in the volume of discharge from the sedimentation ponds prior to and during OSM's inspection.¹⁰ Even assuming that there was sufficient precipitation to increase the discharges, however, it is clear that neither pond 1 nor the bench ponds were so constructed and maintained as to be eligible for the precipitation event exemption, for although petitioner contends that pond 1 was, if anything, overdesigned (Tr. 220, 229; *see also* Petition for Review at 8-10),¹¹ this contention is based upon the fact that it (and the bench ponds) were designed and constructed to treat the runoff from only the "active mining area" as this term is understood by peti-

¹⁰ Compare 44 FR 77450 (Dec. 31, 1979) wherein OSM admonishes that "conclusory, self-serving statements will not suffice to justify [a rainfall] exemption" with text.

¹¹ Petitioner's Director of Engineering conceded that the Dorothy bench ponds were insufficiently maintained to hold the requisite volume of water on the date of inspection (Tr. 231), and he was uncertain about the design and construction of these (Tr. 220-221, 229).

tioner (e.g., Tr. 221, 227, 229). In contrast, EPA's regulations require that drainage which is not from an active mining area must be considered for purposes of applying effluent limitations when such drainage is commingled with drainage from an active mine area. 40 CFR 434.32(c), 434.35(c), 434.42(c), and 434.45(c). The Department has explained the significance of these regulations for the precipitation event exemption:

It is important to note what this rainfall exemption does not do. * * * [T]he exemption does not relieve the mine operator of either treating water from the undisturbed area above the mining area that mixes with water from the disturbed area or diverting that water from the undisturbed area around and away from the pond. *If an operator does not divert, his or her pond must be designed, constructed and maintained to hold or treat the entire volume of runoff that reaches the pond in the prescribed precipitation event in order to qualify for the exemption.* [Italics added.]

44 FR 77450-51 (Dec. 31, 1979).

Sedimentation pond 1 and the bench ponds all received commingled drainage from active mining areas and undisturbed areas (e.g., Tr. 233-36). None was designed or constructed to contain or treat that volume of water (e.g., Tr. 229). Thus, petitioner is not entitled to claim exemption from the effluent limitations on the basis of a rainfall event.

[4] Petitioner's final argument based on the Circuit Court's decision, *supra*, is that the effluent limitations do not apply to pond 1 or the Dorothy bench ponds because petitioner received no "credit" for pollutants which may have been

present in water entering the mine-site (intake water). The Circuit Court held that 30 CFR 715.17(a) and 717.17(a) should be amended to reflect the EPA intake credit provision if it is determined that such provision was intended to apply to surface mining operations. Without making such a determination, the District Court remanded to the Secretary of the Interior. To our knowledge, the Secretary has not yet determined to what extent the EPA intake credits apply to surface mining operations.

Assuming, *arguendo*, that EPA's intake credit, or offset provision, found at 40 CFR 122.63 (g) and (h) (formerly 40 CFR 125.28), does apply to surface mining operations, petitioner clearly has failed to meet the burden of proof imposed by EPA. 40 CFR 122.63(g) provides: "Except as provided in paragraph (h) of this section, effluent limitations imposed in permits *shall not be adjusted for pollutants in the intake water.*" (Italics added.) Thus, the general rule is that effluent limitations are not adjusted for pollutants in the intake water.

In order to demonstrate its entitlement to the offset, the permittee must demonstrate its compliance with the requirements of paragraph (h). Island Creek failed to do this. For example, 40 CFR 122.63(h) (1) provides.

Upon request of the discharger, effluent limitations or standards imposed in a permit shall be calculated on a "net" basis; that is, adjusted to reflect credit for pollutants in the discharger's intake water, if the discharger demonstrates that its intake water is drawn from the same body of water into which the discharge is made *and if* * * *. [Italics added.]

Subparagraph (2) of 40 CFR 122.63(h) states in part: "Adjustments under this paragraph shall be given only to the extent that pollutants in the intake water which are limited in the permit are not removed by the treatment technology employed by the discharger." No evidence whatsoever was presented by petitioner that it ever requested or received such a credit. Moreover, it is questionable whether any "intake water" entered the sedimentation ponds (Tr. 79). Even if some did, it was certainly not "drawn from the same body of water into which the discharge [was] made." Clearly, appellant is not entitled to any credit or offset for intake water.

[5] Petitioner's remaining defense, separate from those based on the Circuit Court's decision, is that the samples taken of discharges from the bench ponds were not taken at proper locations, and therefore, that OSM failed to establish a violation of the effluent limitations on the basis of these samples. We disagree. Petitioner contends that the sample sites for samples 1 through 4 were proven to be 40 to 136 feet from the permit boundary and that vegetation and rock riprap between the sample sites and the permit boundary would have filtered out "some" of the suspended solids. According to petitioner, 30 CFR 715.17(a) requires drainage to meet the effluent limitations at the edge of the disturbed area which, in the area of the Dorothy bench, is the permit boundary.¹²

With respect to this issue the Administrative Law Judge stated as follows:

It is obvious that the inspector took samples at the easiest point of access and certainly where the suspended solid count would be the highest. Also, sediment drainage control on a haul road, without more, can hardly be expected to remove all excess suspended solids since they are not sedimentation ponds nor designed to provide protections required of sedimentation ponds as envisioned by 30 CFR 715.17(a). This is especially true if there is any measurable amount of rain in the area during mining operations.

One cannot rely on natural vegetation to act as a sediment control device required by the Act where there is no dispute that drainage from such an area is leaving the permit property and is not going through a sedimentation pond or a series of sedimentation ponds as is required by 30 CFR 715.17(a). In the instant case, because of the size of drainage area B, it is apparent that the bench ponds are insufficient to keep the effluent limitations within the maximum allowable amounts prescribed by 30 CFR 715.17(a).

I feel certain that if the inspector had taken his samples at a point where the surface drainage exited the permit property, the effluent limitations would probably still have been exceeded even if traveling 150 feet or more through riprap.

(Decision at 4-5).

Sec. 715.17(a) of the regulations provides that "[a]ll surface drainage from the disturbed area * * * shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area," that "[s]edimentation ponds * * * shall be constructed * * * in appropriate locations * * * to control sedimentation or otherwise treat water," and that "[d]ischarges

¹² Petitioner has not challenged the sampling location of discharges from pond 1.

from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the * * * numerical effluent limitations [set forth in sec. 715.17(a)]." Under these provisions, unless effluent control measures other than or in addition to sedimentation ponds have been approved by the regulatory authority under other provisions of 30 CFR 715.17, the point of discharge at which numerical effluent limitations are to be applied is the point at which drainage from the disturbed area leaves the last sedimentation pond through which it is passed.¹³ Sedimentation ponds are, as the general rule, the method prescribed to control sedimentation in or otherwise treat drainage from areas disturbed from surface coal mining operations.¹⁴

There is no indication in the record of approval by the West Virginia regulatory authority of pe-

titioner's reliance on effluent control measures below the Dorothy bench ponds to meet the Department's effluent limitations. Accordingly, while the use of riprap and vegetation by petitioner in the ditches which carry discharges from those ponds may manifest compliance with 30 CFR 715.17(f)—which requires that discharges from sedimentation ponds be controlled, where necessary, to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize, generally, disturbances to the hydrologic balance—this action has not relieved petitioner of the obligation to ensure that the drainage from disturbed areas meets the Department's effluent limitations at the points of discharge from the Dorothy bench ponds.¹⁵ We must, therefore, reject petitioner's contention that OSM's samples were not taken at proper locations.

For the foregoing reasons, the decision below is affirmed.

NEWTON FRISHBERG

Administrative Judge

WILL A. IRWIN

Administrative Judge

MELVIN J. MIRKIN

Administrative Judge

¹³ Where other or additional effluent control methods have been authorized or mandated by the regulatory authority (e.g., pursuant to the provisions of 30 CFR 715.17(e)(22)), the approved deviation from the general prescription should include specification of the locations where discharges are to be tested for compliance with the effluent limitations.

Absent such authorization, were OSM to wait until discharges reached the permit boundary (where the point of discharge from a sedimentation pond does not coincide with that boundary) the operator could be subject to a notice of violation when the discharge from a pond is within prescribed limits but has become contaminated on its way to the boundary by pollution not of the operator's cause or responsibility. When there is no proper sedimentation pond and no approved deviation by the regulatory authority, the boundary may be a proper test point.

¹⁴ See generally 44 FR 30619-32 (May 25, 1979). We note, also, that EPA's effluent limitations for the coal mining point source category are to be applied to discharges from "point sources" (40 CFR 434.32(a), 434.35(a), 434.42(a), and 434.45(a)), which are de-

fined at 40 CFR 401.11(d) to mean "discernible, confined and discrete" conveyances of drainage. OSM's sampling of drainage from disturbed areas at its point of discharge from a sedimentation pond is consistent with this feature of EPA's application of effluent limitations to mine drainage. See generally *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979).

¹⁵ The requirement of 30 CFR 715.17 is for the purpose of precluding significant erosion that might otherwise result from discharges from sedimentation ponds; it is not intended as a prescription of methodology to meet the effluent limitations.

INDEX-DIGEST

(Note—See front of this volume for tables)

ACCOUNTS

(See also Fees, Funds, Payments—if included in this Index.)

PAYMENTS

1. A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. A regulation specifying a bank money order as an acceptable form of remittance requires the acceptance of a personal money order issued by a bank.-----

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REFUNDS

1. Sec. 10 of the Outer Continental Shelf Lands Act does not authorize refunds to purchasers of royalty oil.-----
2. Sec. 10 of the Outer Continental Shelf Lands Act does not authorize refunds to persons who have paid a civil penalty under sec. 24 of the Act.-----

1090

1090

ACT OF FEBRUARY 8, 1887

1. The effect of the issuance of a patent is to transfer legal title from the United States and to remove the land from jurisdiction of the Department of the Interior. Where BLM's records show lands have been patented, an Indian allotment application filed under the General Allotment Act of Feb. 8, 1887, for such lands is properly rejected.-----

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ACT OF AUGUST 4, 1892

1. Under provisions of the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1976), known as the Building Stone Act, land chiefly valuable for building stone can only be entered by mining claims in the placer form, regardless of the actual mode of occurrence of the deposit.-----
2. While deposits of limestone chiefly valuable for building stone were subject to location only as placer claims, deposits of limestone valuable for their chemical or metallurgical properties are properly located according to the form of their deposition.-----
3. Land may be considered "chiefly valuable for building stone" where the building stone values of the mineral deposit sought are greater than any other mineral values or nonmineral values for which the land may be appropriated.-----

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ACT OF MARCH 3, 1909

1. Patents issued pursuant to the Act of Mar. 3, 1909, or the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976) reserved to the United States "all coal" and the right to prospect for, mine and remove the "coal deposits" underlying the patented lands. Congress in the 1909 and 1910 Acts intended to, and did, reserve only the coal and not other minerals found in association with coal. Accordingly, all minerals other than coal, including coalbed gas, passed to the surface owner at the time a patent was issued pursuant to the 1909 or 1910 Acts.-----

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ACT OF JUNE 22, 1910

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1. Patents issued pursuant to the Act of Mar. 3, 1909, or the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976) reserved to the United States "all coal" and the right to prospect for, mine and remove the "coal deposits" underlying the patented lands. Congress in the 1909 and 1910 Acts intended to, and did, reserve only the coal and not other minerals found in association with coal. Accordingly, all minerals other than coal, including coalbed gas, passed to the surface owner at the time a patent was issued pursuant to the 1909 or 1910 Acts.----- 538

ACT OF JUNE 25, 1910

1. The President had nonstatutory authority to withdraw public land in addition to authority conferred upon him by the Pickett Act, 43 U.S.C. §§ 141, 142 (1970). Such non-statutory authority was not limited by the terms of 43 U.S.C. § 142 (1970) which provided that withdrawn lands shall remain open to location for metalliferous minerals.----- 31
2. Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals.----- 31

ACT OF JULY 17, 1914

1. Should coalbed gas occur in lands in which "oil and gas" were reserved to the United States in agricultural patents issued under the Act of July 17, 1914, 30 U.S.C. § 121 (1976), that coalbed gas is reserved to the United States.----- 538

ACT OF SEPTEMBER 3, 1964

1. Congress, with the passage of the Geothermal Steam Act, 30 U.S.C. § 1001 *et seq.*, intended that geothermal leases be deemed as within the mineral leasing exception of sec. 4(d)(3) of the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3). Designated wilderness are open to geothermal leasing to the same extent they would have been at the date of their creation. Such leases are subject to the provisions of sec. 4(d)(3) of the Wilderness Act.----- 813

ACT OF DECEMBER 24, 1970

1. "Mineral." Geothermal steam, as defined in sec. 2(c) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1001(c), is not a "mineral" as the term is used in the mineral leasing laws. Congress generally did not intend the Steam Act to be treated as a "mineral leasing law."----- 813

ADMINISTRATIVE AUTHORITY

(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior—if included in this Index.)

GENERALLY

1. Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.----- 370, 919

ADMINISTRATIVE AUTHORITY—Continued

Page

ESTOPPEL

1. Exclusion of appellant members of the Metlakatla Community from benefits under provisions of the Alaska Native Claims Settlement Act held not to be precluded by a contrary result reached in a prior Administrative Law Judge's decision in a similar case. The determination by the agency factfinder in the separate but similar situation is not binding upon the Board of Indian Appeals, which renders final decision for the Department in disenrollment appeals referred on appeal to the Board.----- 822
2. Where a party, in the course of various proceedings before the Department, asserts facts that would, if proven, entitle him or her to obtain patent to land owned by the United States, and the litigation proceeds on the assumption that the facts are as stated, appellant will not be heard in a subsequent hearing to deny that those facts existed.----- 926

LACHES

1. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers.----- 915

ADMINISTRATIVE PRACTICE

1. Interpretation of the Alaska Native Claims Settlement Act by the Bureau of Indian Affairs contemporaneous with the enactment of the statute and continued over the succeeding 9 years is relevant to a determination of the application to be given to the statute. The Agency refusal to enroll persons who were not United States citizens on Dec. 18, 1971, the effective date of the Act, is a reasonable application of the Act and of Departmental regulations implementing the Act, and gives the language of the statute (43 U.S.C. § 1604 (1976)) its common and ordinary meaning.----- 262
2. Where, following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future.----- 772
3. Where a party, in the course of various proceedings before the Department, asserts facts that would, if proven, entitle him or her to obtain patent to land owned by the United States, and the litigation proceeds on the assumption that the facts are as stated, appellant will not be heard in a subsequent hearing to deny that those facts existed.----- 926

ADMINISTRATIVE PROCEDURE

(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice—if included in this Index.)

GENERALLY

1. "Service." Where BLM sends a copy of its decision to an adversely affected party at his address of record on Sept. 21; where additional information containing the party's more recent address is filed with BLM on Oct. 5;

ADMINISTRATIVE PROCEDURE—Continued

Page

GENERALLY—Continued

and where BLM receives the mailed copy back as undeliverable on Oct. 16 but does not mail another copy to the more recent address, BLM has not mailed a copy to the party's last address of record, and there is no "service" under 43 CFR 1810.2. Where BLM has never served a copy of its decision on an adversely affected party, the time for this party to appeal has never commenced, and the decision is not effective *per* 43 CFR 4.21(a)-----

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ADJUDICATION

1. Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and in fact did so, in enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases-----
2. Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered, with due regard for the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal-----

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ADMINISTRATIVE REVIEW

1. Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered, with due regard for the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal-----
2. Where, following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future-----
3. A finding by BLM that some statutory mechanism has been triggered which automatically divests a right does not and cannot mean that the adversely affected party is denied recourse to the appellate process. The Board of Land Appeals is the exclusive arbiter of its jurisdiction, and neither employees of BLM nor attorneys of the Office of the Solicitor may create or deny the right of appeal to the Board-----

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ADMINISTRATIVE PROCEDURE--Continued
BURDEN OF PROOF

Page

1. After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that an individual has committed a grazing trespass if that finding is in accordance with, and supported by, reliable, probative and substantial evidence.----- 275
2. Where the evidence as to specific trespass indicates that, of a number of cattle counted, some were located on intermingled private land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. The burden then shifts to the grazing licensee to rebut this presumption.----- 276

DECISIONS

1. After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that an individual has committed a grazing trespass if that finding is in accordance with, and supported by, reliable, probative and substantial evidence.----- 275
2. Where the evidence as to specific trespass indicates that, of a number of cattle counted, some were located on intermingled private land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. The burden then shifts to the grazing licensee to rebut this presumption.----- 276
3. Where, in a Bureau of Land Management decision to issue conveyance, a water body excluded from the selection application on the basis that it is navigable is expressly "considered" nonnavigable and the underlying submerged lands thus deemed selected by the applicant, the Bureau of Land Management has made a navigability determination with regard to the subject water body.----- 1086, 1105

HEARINGS

1. Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.----- 31
2. After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that an individual has committed a grazing trespass if that finding is in accordance with, and supported by, reliable, probative and substantial evidence.----- 275
3. Where the evidence as to specific trespass indicates that, of a number of cattle counted, some were located on intermingled private land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. The burden then shifts to the grazing licensee to rebut this presumption.----- 276
4. Settlement agreements compromising prior trespasses may be considered an admission of liability only where, by the terms of a settlement, liability is admitted. Where, however, liability has been initially determined in a Departmental adjudication, such a determination is properly considered in a subsequent hearing. As probative of the issue of "repeated" violations, absent a stipulated settlement which *expressly* vacates the factual determinations made in the prior adjudication.----- 276

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NATIVE ALLOTMENTS

1. An Alaskan Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others, and not merely intermittent use. While qualifying use must be substantially continuous, there is requirement that the 5-year use be in a consecutive 5-year period..... 373
2. The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land *and* the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native. In a similar fashion, all possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy. Such lands then become open to the initiation of rights by others.... 373
3. The provisions of 25 U.S.C. § 194 (1976) relating to the placing of the burden of proof do not apply where the Government contests the qualifications of an allotment applicant. An allotment applicant in such a situation is the proponent of the rule and must show his or her entitlement to the land sought..... 374
4. In sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), Congress provided that all Native allotment applications which were pending before the Department on Dec. 18, 1971, which describe either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve—Alaska, are approved on the 180th day following the effective date of that Act subject to valid existing rights, unless otherwise provided by other paragraphs or subsections of that section. Although only non-mineral land may be allotted, Congress has defined that term as used in the Native Allotment Act to include land valuable for deposits of sand and gravel..... 663
5. Applications for Alaska Native allotments in "core" townships of Native villages are subject to the statutory approval contained in sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, notwithstanding a State selection or tentative approval thereof for the same lands prior to Dec. 18, 1971..... 664

NAVIGABLE WATERS

Generally

1. Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable..... 712

OIL AND GAS LEASES

1. An offer to lease for oil and gas in the Arctic National Wildlife Refuge is properly rejected where the lands in the refuge have been withdrawn from the operation of the mineral leasing laws by either secs. 1002 or 1003 of the Alaska National Interest Lands Conservation Act. Stand-

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OIL AND GAS LEASES—Continued

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- ard offers to lease for oil and gas may not be construed as requests to undertake exploratory activities only. The only exploratory activities permitted in the Arctic National Wildlife Refuge are governed by sec. 1002 of the Act. Any requests to undertake exploratory activities are premature until the Secretary of the Interior has issued guidelines governing exploration in the refuge.----- 601
2. "Leasing." The word "leasing" in the phrase "no leasing * * * leading to production of oil and gas" in sec. 1003 of the Alaska National Interest Lands Conservation Act includes leasing for the purpose of exploratory activities.----- 601

POSSESSORY RIGHTS

1. The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land *and* the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native. In a similar fashion, all possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy. Such lands then become open to the initiation of rights by others.----- 373

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

1. An offer to lease for oil and gas in the Arctic National Wildlife Refuge is properly rejected where the lands in the refuge have been withdrawn from the operation of the mineral leasing laws by either secs. 1002 or 1003 of the Alaska National Interest Lands Conservation Act. Standard offers to lease for oil and gas may not be construed as requests to undertake exploratory activities only. The only exploratory activities permitted in the Arctic National Wildlife Refuge are governed by sec. 1002 of the Act. Any requests to undertake exploratory activities are premature until the Secretary of the Interior has issued guidelines governing exploration in the refuge.----- 601

ALASKA NATIVE CLAIMS SETTLEMENT ACT

ABORIGINAL CLAIMS

1. The provisions of the Alaska Native Claims Settlement Act defining the class of persons entitled to share in benefits under the Act are not ambiguous so as to require reference to the legislative history to determine whether persons becoming United States citizens after Dec. 18, 1971, the effective date of the Act, are entitled to be enrolled.----- 262

ADMINISTRATIVE PROCEDURE

Generally

1. Pursuant to the Departmental Manual 601 DM 2, requirements in Secretary's Order No. 3029, as to adjudication of Federally created interests, do not apply to unpatented mining claims and the Bureau of Land Management is not required to adjudicate mining claims before conveyance. Pursuant to ANCSA and Secretary's Order No. 3029, *as amended*, lands selected by a Native corporation must be conveyed by the Bureau of Land Management notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws.----- 760

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**ADMINISTRATIVE PROCEDURES—Continued****Generally—Continued**

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2. In the absence of allegation of error in the decision itself, an allegation that an internal unpublished agency practice regarding predecision procedure was violated does not provide a basis for appeal to this Board.....	886
3. The general language of 43 CFR 2650.0-2 and § 2(b) of the Alaska Native Claims Settlement Act that the settlement of claims of Alaska Natives be accomplished with maximum participation by Natives in decisions affecting their rights and property does not establish an appealable right to predecision notice of Departmental intent to reject a selection...	886
4. Departmental regulations at 43 CFR 2653.5, insofar as they prescribe a specified course of action including publication, referral, investigation, conferring, reporting, etc., by the Department with regard to selections of public lands made pursuant to § 14(h)(1) of the Alaska Native Claims Settlement Act, cannot apply when the selected lands are not public lands and the selection applications must be rejected at the outset.....	886
5. Where, in a Bureau of Land Management decision to issue conveyance, a water body excluded from the selection application on the basis that it is navigable is expressly "considered" nonnavigable and the underlying submerged lands thus deemed selected by the applicant, the Bureau of Land Management has made a navigability determination with regard to the subject water body.....	1086, 1105
6. In the absence of an issue regarding error in the decision itself, allegations of irregularities or deficiencies in the predecision procedure, such as noncompliance with the pertinent section of ANCSA and its implementing regulations, do not provide a basis for appeal to this Board.....	1086, 1105

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1. Where conveyance of land to a Native corporation under ANCSA would effectively deny a pending application for a right-of-way across such land, the applicant is entitled to a decision expressly granting or denying the right-of-way and stating the reasons therefor.....	353
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Conveyances

1. Rights-of-way granted by Revised Statutes Sec. 2477 shall be identified in the decision to issue conveyance and in the conveyance document in the same manner as other third-party interests which the Bureau of Land Management need not adjudicate.....	629
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Decision to Issue Conveyance

1. Departmental policy expressed in Secretary's Order No. 3029 and converted into the Departmental Manual at 601 DM 2.3 and 2.4 does not require the Bureau of Land Management to identify or adjudicate alleged third-party interests derived from sources other than the Federal Government or the State of Alaska.....	443
2. Rights-of-way granted by Revised Statutes Sec. 2477 shall be identified in the decision to issue conveyance and in the conveyance document in the same manner as other third-party interests which the Bureau of Land Management need not adjudicate.....	629
3. Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.....	712

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| 4. The general language of 43 CFR 2650.0-2 and § 2(b) of the Alaska Native Claims Settlement Act that the settlement of claims of Alaska Natives be accomplished with maximum participation by Natives in decisions affecting their rights and property does not establish an appealable right to predecision notice of Departmental intent to reject a selection.. | 886 |
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Publication

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| 1. Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7..... | 712 |
| 2. The general language of 43 CFR 2650.0-2 and § 2(b) of the Alaska Native Claims Settlement Act that the settlement of claims of Alaska Natives be accomplished with maximum participation by Natives in decisions affecting their rights and property does not establish an appealable right to predecision notice of Departmental intent to reject a selection.. | 886 |

ALASKA NATIVE CLAIMS APPEAL BOARD**Appeals****Generally**

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|--|------------|
| 1. Where the Federal Government grants a right-of-way for a Federal aid material site, that right-of-way, if valid, is a valid existing right within the meaning of § 14(g) of ANCSA, and as such a patent issued pursuant to ANCSA must contain provisions making it subject to the right-of-way..... | 14 |
| 2. If the terms of the right-of-way grants were violated, the rights-of-way would not be automatically terminated but would be subject to cancellation within the discretion of the Bureau of Land Management..... | 14 |
| 3. When the record before the Bureau of Land Management raises questions which may affect the validity of Federally created third-party interests, Secretary's Order No. 3029 requires the Bureau of Land Management to determine through adjudication, the validity of such interests..... | 14 |
| 4. The Board is bound by duly promulgated Departmental regulations as well as by Departmental policy expressed in Secretarial Orders published in the <i>Federal Register</i> or set forth in the Departmental Manual... | 760 |
| 5. In the absence of allegation of error in the decision itself, an allegation that an internal unpublished agency practice regarding predecision procedure was violated does not provide a basis for appeal to this Board..... | 886 |
| 6. In the absence of an issue regarding error in the decision itself, allegations of irregularities or deficiencies in the predecision procedure, such as non-compliance with the pertinent section of ANCSA and its implementing regulations, do not provide a basis for appeal to this Board..... | 1086, 1105 |

Dismissal

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| 1. An appeal will be dismissed when an appellant has failed to file additional pleadings ordered by the Board pursuant to 43 CFR Part 4, Subpart J, 4.907, and further fails to comply with an order of the Board requiring a showing of cause..... | 511 |
| 2. Absent reasons justifying continuance of an appeal as to a particular issue, an appeal will be dismissed when the appellant before the Board withdraws its appeal of that issue..... | 712 |
| 3. An appeal to the Secretary of the Interior will be dismissed when enactment of legislation renders moot the questions raised on appeal..... | 757 |

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**ALASKA NATIVE CLAIMS APPEAL BOARD—Continued****Appeals—Continued****Jurisdiction**

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1. Where a decision by the BLM involves the effect of the Alaska Native Claims Settlement Act upon an interest, or pending application for an interest derived under the public land laws, including the general mining law and mineral leasing acts, any appeal from such decision shall be directed to the Alaska Native Claims Appeal Board. Where the decision by the BLM involves the validity of an interest, or pending application for an interest, asserted under the public land laws, including the general mining law and mineral leasing acts, any appeal from such decision shall be directed to the Interior Board of Land Appeals.----- 352
2. The Board has jurisdiction to decide whether the Bureau of Land Management, in issuing a decision to convey land pursuant to ANCSA, erred by failing to identify and adjudicate an alleged third-party interest derived from a source other than the Federal Government or the State of Alaska.----- 442
3. The Board is without jurisdiction to adjudicate the validity of a Native allotment.----- 718
4. The approval of the Alaska State Director of the Bureau of Land Management of a general plan of action for meeting the requirements of sec. 22(k) of the Alaska Native Claims Settlement Act is not a decision "rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act" within the context of 43 CFR 4.1(b)(5), and an appeal from the approval of such a plan must be dismissed by this Board for lack of jurisdiction.. 1027

Remand

1. When the record on appeal raises questions which may affect the validity of Federally created third-party interests, and when there is no evidence that a determination of validity has been made pursuant to Secretary's Order No. 3029, the Board will remand to the Bureau of Land Management for such determination.----- 14

Standing

1. The appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed" as required by 43 CFR 4.902.----- 460
2. Decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.----- 460
3. Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.----- 460
4. An individual claiming standing to appeal a § 17(b)(1) public easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b)(2) private access right.----- 461

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**ALASKA NATIVE CLAIMS APPEAL BOARD—Continued****Appeals—Continued****Standing—Continued**

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5. The appropriate test for determining standing to appeal a decision made pursuant to ANCSA is whether a party "claims a property interest in land affected by a determination" appealable to this board.-----	513
6. Where an assertion that a property interest is affected by a decision to convey is based on the effect of a possible future waiver of administration by the agency presently administering a lease, and such waiver is discretionary with the agency under § 14(g) of ANCSA, the alleged effect on the property interest is too speculative to meet the requirement of 43 CFR 4.902.-----	513
7. Decisions pursuant to ANCSA affect property interests differently, depending, in part, upon the section of the Act on which each decision is based. Application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.---	1028
8. Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as a "property interest affected" within the meaning of 43 CFR 4.902.-----	1029
9. Where appellants seek a public access easement under § 17(b)(1) of ANCSA, they may rely on their patented homesite, located outside the conveyance, as a property interest for purposes of meeting the standing requirements of 43 CFR 4.902.-----	1029
10. Where appellants claim that their homesite is affected by the Bureau of Land Management's failure to reserve a § 17(b)(1) public access easement, along a road used by appellants and the public, because in the absence of such an easement their present access route to the homesite may be cut off by the proposed conveyance to a Native corporation, this is a claim that their property interest is affected within the terms of 43 CFR 4.902.-----	1029
11. Sec. 17(b)(2) of ANCSA assures that persons who have valid existing uses do not lose access rights because of the public easements provided by § 17(b)(1). The private right of access provided to holders of valid existing rights pursuant to § 17(b)(2) of ANCSA is separate from the right provided by § 17(b)(1) of public access routes. An individual claiming standing to appeal a public easement decision must assert public use of the desired easement to distinguish it from a private access right under § 17(b)(2). However, the possibility of protection under § 17(b)(2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to meet the standing requirements of 43 CFR 4.902.-----	1029
12. The appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party," but whether a person "claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed" as required by 43 CFR 4.902.-----	1039
13. Decisions made pursuant to ANCSA affect property interests differently, with the effect depending, in part, upon the section of the Act on which each decision is based. Therefore, application of the standing test in 43 CFR 4.902 must take into account the section of the Act relied upon in the decision under appeal.-----	1039

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14. Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.----- 1039
15. An individual claiming standing to appeal a § 17(b)(1) public easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b)(2) private access right.----- 1039
16. When a municipality's "interest" in a particular tract of land is based only on the possibility that some day it may acquire the land under the provisions of the Federal Property and Administrative Services Act of 1949, *as amended*, the municipality's "interest" is to speculative to constitute a "property interest" under 43 CFR 4.902.----- 1047
17. The appropriate test of standing to appeal a decision under ANCSA is not whether a person is an "aggrieved party" but whether a person "claims a property interest in lands affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed"----- 1048
18. The Act of Jan. 2, 1976, P.L. 94-204, 89 Stat. 1145, *as amended*, was clearly an amendment to ANCSA and the standing requirements of the original Act (43 CFR 4.902) apply to the amendments.----- 1048

CONVEYANCES

Generally

1. The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.----- 636
2. When the State of Alaska's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the Decision to Issue Conveyance.----- 636
3. When lands have been selected by a Native corporation and approved by the Bureau of Land Management for conveyance under ANCSA, such lands may be excluded from conveyance only pursuant to provisions of ANCSA or implementing regulations which constitute an exception to the requirements of Secretary's Order No. 3029, *as amended*.----- 760
4. Exclusion of the disputed mining claims from conveyance, pending their adjudication, is not permitted under any provision of ANCSA or implementing regulations.----- 761
5. The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.----- 1087, 1105

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6. When the State of Alaska's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the Decision to Issue Conveyance----- 1086, 1105

Easements

1. The existence of a Revised Statutes Sec. 2477 right-of-way precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing right-of-way----- 629
2. The continued existence of a Revised Statutes Sec. 2477 right-of-way following conveyance of the underlying fee interest is entirely independent of any reservation, pursuant to § 17(b), of a public easement.. 629

Valid Existing Rights**Generally**

1. A right-of-way under 43 U.S.C. § 959 (1976), issued before conveyance under ANCSA of the underlying land, would be a valid existing right protected under § 14 (g) of the Act----- 352
2. The private right of access protected by § 17 (b) (2) of ANCSA for holders of valid existing rights is separate from public access routes specifically identified pursuant to § 17 (b) (1). Possible protection under § 17 (b) (2) does not preclude an individual from asserting that a public easement decision affects his or her property interest so as to meet the standing test of 43 CFR 4.902----- 460
3. When a lease is identified in a Decision to Issue Conveyance as a § 14 (g) interest, and the conveyance is made subject to such interest, then all rights the lessee holds under the terms of the lease, if valid, are protected and there remains no issue which the lessee may appeal as to the effect of the conveyance on the lease----- 513
4. Possible protection under § 17 (b) (2) does not preclude an individual from asserting that a public easement decision affects his or her property interest so as to meet the standing test of 43 CFR 4.902----- 1039

Third-Party Interests

1. Sec. 14(g) of ANCSA mandates identification, in conveyance documents issued pursuant to ANCSA, of only those interests issued by the United States or the State of Alaska. Alleged third-party interests derived from sources other than the United States or the State of Alaska are not within the scope of § 14(g) of ANCSA----- 443
2. Departmental policy expressed in Secretary's Order No. 3029 and converted into the Departmental Manual at 601 DM 2.3 and 2.4 does not require the Bureau of Land Management to identify or adjudicate alleged third-party interests derived from sources other than the Federal Government or the State of Alaska----- 443
3. The existence of a Revised Statutes Sec. 2477 right-of-way precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing right-of-way----- 629

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5. Rights-of-way granted by Revised Statutes Sec. 2477 shall be indentified in the decision to issue conveyance and in the conveyance document in the same manner as other third-party interests which the Bureau of Land Management need not adjudicate.....	629
6. The Board will order the exclusion of a disputed Native allotment from the conveyance of lands pursuant to the Alaska Native Claims Settlement Act pending adjudication of the disputed allotment.....	718
7. Pursuant to the Departmental Manual 601 DM 2, requirements in Secretary's order No. 3029, as to adjudication of Federally created interests, do not apply to unpatented mining claims and the Bureau of Land Management is not required to adjudicate mining claims before conveyance. Pursuant to ANCSA and Secretary's Order No. 3029, <i>as amended</i> , lands selected by a Native corporation must be conveyed by the Bureau of Land Management notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws.....	760
8. When an unpatented mining claim is situated within lands selected and approved for conveyance under ANCSA, the possessory interest of the mining claimant is protected under provisions of § 22(c) and 43 CFR 2650.3-2 as a valid existing right notwithstanding that the Bureau of Land Management has not adjudicated such unpatented mining claims prior to conveyance.....	761

DEFINITIONS

Public Lands

Generally

1. The Department of the Interior under provisions of ANCSA and regulations in 43 CFR has both the authority and responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.....	636
2. "Public lands" as defined by § 3(e) of the Alaska Native Claims Settlement Act do not include lands identified for selection by the State of Alaska prior to Jan. 17, 1969.....	886
3. The Bureau of Land Management under provisions of ANCSA and regulations in 43 CFR has both the authority and responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.....	1086, 1105

DISENROLLMENT

Metlakatla Natives

1. The provisions of the Alaska Native Claims Settlement Act specifically exclude members of the Metlakatla Tribe of the Annette Islands Reserve from benefits under the Act. Where appellant and her children periodically resided at Metlakatla, accepted benefits from the Metlakatla Tribe as tribal members, were enrolled members since 1968, and did not initiate efforts to terminate tribal membership until 1974,

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**DISENROLLMENT—Continued****Metlakatla Natives—Continued**

appellants were enrolled members of Metlakatla within the meaning of the Alaska Native Claims Settlement Act and were properly excluded from enrollment under the Act.....	Page 57
2. Exclusion of appellant members of the Metlakatla Community from benefits under provisions of the Alaska Native Claims Settlement Act held not to be precluded by a contrary result reached in a prior Administrative Law Judge's decision in a similar case. The determination by the agency factfinder in the separate but similar situation is not binding upon the Board of Indian Appeals, which renders final decision for the Department in disenrollment appeals referred on appeal to the Board.....	822

EASEMENTS**Access**

1. Sec. 17(b)(2) of ANCSA protects the private right of access, provided for under existing law, to any valid right recognized by ANCSA.....	1029
2. Sec. 17(b)(2) of ANCSA assures that persons who have valid existing uses do not lose access rights because of the public easements provided by § 17(b)(1). The private right of access provided to holders of valid existing rights pursuant to § 17(b)(2) of ANCSA is separate from the right provided by § 17(b)(1) of public access routes. An individual claiming standing to appeal a public easement decision must assert public use of the desired easement to distinguish it from a private access right under § 17(b)(2). However, the possibility of protection under § 17(b)(2) does not preclude the holder of a property interest from asserting that an easement decision affects his interest so as to meet the standing requirements of 43 CFR 4.902.....	1029

Public Easements

1. Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.....	460
2. The private right of access protected by § 17(b)(2) of ANCSA for holders of valid existing rights is separate from public access routes specifically identified pursuant to § 17(b)(1). Possible protection under § 17(b)(2) does not preclude an individual from asserting that a public easement decision affects his or her property interest so as to meet the standing test of 43 CFR 4.902.....	460
3. An individual claiming standing to appeal a § 17(b)(1) public easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b)(2) private access right.....	461
4. The existence of a Revised Statutes Sec. 2477 right-of-way precludes neither the reservation of an overlapping § 17(b) public easement nor the conveyance of the underlying fee. Such reservation or conveyance does not affect the previously existing right-of-way.....	629

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6. Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as a "property interest affected" within the meaning of 43 CFR 4.902.....	1029
7. Where appellants seek a public access easement under § 17(b)(1) of ANCSA, they may rely on their patented homesite, located outside the conveyance as a property interest for purposes of meeting the standing requirements of 43 CFR 4.902.....	1029
8. Where appellants claim that their homesite is affected by the Bureau of Land Management's failure to reserve a § 17(b)(1) public access easement, along a road used by appellants and the public, because in the absence of such an easement their present access route to the homesite may be cut off by the proposed conveyance to a Native corporation, this is a claim that their property interest is affected within the terms of 43 CFR 4.902.....	1029
9. Since the purpose of a § 17(b)(1) public easement is to provide access across Native lands to lands not selected, such an easement necessarily affects lands other than those to be conveyed. Therefore, in asserting standing to appeal a § 17(b)(1) easement decision, a member of the public who claims a private interest in land other than the land to be conveyed may rely on this private holding as his or her "property interest" affected within the meaning of 43 CFR 4.902.....	1039
10. Possible protection under § 17(b)(2) does not preclude an individual from asserting that a public easement decision affects his or her property interest so as to meet the standing test of 43 CFR 4.902.....	1039
11. An individual claiming standing to appeal a § 17(b)(1) public easement decision must assert public use of the desired easement in order to distinguish it from a § 17(b)(2) private access right.....	1039

ENROLLMENT

1. The provisions of the Alaska Native Claims Settlement Act defining the class of persons entitled to share in benefits under the Act are not ambiguous so as to require reference to the legislative history to determine whether persons becoming United States citizens after Dec. 18, 1971, the effective date of the Act, are entitled to be enrolled.....	262
2. Interpretation of the Alaska Native Claims Settlement Act by the Bureau of Indian Affairs contemporaneous with the enactment of the statute and continued over the succeeding 9 years is relevant to a determination of the application to be given to the statute. The Agency refusal to enroll persons who were not United States citizens on Dec. 18, 1971, the effective date of the Act, is a reasonable application of the Act and of Departmental regulations implementing the Act, and gives the language of the statute (43 U.S.C. § 1604 (1976)) its common and ordinary meaning...	262

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**NATIVE LAND SELECTIONS****Regional Selections****Generally**

Page

1. Departmental regulations at 43 CFR 2653.5, insofar as they prescribe a specified course of action including publication, referral, investigation, conferring, reporting, etc., by the Department with regard to selections of public lands made pursuant to § 14(h)(1) of the Alaska Native Claims Settlement Act, cannot apply when the selected lands are not public lands and the selection applications must be rejected at the outset.....

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Allocations

1. Sec. 14(h)(8)(B) of ANCSA, which governs withdrawal and allocation of lands for selection by the Native regional corporation for southeastern Alaska, constitutes an exception to the requirement that lands withdrawn and allocated by the Secretary under § 14(h)(8) must be from unreserved and unappropriated lands outside areas withdrawn by §§ 11 and 16.....

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Selection Limitations

1. Regulations in 43 CFR 2651.4(e) cannot be applied to permit a selecting Native corporation to exclude lands within unpatented mining claims after the selection period has terminated.....
2. Only unreserved and unappropriated public lands are available for selection under § 14(h)(1) of the Alaska Native Claims Settlement Act.....

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NAVIGABLE WATERS

1. The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.....
2. When the State of Alaska's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the Decision to Issue Conveyance.....
3. Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.....
4. The Bureau of Land Management is not bound to make its navigability determinations in conformity with information provided by the State of Alaska pursuant to 43 CFR 2650.1(b) as to navigability of water bodies within lands selected under ANCSA, or to accept the State's conclusions as to navigability.....
5. When the State of Alaska's claim of ownership of submerged lands is based solely upon its own conclusions as to the navigability of water bodies within lands selected under ANCSA, and not upon a final adjudication of navigability, the mere assertion of the State's ownership does not constitute a claim of title in the submerged lands which requires the Bureau of Land Management to exclude such lands from the Decision to Issue Conveyance.....

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ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**WITHDRAWALS AND RESERVATIONS****Withdrawals for Native Selection****Generally****Page**

1. Sec. 14(h)(8)(B) of ANCSA, which governs withdrawal and allocation of lands for selection by the Native regional corporation for southeastern Alaska, constitutes an exception to the requirement that lands withdrawn and allocated by the Secretary under § 14(h)(8) must be from unreserved and unappropriated lands outside areas withdrawn by §§ 11 and 16.-----

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APPEALS

(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indian Tribes, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970—if included in this Index.)

1. "Service." Where BLM sends a copy of its decision to an adversely affected party at his address of record on Sept. 21; where additional information containing the party's more recent address is filed with BLM on Oct. 5; and where BLM receives the mailed copy back as undeliverable on Oct. 16 but does not mail another copy to the more recent address, BLM has not mailed a copy to the party's last address of record, and there is no "service" under 43 CFR 1810.2. Where BLM has never served a copy of its decision on an adversely affected party, the time for this party to appeal has never commenced, and the decision is not effective *per* 43 CFR 4.21(a)-----
2. Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered, with due regard for the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.-----
3. Where, following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining Claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future.-----
4. A finding by BLM that some statutory mechanism has been triggered which automatically divests a right does not and cannot mean that the adversely affected party is denied recourse to the appellate process. The Board of Land Appeals is the exclusive arbiter of its jurisdiction, and neither employees of BLM nor attorneys of the Office of the Solicitor may create or deny the right of appeal to the Board.-----

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ATTORNEYS

1. Qualifications to practice before the Department of the Interior are prescribed by regulations. Where an appeal is brought by a corporation that does not appear to fall within any of the categories of persons authorized to practice, the appeal is subject to dismissal.-----

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BALD EAGLE PROTECTION ACT

Page

1. Only those group which have received Federal acknowledgement of their Indian tribal status constitute Indian tribes, for purposes of sec. 2 of the Bald Eagle Protection Act..... 338

BUREAU OF INDIAN AFFAIRS

(See also Indian Probate—if included in this Index.)

ADMINISTRATIVE APPEALS

Generally

1. In reviewing action of the Bureau of Indian Affairs in raising grazing rental rates, the Board of Indian Appeals should overturn the action only if it is found to be unreasonable. As long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for the Board to substitute its judgment for the agency's..... 315
2. While it is true that the Klamath Termination Act, Aug. 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1976), rendered inapplicable to Klamath tribal members the Secretary's usual jurisdiction over Indian heirship determinations as set forth in 25 U.S.C. §§ 372-373 (1976) (see 25 U.S.C. § 564h), Congress, by the more recent Act of Oct. 1, 1965, 79 Stat. 897, 25 U.S.C. §§ 565-565g (1976), specifically empowered the Secretary of the Interior to determine the rightful heirs of deceased Klamath enrollees entitled to a share of judgment funds payable from the United States for the limited purpose of seeing that such funds are distributed to the heir or heirs so determined..... 619
3. The Secretary has no statutory authority to pay creditors' claims against estates of deceased Klamath Indians out of judgment funds distributable by the Secretary under the Act of Oct. 1, 1965, 79 Stat. 897..... 620

COAL LEASES AND PERMITS

(See also Mineral Leasing Act—if included in this Index.)

GENERALLY

1. Under the provisions of 30 U.S.C. § 188a (1976) accrued rentals on mineral leases are to be prorated on a monthly basis where the failure to file a timely surrender was not due to a lack of reasonable diligence on the part of the lessee..... 24

CANCELLATION

1. An ambiguous regulation relating to "the proper office" in which to file a relinquishment of a coal lease should not be interpreted to the detriment of a coal lessee who sought to comply with its provisions..... 24
2. The Boards of Appeal of the Department of the Interior have no authority to declare invalid a duly promulgated regulation of this Department. Where, however, the regulation was not properly promulgated, is lacking in statutory basis, and has been consistently ignored in actual practice, that regulation will be accorded no force or effect..... 24
3. Under the provisions of 30 U.S.C. § 188a (1976) accrued rentals on mineral leases are to be prorated on a monthly basis where the failure to file a timely surrender was not due to a lack of reasonable diligence on the part of the lessee..... 24

DILIGENCE

1. Although Congress revised the provision governing readjustment of federal coal leases in 1976, the deletion of the clause "unless otherwise provided by law at the time of expiration of such periods" from sec. 7 of the MIA (30 U.S.C. § 207) did not alter the Secretary's obligation not to establish any lease terms contrary to law in readjusting a coal lease..... 1003

COAL LEASES AND PERMITS—Continued

DILIGENCE—Continued

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2. The legislative history of sec. 6 of the Federal Coal Leasing Amendments Act shows that the revision of sec. 7 of the MLA (30 U.S.C. § 207) was not retroactive, but applied to new leases and to "old" leases upon readjustment. The ten-year production period and revised royalty rates of amended sec. 7 must be imposed on "old" coal leases at readjustment. The legislative history to the 1978 coal leasing revisions (Act of Oct. 30, 1978) discloses that Congress understood and acted on the assumption that the amended sec. 7 royalty rates did apply to all "old" leases upon readjustment.----- 1003

LEASES

1. Coalbed gas is not included in a coal lease under the MLA. In the coal leasing provision of the MLA, Congress did not provide for a coal lessee's extraction of minerals related to or associated with coal. 30 U.S.C. § 207 (Supp. II 1978). This provision does not authorize a coal lessee's extraction of coalbed gas, other than the venting of the gas required by mine health and safety laws and regulations.----- 538

PERMITS

Generally

1. Limitation of a coal prospecting permit to "unclaimed, undeveloped" lands restricts it to lands without valid, vested rights, existing at the time of issuance of the permit, which are adverse to the prospecting permit which is sought, and any preference right lease which may be earned pursuant to such a permit.----- 247
2. A prospecting permit may be issued for coal for which there is no valid, adverse claim at the time of issuance, notwithstanding the existence then of nonadverse claims, entries, or leases.----- 247
3. Issuance of a prospecting permit is presumed to be regular if no valid, adverse interest appeared in the land office records at the time of issuance of the permit.----- 247

READJUSTMENT

1. Although Congress revised the provision governing readjustment of federal coal leases in 1976, the deletion of the clause "unless otherwise provided by law at the time of expiration of such periods" from sec. 7 of the MLA (30 U.S.C. § 207) did not alter the Secretary's obligation not to establish any lease terms contrary to law in readjusting a coal lease.----- 1003
2. The legislative history of sec. 6 of the Federal Coal Leasing Amendments Act shows that the revision of sec. 7 of the MLA (30 U.S.C. § 207) was not retroactive, but applied to new leases and to "old" leases upon readjustment. The ten-year production period and revised royalty rates of amended sec. 7 must be imposed on "old" coal leases at readjustment. The legislative history to the 1978 coal leasing revisions (Act of Oct. 30, 1978) discloses that Congress understood and acted on the assumption that the amended sec. 7 royalty rates did apply to all "old" leases upon readjustment.----- 1003

RENTALS

1. An ambiguous regulation relating to "the proper office" in which to file a relinquishment of a coal lease should not be interpreted to the detriment of a coal lessee who sought to comply with its provisions.----- 24

COAL LEASES AND PERMITS—Continued

ROYALTIES

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1. Although Congress revised the provision governing readjustment of federal coal leases in 1976, the deletion of the clause "unless otherwise provided by law at the time of expiration of such periods" from sec. 7 of the MLA (30 U.S.C. § 207) did not alter the Secretary's obligation not to establish any lease terms contrary to law in readjusting a coal lease..... 1003
2. The legislative history of sec. 6 of the Federal Coal Leasing Amendments Act shows that the revision of sec. 7 of the MLA (30 U.S.C. § 207) was not retroactive, but applied to new leases and to "old" leases upon readjustment. The ten-year production period and revised royalty rates of amended sec. 7 must be imposed on "old" coal leases at readjustment. The legislative history to the 1978 coal leasing revisions (Act of Oct. 30, 1978) discloses that Congress understood and acted on the assumption that the amended sec. 7 royalty rates did apply to all "old" leases upon readjustment..... 1003

CONSTITUTIONAL LAW

GENERALLY

1. Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional..... 370, 919

DUE PROCESS

1. Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final..... 31

CONTRACTS

(See also Appeals, Claims Against the United States, Delegation of Authority, Labor, Rules of Practice—if included in this Index.)

CONSTRUCTION AND OPERATION

Actions of Parties

1. Where a contractor alleged that differing site conditions were encountered in constructing bored tunnels for the Navajo Indian Irrigation Project and resolution of the question as to what the contract indicated turned on the construction to be placed on the specifications and drawings relating to the nature of the support required to support the tunnels, as well as upon a Government estimate that approximately 80 percent of the tunnels would require support other than rockbolts, the Board found the contract to have indicated that the deterioration and disintegration encountered in driving the tunnels would be primarily of a surficial nature. In so finding the Board noted that in the disputed area the contract appears to be susceptible of more than one reasonable interpretation and that within the zones of reasonableness the Government as the author has to share the major responsibility for communicating its intentions as well as the main risk of failure to carry out that responsibility. Heavily weighted by the Board in reaching its decision was the fact that all four of the lowest bidders appeared to have construed the contract to indicate that the tunnels could be supported virtually entirely with rockbolts and that that construction was apparently known to the project construction engineer at the time of bid opening based upon his analysis of the bids received... 41

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Actions of Parties—Continued**

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2. Where an appellant acknowledges that it received a purchase order calling for moving Government-owned furniture and furnishings shortly prior to the move and the record shows that without making a protest of any kind the contractor proceeded with the move and that it subsequently billed the Government for the services rendered in accordance with the rate stated in the purchase order, the Board finds the purchase order to constitute the agreement of the parties..... 979

Allowable Costs

1. Where a cost-plus-fixed-fee contract expressly provided for the payment of finally negotiated overhead rates notwithstanding the foregoing provisions which include the limitation of cost provision, the Board finds that a claim for additional overhead costs is not subject to the limitation of the contract estimated costs..... 423
2. Under a cost-plus-fixed-fee contract where indirect costs are disallowed as excessive or not directly related to the performance of the contract, the Board finds the determination of allowable costs to improperly apply the standard for direct costs to indirect costs and on review of the costs in question finds entitlement to a portion of the disallowed costs..... 423
3. Where the invitation for bids instructs potential bidders to submit bids on each of three schedules independent of the other, and the bidder to whom the contract was ultimately awarded incurs additional cost as a result of anticipation of award of one of the schedules not included in the contract awarded, the Board holds that such cost must be borne by the contractor..... 518
4. Under a cost-plus-fixed-fee contract wherein the Government has agreed to reimburse the contractor for its allowable costs not exceeding a ceiling amount for reimbursement, the Board finds the disallowance of costs alleged to have resulted from an unauthorized change to have been improper because the otherwise allowable costs exceeded the contract ceiling amount by more than the disallowance..... 877
5. Under two cost-no-fee contracts with an educational institution requiring the work to be done in accordance with appellant's proposals and providing for a fixed-dollar amount to be paid for overhead expenses, the Board denies claimed overhead expenses attributable to the terminated portion of the performance time under the contracts and denies recovery as direct expense the salary of the project director because neither proposal contemplated this expense to be a direct cost..... 1017

Changed Conditions (Differing Site Conditions)

1. Under a contract for the construction of two concrete lined tunnels for the Navajo Indian Irrigation Project (Tunnel Nos. 3 and 3A) the Board finds a first category differing site conditions claim to have been established with respect to constructing Tunnel No. 3 where the conditions encountered by the contractor in that tunnel were shown to be materially different from those indicated in the contract..... 42
2. In a case involving the assertion of first and second category differing site conditions claims under a contract for the construction of two concrete lined tunnels (Tunnel Nos. 3 and 3A), a first category differing site conditions claim was not established with respect to Tunnel No. 3A where the Board found the contract to have indicated that the deterioration and disintegration to be anticipated in constructing the

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changed Conditions—Continued**

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two tunnels would be primarily surficial in nature but the evidence offered failed to show that the rock failures and fallout encountered in Tunnel No. 3A were due to overstressing and therefore nonsurficial in nature.....	42
3. A second category differing site conditions claim, asserted under a contract for the construction of two concrete lined tunnels for the Navajo Indian Irrigation Project (Tunnel Nos. 3 and 3A), is denied where the basis for the claim is that the rock failures and fallout encountered in constructing Tunnel No. 3A were due to overstressing (shear type failures) but the evidence of record failed to show that overstressing was the cause of such rock failures and fallout as occurred in that tunnel.....	42
4. A claim asserted under a Changed Conditions Clause by reason of alleged withholding of material information (first category) is denied where there is no evidence of record indicating that the Government either withheld material information or otherwise misrepresented the conditions the contractor would encounter in performing a tree thinning contract.....	305
5. A Government motion for summary judgment is granted and a claim for differing site conditions (based upon damages to the jobsite caused by runoff from a severe rainstorm) is denied where the Board finds that if all of appellant's factual allegations are accepted as true neither the differing site conditions clause nor any other clause in the contract provides a basis for granting the appellant relief for the claim asserted..	361
6. Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the quantity of roofing estimated by the Government and it is determined that the quantity of roofing required for performance of the contract could not have been verified by a prebid investigation, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions clause.....	722
7. A second category differing site conditions is found to exist where the Government tacitly acknowledged that double roofing encountered under a contract calling for reroofing of a building in Miami, Florida, constituted an unknown condition and the testimony offered in support of the contractor's claim shows that while double roofing is not unusual in some areas of the country, it is unusual in the southern areas where there is a lot of mildew and moisture, humidity, as would be true of the particular locale in which the instant contract was performed.....	723
8. Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the approximate quantities estimated by the Government in the invitation for bids and there was no provision included therein requiring or requesting that the quantities specified be verified by prospective bidders, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constituted a first category differing site condition for which the contractor is entitled to an equitable adjustment in the contract price.....	836

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changes and Extras**

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1. A claim predicated upon defective specifications is denied where assuming *arguendo* that the specifications were defective, the appellant failed to show that it incurred any additional costs by reason of the allegedly defective specifications..... 305
2. A claim asserted under the Changes clause for increased costs resulting from actions of the President in decontrolling the price of heavy crude oil is dismissed as being outside the jurisdiction of the Board since the President's action was a sovereign act taken as part of the program to maintain or increase production of heavy crude oil..... 431
3. Where at least four of seven bidders shared the same interpretation of the method of construction required by a contract for the construction of a bridge and none of the bidders were shown to have a different interpretation, the Board finds the contractor's interpretation to be reasonable and further finds that the Government's insistence on a different and more costly method of construction was a constructive change for which the contractor is entitled to an equitable adjustment.. 527

Construction Against Drafter

1. Where a contractor alleged that differing site conditions were encountered in constructing bored tunnels for the Navajo Indian Irrigation Project and resolution of the question as to what the contract indicated turned on the construction to be placed on the specifications and drawings relating to the nature of the support required to support the tunnels, as well as upon a Government estimate that approximately 80 percent of the tunnels would require support other than rockbolts, the Board found the contract to have indicated that the deterioration and disintegration encountered in driving the tunnels would be primarily of a superficial nature. In so finding the Board noted that in the disputed area the contract appears to be susceptible of more than one reasonable interpretation and that within the zones of reasonableness the Government as the author has to share the major responsibility for communicating its intentions as well as the main risk of failure to carry out that responsibility. Heavily weighted by the Board in reaching its decision was the fact that all four of the lowest bidders appeared to have construed the contract to indicate that the tunnels could be supported virtually entirely with rockbolts and that that construction was apparently known to the project construction engineer at the time of bid opening based upon his analysis of the bids received..... 41
2. Where at least four of seven bidders shared the same interpretation of the method of construction required by a contract for the construction of a bridge and none of the bidders were shown to have a different interpretation, the Board finds the contractor's interpretation to be reasonable and further finds that the Government's insistence on a different and more costly method of construction was a constructive change for which the contractor is entitled to an equitable adjustment..... 527

Contract Clauses

1. Where a cost-plus-fixed-fee contract expressly provides for the payment of finally negotiated overhead rates notwithstanding the foregoing provisions which include the limitation of cost provisions, the Board finds that a claim for additional overhead costs is not subject to the limitation of the contract estimated costs..... 423

CONTRACTS—Continued

CONSTRUCTION AND OPERATIONS—Continued

Contract Clauses—Continued

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2. When a contractor expressed a desire to avoid legal action and suggested submitting a dispute to arbitration rather than following the dispute resolution process required by the disputes clause, the contracting officer was without authority to delegate his duties under the disputes clause to an arbitrator and the document entitled "Agreement to Submit to Arbitration" was a nullity which conferred no right on the contractor to claim expenses during the arbitration period..... 991

Contracting Officer

1. A claim asserted under the Changes clause for increased costs resulting from actions of the President in decontrolling the price of heavy crude oil is dismissed as being outside the jurisdiction of the Board since the President's action was a sovereign act taken as part of the program to maintain or increase production of heavy crude oil..... 431

Differing Site Conditions (Changed Conditions)

1. Where a contractor alleged that differing site conditions were encountered in constructing bored tunnels for the Navajo Indian Irrigation Project and resolution of the question as to what the contract indicated turned on the construction to be placed on the specifications and drawings relating to the nature of the support required to support the tunnels, as well as upon a Government estimate that approximately 80 percent of the tunnels would require support other than rockbolts, the Board found the contract to have indicated that the deterioration and disintegration encountered in driving the tunnels would be primarily of a surficial nature. In so finding the Board noted that in the disputed area the contract appears to be susceptible of more than one reasonable interpretation and that within the zones of reasonableness the Government as the author has to share the major responsibility for communicating its intentions as well as the main risk of failure to carry out that responsibility. Heavily weighted by the Board in reaching its decision was the fact that all four of the lowest bidders appeared to have construed the contract to indicate that the tunnels could be supported virtually entirely with rockbolts and that that construction was apparently known to the project construction engineer at the time of bid opening based upon his analysis of the bids received..... 41
2. In a case involving the assertion of a differing site conditions claim under a contract for the construction of concrete line tunnels for the Navajo Indian Irrigation Project, the Board follows the Court of Claims in holding that it is not necessary for the "indications" in the contract to be explicit or specific, it being sufficient for there to be an indication on the face of the contract documents causing a bidder reasonably to expect that there were no "subsurface or latent" physical conditions at the site differing materially from those indicated in the contract... 41
3. Under a contract for the construction of two concrete lined tunnels for the Navajo Indian Irrigation Project (Tunnel Nos. 3 and 3A) the Board finds a first category differing site conditions claim to have been established with respect to constructing Tunnel No. 3 where the conditions encountered by the contractor in that tunnel were shown to be materially different from those indicated in the contract..... 42
4. In a case involving the assertion of first and second category differing site conditions claims under a contract for the construction of two concrete

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- lined tunnels (Tunnel Nos. 3 and 3A), a first category differing site conditions claim was not established with respect to Tunnel No. 3A where the Board found the contract to have indicated that the deterioration and disintegration to be anticipated in constructing the two tunnels would be primarily surficial in nature but the evidence offered failed to show that the rock failures and fallout encountered in Tunnel No. 3A were due to overstressing and therefore nonsurficial in nature... 42
5. A second category differing site conditions claim, asserted under a contract for the construction of two concrete lined tunnels for the Navajo Indian Irrigation Project (Tunnel Nos. 3 and 3A), is denied where the basis for the claim is that the rock failures and fallout encountered in constructing Tunnel No. 3A were due to overstressing (shear type failures) but the evidence of record failed to show that overstressing was the cause of such rock failures and fallout as occurred in that tunnel. 42
6. Where neither what is described as the "reference reach/claim reach" approach nor the total cost method are found acceptable as a proper basis for an equitable adjustment, the Board resorts to the so-called jury verdict method for determining the amount of the equitable adjustment to which the contractor is entitled by reason of the differing site conditions found to have been encountered by the contractor in construction of Tunnel No. 3, a bored and concrete lined tunnel of the Navajo Indian Irrigation Project. 43
7. A claim asserted under a Changed Conditions Clause by reason of alleged withholding of material information (first category) is denied where there is no evidence of record indicating that the Government either withheld material information or otherwise misrepresented the conditions the contractor would encounter in performing a tree thinning contract. 305
8. A Government motion for summary judgment is granted and a claim for differing site conditions (based upon damages to the jobsite caused by runoff from a severe rainstorm) is denied where the Board finds that if all of appellant's factual allegations are accepted as true neither the differing site conditions clause nor any other clause in the contract provides a basis for granting the appellant relief for the claim asserted. 361
9. Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the quantity of roofing estimated by the Government and it is determined that the quantity of roofing required for performance of the contract could not have been verified by a prebid investigation, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions clause. 722
10. A second category differing site conditions is found to exist where the Government tacitly acknowledged that double roofing encountered under a contract calling for reroofing of a building in Miami, Florida, constituted an unknown condition and the testimony offered in support of the contractor's claim shows that while double roofing is not unusual in some areas of the country, it is unusual in the southern areas where there is a lot of mildew and moisture, humidity, as would be true of the particular locale in which the instant contract was performed. 723

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CONSTRUCTION AND OPERATIONS—Continued

Differing Site Conditions—Continued

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11. Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the approximate quantities estimated by the Government in the invitation for bids and there was no provision included therein requiring or requesting that the quantities specified be verified by prospective bidders, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constituted a first category differing site condition for which the contractor is entitled to an equitable adjustment in the contract price-----

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Drawings and Specifications

1. Where a contractor alleged that differing site conditions were encountered in constructing bored tunnels for the Navajo Indian Irrigation Project and resolution of the question as to what the contract indicated turned on the construction to be placed on the specifications and drawings relating to the nature of the support required to support the tunnels, as well as upon a Government estimate that approximately 80 percent of the tunnels would require support other than rockbolts, the Board found the contract to have indicated that the deterioration and disintegration encountered in driving the tunnels would be primarily of a surficial nature. In so finding the Board noted that in the disputed area the contract appears to be susceptible of more than one reasonable interpretation and that within the zones of reasonableness the Government as the author has to share the major responsibility for communicating its intentions as well as the main risk of failure to carry out that responsibility. Heavily weighted by the Board in reaching its decision was the fact that all four of the lowest bidders appeared to have construed the contract to indicate that the tunnels could be supported virtually entirely with rockbolts and that that construction was apparently known to the project construction engineer at the time of bid opening based upon his analysis of the bids received-----
2. A claim predicated upon defective specifications is denied where assuming *arguendo* that the specifications were defective, the appellant failed to show that it incurred any additional costs by reason of the allegedly defective specifications-----
3. Where the Board found that the Government withheld information from the contractor pertaining to test results showing the plasticity index of an alternate borrow pit, it was held that the contractor was entitled to an equitable adjustment for resulting additional costs on the basis of defective specifications-----

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Estimated Quantities

1. Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the quantity of roofing estimated by the Government and it is determined that the quantity of roofing required for performance of the contract could not have been verified by a prebid investigation, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions clause-----

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CONTRACTS—Continued**CONSTRUCTION AND OPERATIONS—Continued****Estimated Quantities—Continued**

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2. Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the approximate quantities estimated by the Government in the invitation for bids and there was no provision included therein requiring or requesting that the quantities specified be verified by prospective bidders, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constituted a first category differing site condition for which the contractor is entitled to an equitable adjustment in the contract price.....

836

General Rules of Construction

1. The Board rejected the argument of the contractor that the language of the Work Stoppage Clause, providing that the contractor will not be entitled to additional compensation for stop work orders of reasonable duration, should be interpreted to allow a claim to be compensable where the total duration of a series of stop work orders was over 50 percent of the total performance time of the contract. The Board found that no single stop work order in a series of five issued was of unreasonable duration and held that the subject language was intended to apply to only one stop work order at a time, and since the parties stipulated that each stop work order was reasonably and properly issued, the claim was not compensable.....
2. Where an appellant acknowledges that it received a purchase order calling for moving Government-owned furniture and furnishings shortly prior to the move and the record shows that without making a protest of any kind the contractor proceeded with the move and that it subsequently billed the Government for the services rendered in accordance with the rate stated in the purchase order, the Board finds the purchase order to constitute the agreement of the parties....

895

979

Modification of Contracts**Generally**

1. In a case involving the movement of Government office furniture and furnishings within the State of Colorado, the Board finds (i) that the National Park Service is not required to pay a higher rate for the movement of its property than the rate negotiated with the contractor as reflected in an accepted purchase order and (ii) that it is not required to forego presenting to the contracting officer for decision a claim for damages sustained to Government property during the course of the move, even though at the time the move took place the tariff rates promulgated by the Colorado Public Utilities Commission required payment of a higher rate than that specified in the purchase order and even though the same tariff rates required payment of the full amount billed for services rendered before claims against the carrier for damages to property during the move could be entertained.....

979

Duress

1. Where a termination settlement agreement was reached about 14 months after a decision of the Board in favor of appellant and the facts show that appellant was responsible for almost a year of the delay for refusal to allow Government auditors full access to the contract records, and the agreement was signed by appellant's president in an amount in excess of the amount authorized by appellant's board of directors, the Board finds that appellant failed to show that it entered the agreement because of duress on behalf of the Government.....

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CONTRACTS—Continued

CONSTRUCTION AND OPERATIONS—Continued

Notices

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|--|------|
| 1. Where the Board found that the contracting officer had actual notice of the claim for delay based on a diesel fuel shortage, but declined to make the investigation required by Clause 5(d)(2) of the General Provisions of the Standard Form 23A construction contract because of the erroneous belief that a fuel shortage was not a sufficient legal ground to justify an extension, the Board further found that the Government was not prejudiced by alleged untimely notice of delay and refused to foreclose the contractor from asserting the defense of excusable cause for delay..... | 689 |
| 2. Written notice given a week after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer before the conditions are disturbed where the evidence shows that the Government had actual notice of the operative facts related to double roofing at the time the double roofing was encountered and no showing was made that any prejudice to the Government had resulted from the belated written notice..... | 722 |

Payments

- | | |
|---|-----|
| 1. A claim based primarily upon an overpayment to a contractor is approved where the Board finds the evidence of record substantiates the Government claim and it does not appear that the appellant has ever contested either the fact or the amount of the overpayment or adjustments related to such overpayment which have the effect of reducing the amount of the Government's claim..... | 305 |
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CONTRACT DISPUTES ACT OF 1978

Interest

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|--|------|
| 1. A construction contractor's claim for interest under the Contract Disputes Act of 1978, is denied where the Board finds that the underlying claims for an equitable adjustment were negotiated to settlement as evidenced by a written agreement between the parties which contained no provision postponing the finality of the settlement pending the resolution of the claim for interest..... | 1065 |
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Jurisdiction

- | | |
|---|-----|
| 1. A claim of mutual mistake asserted under a tree thinning contract is dismissed for want of jurisdiction where the Board finds (i) that it has no authority under the Disputes clause to reform contracts and (ii) that since appellant did not elect to proceed under the Contract Disputes Act of 1978, the Board derives no reformation authority from the Act in this instance..... | 304 |
| 2. A protest of award by an unsuccessful bidder is dismissed where the Board finds that it has no jurisdiction over bid protests under either the disputes clause or the Contract Disputes Act of 1978..... | 324 |
| 3. A Government motion to dismiss an appeal is granted where no express contract between the parties exists, there is no evidence from which an implied in fact contract could be inferred, and the Board is without jurisdiction over contracts implied in law, assuming appellant is seeking full relief..... | 809 |

CONTRACTS—Continued**DISPUTES AND REMEDIES****Burden of Proof**

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1. In a case involving the assertion of a differing site conditions claim under a contract for the construction of concrete lined tunnels for the Navajo Indian Irrigation Project, the Board follows the Court of Claims in holding that it is not necessary for the "indications" in the contract to be explicit or specific, it being sufficient for there to be an indication on the face of the contract documents causing a bidder reasonably to expect that there were no "subsurface or latent" physical conditions at the site differing materially from those indicated in the contract... 41
2. Where the testimony of appellant's only witness testifying with respect to contract performance was found unworthy of belief and not credible, the Board holds that it has the discretion to reject all the testimony of such witness except that which has been corroborated; and the Board concludes, that except for one of the claims for an equitable adjustment conceded by the Government, there was no corroboration of the discredited testimony, and, therefore, the remaining claims of appellant must be denied for failure to sustain the burden of proof. 591
3. Where the Board finds appellant's evidence with respect to two alleged conversations to be little more than conclusory hearsay without reference to literal substance and appellant alleged that certain drawings had been approved by the Government, when the clear language of the responses to the submitted drawings indicated rejection, the Board holds that appellant has failed to sustain its burden of proof, because of failure to prove the allegations of its complaint by any substantial evidence, and denies the claim of appellant for costs incurred to furnish and install insulating fittings required by the specifications in connection with the construction of a pipeline..... 798

Damages**Generally**

1. In a contract which provided for helicopter spraying of herbicide on grass after spring sprouting and the Government, after giving notice to proceed and granting permission to the contractor to mix the herbicide for the entire project, changed its mind about the readiness of the grass for spraying and imposed a noncontractual requirement that the grass be 4 inches high before spraying, the Board found that the Government breached its duty not to interfere with the contractor's performance and that the contractor was entitled to damages in the form of standby costs for its helicopter and for the tank truck in which the herbicide was mixed..... 803

Actual Damages

1. Where in connection with the movement of Government property, a contractor employs workers not provided for by terms of the purchase order covering the move and it appears that the need for such extra workers resulted in part from deficiencies in performance by the contractor and in part from failures of cooperation by the Government, the Board—noting the absence of any precise measurement for determining the relative fault of the parties—resorts to a jury verdict approach in finding the amount to which the contractor is entitled for one of the items included in the claim for equitable adjustment..... 979

CONTRACTS—Continued

DISPUTES AND REMEDIES—Continued

Damages—Continued

Measurement

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1. Where in connection with the movement of Government property, a contractor employs workers not provided for by terms of the purchase order covering the move and it appears that the need for such extra workers resulted in part from deficiencies in performance by the contractor and in part from failures of cooperation by the Government, the Board—noting the absence of any precise measurement for determining the relative fault of the parties—resorts to a jury verdict approach in finding the amount to which the contractor is entitled for one of the items included in the claim for equitable adjustment... 979

Equitable Adjustments

1. Where neither what is described as the "reference reach/claim reach" approach nor the total cost method are found acceptable as a proper basis for an equitable adjustment, the Board resorts to the so-called jury verdict method for determining the amount of the equitable adjustment to which the contractor is entitled by reason of the differing site conditions found to have been encountered by the contractor in construction of Tunnel No. 3, a bored and concrete lined tunnel of the Navajo Indian Irrigation Project..... 43
2. A claim predicated upon defective specifications is denied where assuming *arguendo* that the specifications were defective, the appellant failed to show that it incurred any additional costs by reason of the allegedly defective specifications..... 305
3. Where under a reroofing contract the quantity of roofing required to be used is substantially greater than the approximate quantities estimated by the Government in the invitation for bids and there was no provision included therein requiring or requesting that the quantities specified be verified by prospective bidders, the Board finds that the substantially greater amount of roofing required to complete the contract work than the Government had estimated constituted a first category differing site condition for which the contractor is entitled to an equitable adjustment in the contract price..... 836
4. Where the Government admits liability and the quantum evidence adduced by the parties is not satisfactory, the Board will determine the amount of equitable adjustment by utilizing the jury verdict approach.. 895
5. Where in connection with the movement of Government property, a contractor employs workers not provided for by terms of the purchase order covering the move and it appears that the need for such extra workers resulted in part from deficiencies in performance by the contractor and in part from failures of cooperation by the Government, the Board—noting the absence of any precise measurement for determining the relative fault of the parties—resorts to a jury verdict approach in finding the amount to which the contractor is entitled for one of the items included in the claim for equitable adjustment..... 979
6. A construction contractor's claim for interest under the Contract Disputes Act of 1978, is denied where the Board finds that the underlying claims for an equitable adjustment were negotiated to settlement as evidenced by a written agreement between the parties which contained no provision postponing the finality of the settlement pending the resolution of the claim for interest..... 1065

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| 1. A claim of mutual mistake asserted under a tree thinning contract is dismissed for want of jurisdiction where the Board finds (i) that it has no authority under the Disputes clause to reform contracts and (ii) that since appellant did not elect to proceed under the Contract Disputes Act of 1978, the Board derives no reformation authority from the Act in this instance..... | 304 |
| 2. A claim based primarily upon an overpayment to a contractor is approved where the Board finds the evidence of record substantiates the Government claim and it does not appear that the appellant has ever contested either the fact or the amount of the overpayment or adjustments related to such overpayment which have the effect of reducing the amount of the Government's claim..... | 305 |
| 3. A protest of award by an unsuccessful bidder is dismissed where the Board finds that it has no jurisdiction over bid protests under either the disputes clause or the Contract Disputes Act of 1978..... | 324 |
| 4. The Board held that since its jurisdiction is appellate only, it may not consider claims presented to it without such claims first having been submitted to the contracting officer for consideration and decision... | 689 |
| 5. An appeal may be decided on the basis of a theory not advanced by the parties so long as the theory is consistent with the facts of record or legitimate inferences therefrom..... | 722 |
| 6. Written notice given a week after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer before the conditions are disturbed where the evidence shows that the Government had actual notice of the operative facts related to double roofing at the time the double roofing was encountered and no showing was made that any prejudice to the Government had resulted from the belated written notice..... | 722 |

Substantial Evidence

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|---|-----|
| 1. In a case involving the assertion of a differing site conditions claim under a contract for the construction of concrete lined tunnels for the Navajo Indian Irrigation Project, the Board follows the Court of Claims in holding that it is not necessary for the "indications" in the contract to be explicit or specific, it being sufficient for there to be an indication on the face of the contract documents causing a bidder reasonably to expect that there were no "subsurface or latent" physical conditions at the site differing materially from those indicated in the contract..... | 41 |
| 2. Where the Board finds appellant's evidence with respect to two alleged conversations to be little more than conclusory hearsay without reference to literal substance and appellant alleged that certain drawings had been approved by the Government, when the clear language of the responses to the submitted drawings indicated rejection, the Board holds that appellant has failed to sustain its burden of proof, because of failure to prove the allegations of its complaint by any substantial evidence, and denies the claim of appellant for costs incurred to furnish and install insulating fittings required by the specifications in connection with the construction of a pipeline..... | 798 |

CONTRACTS—Continued

DISPUTES AND REMEDIES—Continued

Termination for Default

Generally

Page

1. Where the contractor delivered contract items which failed to substantially conform with the contract specifications, and where the contracting officer terminated the contractor's right to proceed with performance of the contract work because of the contractor's nonconforming delivery, the Government's termination for default was proper..... 326
2. Where the contractor established that a critical diesel fuel shortage prevented timely completion of the contract, and that such shortage was unforeseeable, beyond the control, and without the fault or negligence of the contractor or its subcontractors or suppliers, the Board held that the contractor proved excusable cause for delay..... 689

FORMATION AND VALIDITY

Authority to Make

1. When a contractor expressed a desire to avoid legal action and suggested submitting a dispute to arbitration rather than following the dispute resolution process required by the disputes clause, the contracting officer was without authority to delegate his duties under the disputes clause to an arbitrator and the document entitled "Agreement to Submit to Arbitration" was a nullity which conferred no right on the contractor to claim expenses during the arbitration period..... 991

Fixed-price Contracts

1. Where an appellant acknowledges that it received a purchase order calling for moving Government-owned furniture and furnishings shortly prior to the move and the record shows that without making a protest of any kind the contractor proceeded with the move and that it subsequently billed the Government for the services rendered in accordance with the rate stated in the purchase order, the Board finds the purchase order to constitute the agreement of the parties... 979
2. In a case involving the movement of Government office furniture and furnishings within the State of Colorado, the Board finds (i) that the National Park Service is not required to pay a higher rate for the movement of its property than the rate negotiated with the contractor as reflected in an accepted purchase order and (ii) that it is not required to forego presenting to the contracting officer for decision a claim for damages sustained to Government property during the course of the move, even though at the time the move took place the tariff rates promulgated by the Colorado Public Utilities Commission required payment of a higher rate than that specified in the purchase order and even though the same tariff rates required payment of the full amount billed for services rendered before claims against the carrier for damages to property during the move could be entertained... 979

Formalities

1. In a case involving the movement of Government office furniture and furnishings within the State of Colorado, the Board finds (i) that the National Park Service is not required to pay a higher rate for the movement of its property than the rate negotiated with the contractor as reflected in an accepted purchase order and (ii) that it is not required to forego presenting to the contracting officer for decision a claim for damages sustained to Government property during the

CONTRACTS—Continued**FORMATION AND VALIDITY—Continued****Formalities—Continued**

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course of the move, even though at the time the move took place the tariff rates promulgated by the Colorado Public Utilities Commission required payment of a higher rate than that specified in the purchase order and even though the same tariff rates required payment of the full amount billed for services rendered before claims against the carrier for damages to property during the move could be entertained.

979

Governing Law

1. In a case involving the movement of Government office furniture and furnishings within the State of Colorado, the Board finds (i) that the National Park Service is not required to pay a higher rate for the movement of its property than the rate negotiated with the contractor as reflected in an accepted purchase order and (ii) that it is not required to forego presenting to the contracting officer for decision a claim for damages sustained to Government property during the course of the move, even though at the time the move took place the tariff rates promulgated by the Colorado Public Utilities Commission required payment of a higher rate than that specified in the purchase order and even though the same tariff rates required payment of the full amount billed for services rendered before claims against the carrier for damages to property during the move could be entertained.

979

Implied and Constructive Contracts

1. A Government motion to dismiss an appeal is granted where no express contract between the parties exists, there is no evidence from which an implied in fact contract could be inferred, and the Board is without jurisdiction over contracts implied in law, assuming appellant is seeking full relief.

809

PERFORMANCE OR DEFAULT**Breach**

1. In a contract which provided for helicopter spraying of herbicide on grass after spring sprouting and the Government, after giving notice to proceed and granting permission to the contractor to mix the herbicide for the entire project, changed its mind about the readiness of the grass for spraying and imposed a noncontractual requirement that the grass be 4 inches high before spraying, the Board found that the Government breached its duty not to interfere with the contractor's performance and that the contractor was entitled to damages in the form of standby costs for its helicopter and for the tank truck in which the herbicide was mixed.

803

Excusable Delays

1. Where a prime contractor's delayed performance of its contractual obligations was caused by its sole source subcontractor's failure to perform, the prime contractor assumed the risk of such nonperformance by its subcontractor, and the prime contractor's delayed performance was not an excusable cause of delay cognizable under the default clause.
2. Where the contractor established that a critical diesel fuel shortage prevented timely completion of the contract, and that such shortage was unforeseeable, beyond the control, and without the fault or negligence of the contractor or its subcontractors or suppliers, the Board held that the contractor proved excusable cause for delay.

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CONTRACTS—Continued

PERFORMANCE OR DEFAULT—Continued

Waiver and Estoppel

Page

1. Where the Government's conduct constituted encouragement to a contractor to proceed with performance of the contract work after the delivery date had passed, and where such a contractor incurred performance costs in reliance thereon, the Government has waived the delivery schedule.....

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ENDANGERED SPECIES ACT OF 1973

SECTION 7

Consultation

1. The July 19, 1978, Solicitor's Opinion 85 I.D. 275 (1978) relating to analysis of cumulative effects during consultation pursuant to sec. 7 of the Endangered Species Act, and the July 24, 1978, memorandum, which was a supplement to that opinion, are withdrawn. Any further legal advice on the matter will be provided by the Associate Solicitor for Conservation and Wildlife.....
2. Earlier Solicitor's Opinions on cumulative impact analysis have been withdrawn. Solicitor's Opinion M-36905 (Supp.), 88 I.D. 903 (1981). Sec. 7 consultation under the Endangered Species Act must consider past and present impacts of all projects and human activities, whether private, state or federal. Consultation must also consider the cumulative impacts of other proposed future federal projects in the vicinity which have undergone sec. 7 consultation and received favorable biological opinions. Finally, consideration should also be given to the impacts of proposed state or private actions whose completion prior to the completion of the federal project subject to consultation is reasonably certain.....

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EQUITABLE ADJUDICATION

GENERALLY

1. The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level.....

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ESTOPPEL

1. Reliance on erroneous or incomplete information provided by Federal employees cannot create any rights not authorized by law.....
2. The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level.....
3. Failure to disavow a state memorandum implying OSM approval of its contents or failure to object to the issuance of a state permit containing terms inconsistent with Federal regulations does not constitute action that estops OSM from taking an enforcement action.....
4. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers.....

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EVIDENCE**GENERALLY****Page**

1. Settlement agreements compromising prior trespasses may be considered an admission of liability only where, by the terms of a settlement, liability is admitted. Where, however, liability has been initially determined in a Departmental adjudication, such a determination is properly considered in a subsequent hearing. As probative of the issue of "repeated" violations, absent a stipulated settlement which *expressly* vacates the factual determinations made in the prior adjudication..... 276
2. Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and in fact did so, in enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases..... 370

BURDEN OF PROOF

1. After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that an individual has committed a grazing trespass if that finding is in accordance with, and supported by, reliable, probative and substantial evidence..... 275
2. Where the evidence as to specific trespass indicates that, of a number of cattle counted, some were located on intermingled private land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. The burden then shifts to the grazing licensee to rebut this presumption..... 276

CREDIBILITY

1. Where the testimony of appellant's only witness testifying with respect to contract performance was found unworthy of belief and not credible, the Board holds that it has the discretion to reject all the testimony of such witness except that which has been corroborated; and the Board concludes, that except for one of the claims for an equitable adjustment conceded by the Government, there was no corroboration of the discredited testimony, and, therefore, the remaining claims of appellant must be denied for failure to sustain the burden of proof... 591

PRESUMPTIONS

1. Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and in fact did so, in enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases..... 370

EVIDENCE—Continued

PRESUMPTIONS—Continued

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2. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file..... 874

SUFFICIENCY

1. After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that an individual has committed a grazing trespass if that finding is in accordance with, and supported by, reliable, probative and substantial evidence..... 275
2. Where the evidence as to specific trespass indicates that, of a number of cattle counted, some were located on intermingled private land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. The burden then shifts to the grazing licensee to rebut this presumption..... 276
3. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file..... 874

WEIGHT

1. Where the testimony of appellant's only witness testifying with respect to contract performance was found unworthy of belief and not credible, the Board holds that it has the discretion to reject all the testimony of such witness except that which has been corroborated; and the Board concludes, that except for one of the claims for an equitable adjustment conceded by the Government, there was no corroboration of the discredited testimony, and, therefore, the remaining claims of appellant must be denied for failure to sustain the burden of proof..... 591

FEDERAL EMPLOYEES AND OFFICERS

(See also Administrative Authority, Claims Against the United States, Officers & Employees—if included in this Index.)

AUTHORITY TO BIND GOVERNMENT

1. Reliance on erroneous or incomplete information provided by Federal employees cannot create any rights not authorized by law..... 370
2. The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level..... 480

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977**DISTINCTION BETWEEN COOPERATIVE AGREEMENTS AND GRANTS**

Page

1. If substantial involvement is anticipated between the agency and the state a cooperative agreement is to be used to accomplish the public purpose of support. If no substantial involvement is anticipated a grant agreement should be executed to accomplish the public purpose of support or stimulation authorized by Federal statute. Because substantial involvement is anticipated in the instant matter, a grant agreement would be the proper vehicle for accomplishing the public purpose of support.-----

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SELECTION OF INSTRUMENT

1. Secs. 5 and 6 of the Federal Grant and Cooperative Agreement Act of 1977 require an agency to use a grant or cooperative agreement and not a contract whenever, as in the instant matter, the principal purpose of the relationship between the agency and the state is the transfer of money, property or services or anything of value to a state or local government or other recipient to accomplish a public purpose of support or stimulation authorized by a Federal statute, rather than acquisition by purchase, lease, or barter, of property or services for direct benefit or use of the Federal Government.-----

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USE OF A CONTRACT

1. Under sec. 4 of the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. § 501 (1976), a contract would not be used to transfer funds from a bureau to a state for the purpose of constructing recreational facilities on Government owned land when the transaction is accompanied by a long term lease of the land to the state because the principal purpose of the relationship is for the benefit of the state and not "for the direct benefit or use of the Federal Government."-----

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FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

(See also Hearings—if included in this Index.)

GENERALLY

1. Neither FLPMA nor the Taylor Grazing Act authorizes appropriation of water or provide an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law.-----
2. The standard of review in the case of a right-of-way application for a water diversion project is whether the decision demonstrated a reasoned analysis of the factors involved, with due regard for the public interest. A decision to reject such an application will not be affirmed where the record lacks sufficient reasons to support it.-----

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ASSESSMENT WORK

1. The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744 (b) (1976) to file an annual notice of intention to hold the millsite is a curable defect and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.-----

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EXCHANGES

1. State exchange applications pending on Oct. 21, 1976, may be processed under sec. 8(c) of the Taylor Grazing Act, 43 U.S.C. § 315g(c) (1970), only if the state had complied with all the requirements necessary to vest rights to the exchange in the state; all other applications must be processed under sec. 206 of the Federal Land Policy and Management Act of 1976.-----

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FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976—Continued

EXCHANGES—Continued

Page

2. A protest against approval of a state exchange application is properly dismissed where the exchange is shown to be in the public interest under sec. 206 of the Federal Land Policy and Management Act of 1976, and it is immaterial that the protestants may be permittees or licensees of the selected lands whose grazing privileges would have been lost upon completion of the exchange, in that neither a licensee nor a permittee has a vested right in the land covered by the license or permit and such land is available for selection by a state.-----

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RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD MINING CLAIM

1. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.-----
2. Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and in fact did so, in enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases.-----
3. Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.-----
4. Deficiencies under the regulations in the content of an affidavit of assessment work or notice of intention to hold filed with the Bureau of Land Management with respect to an unpatented mining claim may be considered curable and do not result in a conclusive presumption of abandonment of the claim where the filing meets the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).-----
5. With respect to unpatented mining claims located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either notice of intention to hold the claim or evidence of assessment work with the local recording office where the notice of location is recorded and a copy thereof with the Bureau of Land Management prior to Dec. 31 of the year following the calendar year in which the claim was located under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).-----
6. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before

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FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976—Continued**RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF****INTENTION TO HOLD MINING CLAIM—Continued**

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Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.....

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7. Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.....

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RECORDATION OF MINING CLAIMS AND ABANDONMENT

1. The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences..... 370
2. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2(a), the owner of an unpatented mining claim located before Oct. 21, 1976, must file on or before Oct. 22, 1979, in the proper BLM office, a copy of the notice of location or the claim will be conclusively deemed to have been abandoned and declared void..... 557
3. Where an unpatented mining claim is located in Alaska near the dividing line separating the Anchorage and Fairbanks districts, indicated on the map in 43 CFR 1821.2-1, such that it is virtually impossible from the map to determine with substantial accuracy in which district the mining claim lies, the timely filing of the location notice by the owner of the claim in either the Alaska State Office or the Fairbanks District Office will be considered as satisfying the requirement of 43 CFR 3833.1-2(a) of filing in the proper BLM office..... 557
4. The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes an abandonment of the mining claim by the owner..... 874
5. Oil placer mining claims located pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526, and preserved by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (Supp. II 1978), are subject to the recordation requirements of sec. 314 if the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976)..... 918
6. The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences..... 918
7. The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), applies to claims which rely on the provision of 30 U.S.C. § 38 (1976) to prove location and posting. Where such claims have not been duly recorded, they are a nullity..... 925

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976—Continued**RIGHTS-OF-WAY**

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1. The standard of review in the case of a right-of-way application for a water diversion project is whether the decision demonstrated a reasoned analysis of the factors involved, with due regard for the public interest. A decision to reject such an application will not be affirmed where the record lacks sufficient reasons to support it----- 258
2. Rejection of a right-of-way application for a water diversion project will not be affirmed where the record does not support a finding that approval would be incompatible with BLM's timber management plan; that it would adversely affect wildlife; or that it would result in a cumulative adverse impact contrary to the public interest----- 258

WILDERNESS

1. Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered, with due regard for the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal----- 490
2. Valid existing rights are limitations upon the Secretary's authority to manage activities occurring within wilderness study area under the nonimpairment standard. In general, the nonimpairment standard remains the management norm unless it would preclude enjoyment of the rights. When it is determined that the rights can be enjoyed only through activities that will permanently impair an area's suitability, the Secretary must manage the lands to prevent unnecessary and undue degradation and to afford environmental protection----- 909
3. The Bureau of Land Management is directed by sec. 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (c) (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that the continuation of existing mining uses in the same manner and degree in which they were being conducted on the date of enactment of FLPMA (Oct. 21, 1976) is allowed. Such grandfathered use is properly regulated to prevent unnecessary or undue degradation of the land and its resources----- 1115
4. The existence of mining operations actually being conducted on the land on Oct. 21, 1976, and not mere statutory right to use is required to authorize subsequent mining activities in the same manner and degree. 1115
5. A mining claim located prior to the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976) on which a valid discovery has existed from Oct. 21, 1976, to the present constitutes a valid existing right. The owner of such a claim on land under wilderness review will be allowed to continue mining operations to full development even if operations will impair wilderness suitability, subject to regulation to preclude unnecessary or undue degradation of the land and its resources----- 1115

FREEDOM OF INFORMATION ACT (ACT OF JUNE 5, 1967)

1. FOIA's exemptions do not prevent USGS from publishing its finding that a well is producible or from releasing well logs----- 699
2. USGS finding that a well is producible is a central event in the operation of the Outer Continental Shelf Lands Act, *as amended*. Therefore, FOIA requires USGS to release this finding to the public----- 699

FREEDOM OF INFORMATION ACT—Continued

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3. Well logs and findings of producibility are not "trade secrets" within the meaning of 18 U.S.C. § 1905 (1976)----- 699
4. Sec. 1905 allows disclosures authorized by law. 30 CFR 650.3, promulgated pursuant to 43 U.S.C. § 1352(c) (Supp. II 1978) and the Administrative Procedure Act, is adequate authority for disclosure of a lessee's well log after a two-year period of confidentiality----- 699

GEOTHERMAL LEASES

(See also Hearings, Mineral Leasing Act—if included in this Index.)

DISCRETION TO LEASE

1. Decisions by BLM to require acceptance of special stipulations prior to leasing certain lands for geothermal resources will be upheld when the record shows that the decisions reflect a reasoned analysis of the factors involved based upon considerations of public interest, and no sufficient reason to disturb the decisions is shown. Where Geological Survey has reported that lands sought are valuable for geothermal resources and Congress recently passed legislation in support of the development of geothermal resources, decisions requiring no surface occupancy stipulations will be set aside and the cases remanded for consideration of the feasibility of the leases issuing with less onerous stipulations.----- 609

LANDS SUBJECT TO

1. Congress, with the passage of the Geothermal Steam Act, 30 U.S.C. § 1001 *et seq.*, intended that geothermal leases be deemed as within the mineral leasing exception of sec. 4(d)(3) of the Wilderness Act of 1964, 16 U.S.C. § 1133(d)(3). Designated wilderness are open to geothermal leasing to the same extent they would have been at the date of their creation. Such leases are subject to the provisions of sec. 4(d)(3) of the Wilderness Act.----- 813

STIPULATIONS

1. Decisions by BLM to require acceptance of special stipulations prior to leasing certain lands for geothermal resources will be upheld when the record shows that the decisions reflect a reasoned analysis of the factors involved based upon considerations of public interest, and no sufficient reason to disturb the decisions is shown. Where Geological Survey has reported that lands sought are valuable for geothermal resources and Congress recently passed legislation in support of the development of geothermal resources, decisions requiring no surface occupancy stipulations will be set aside and the cases remanded for consideration of the feasibility of the leases issuing with less onerous stipulations.----- 609

GEOTHERMAL RESOURCES

1. "Mineral." Geothermal steam, as defined in sec. 2(c) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1001(c), is not a "mineral" as the term is used in the mineral leasing laws. Congress generally did not intend the Steam Act to be treated as a "mineral leasing law."----- 813

GRAZING PERMITS AND LICENSES

(See also Appeals, Hearings, Taylor Grazing Act—
if included in this Index.)

GENERALLY

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1. In ascertaining the reasonableness of a rental rate increase for grazing lands permitted under authority of 25 CFR Part 151, it was error for the Administrative Law Judge to conclude that "fair annual return" to which Indian landowners are entitled under the regulations is "something different and less than fair market value."----- 315
2. The independent market survey utilized by the Bureau of Indian Affairs in justifying an increase in grazing rental rates on the Fort Berthold Reservation cannot be regarded as invalid on grounds that off-reservation transactions were included in the survey----- 315
3. In reviewing action of the Bureau of Indian Affairs in raising grazing rental rates, the Board of Indian Appeals should overturn the action only if it is found to be unreasonable. As long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for the Board to substitute its judgment for the agency's----- 315

CANCELLATION OR REDUCTION

1. BLM may temporarily suspend portions of maximum allowable active grazing preferences under 43 CFR 4110.3-2(a) authorizing suspensions in cases of "drought, fire, or other natural causes," in order to provide forage for excess wild horses----- 665

HEARINGS

1. Settlement agreements compromising prior trespasses may be considered an admission of liability only where, by the terms of a settlement, liability is admitted. Where, however, liability has been initially determined in a Departmental adjudication, such a determination is properly considered in a subsequent hearing. As probative of the issue of "repeated" violations, absent a stipulated settlement which expressly vacates the factual determinations made in the prior adjudication----- 276

TRESPASS

1. In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his or her conduct was so lacking in reasonableness or responsibility that it became reckless or negligent----- 276

HEARINGS

(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Resources Act, Water Pollution Control—if included in this Index.)

1. Settlement agreements compromising prior trespasses may be considered an admission of liability only where, by the terms of a settlement, liability is admitted. Where, however, liability has been initially determined in a Departmental adjudication, such a determination is properly considered in a subsequent hearing. As probative of the issue of "repeated" violations, absent a stipulated settlement which expressly vacates the factual determinations made in the prior adjudication----- 276

INDIAN ALLOTMENTS ON PUBLIC DOMAIN**LANDS SUBJECT TO**

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1. The effect of the issuance of a patent is to transfer legal title from United States and to remove the land from jurisdiction of the Department of the Interior. Where BLM's records show lands have been patented, an Indian allotment application filed under the General Allotment Act of Feb. 8, 1887, for such lands is properly rejected... 244

INDIAN LANDS

(See also Exchanges of Land, Indian Probate, Rights-of-Way—if included in this Index.)

ALLOTMENTS**Alienation**

1. Where the owner of an Alaska Native allotment notified the Bureau of Indian Affairs that an agreement to alienate part of his allotment had been procured from him by fraud and that he revoked his consent to the use of his land for a road and pipeline by the State of Alaska, the Acting Area Director correctly declined to take action to grant an easement across the allotment to the State for a road and pipeline. Departmental regulations deny the agency authority to permit alienation of part of an Alaska Native allotment subject to restrictions against alienation where the allottee refuses to consent to the alienation, and there is no other provision of law requiring or permitting the alienation. 1020

GRAZING**Rental Rates**

1. In ascertaining the reasonableness of a rental rate increase for grazing lands permitted under authority of 25 CFR Part 151, it was error for the Administrative Law Judge to conclude that "fair annual return" to which Indian landowners are entitled under the regulations is "something different and less than fair market value."----- 315
2. The independent market survey utilized by the Bureau of Indian Affairs in justifying an increase in grazing rental rates on the Fort Berthold Reservation cannot be regarded as invalid on grounds that off-reservation transactions were included in the survey----- 315
3. In reviewing action of the Bureau of Indian Affairs in raising grazing rental rates, the Board of Indian Appeals should overturn the action only if it is found to be unreasonable. As long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for the Board to substitute its judgment for the agency's----- 315

PATENT IN FEE**Jurisdiction**

1. The Federal trust responsibility over allotted land or any fractional share thereof is extinguished as to that interest immediately upon its acquisition by a non-Indian. The ministerial issuance of a fee patent serves only a recordkeeping function and is without legal significance in respect to dissolution of the Department's role as trustee----- 987
2. The Department of the Interior owes no fiduciary duties of any kind to a non-Indian who has acquired an interest in allotted trust land.... 987

INDIAN PROBATE

(See also Appeals, Bureau of Indian Affairs, Hearings, Indian Lands, Indian Tribes, Rules of Practice—if included in this Index.)

ADOPTION (See also **CHILDREN, ADOPTED**—if included in this Index.)

Generally

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1. The Act of July 8, 1940, 54 Stat. 746 (25 U.S.C. § 372a (1976)) gave limited authority to agency superintendents over the adoption of Indian children. Evaluated in light of its legislative history, the Act must be read as allowing superintendents to validate adoptions agreed to in writing by Indian parties as well as Indian custom adoptions... 410
2. The Act of Mar. 3, 1931, 46 Stat. 1494, relating to the adoption of Indian children on the Crow Reservation in Montana, vested the superintendent of the Crow Agency with adoption authority which served as a model in the draftsmanship of the Act of July 8, 1940..... 410

Crow Tribe

1. The Act of Mar. 3, 1931, 46 Stat. 1494, relating to the adoption of Indian children on the Crow Reservation in Montana, vested the superintendent of the Crow Agency with adoption authority which served as a model in the draftsmanship of the Act of July 8, 1940..... 410

DIVORCE (See also **CLAIM AGAINST ESTATE**—if included in this Index.)

Indian Custom

1. Where no evidence was received at probate hearing to show the customs of any Indian tribe concerning regulation of the domestic relations of members of the tribe, a ruling by an Indian probate Administrative Law Judge that he could officially notice the existence of divorce by Yakima tribal custom was error. Since no evidence was offered to show that decedent, who was of Nez Perce and Yakima ancestry, and appellee, of Alaskan Native descent, lived in tribal relations under the jurisdiction of the Yakima Tribe, it was error to conclude they were nonetheless married in accordance with Yakima customary law..... 676

INDIAN REORGANIZATION ACT OF JUNE 18, 1934
(**WHEELER-HOWARD ACT**)(25 U.S.C. §§ 464-486)

Construction of Section 4

1. Jurisdiction of Indian tribe over Quinault Reservation where estate trust property was located being material to a decision concerning the eligibility of a devisee to take property under an Indian will, it was error to hold that the General Allotment Act conferred jurisdiction over the reservation upon the tribes of persons allotted on the reservation without regard to the historical development of the reservation and the actual implementation of the treaty rights of the tribes concerned. The record demonstrates that since acceptance of the Indian Reorganization Act of 1934 (IRA) the Quinault Tribe exercised exclusive jurisdiction over the Quinault Reservation, and that the Quileute Tribe (one of the tribes whose hereditary members accepted Quinault allotments) had earlier elected to forego any treaty rights it may have claimed in the Quinault Reservation in order to retain its ancestral village at LaPush. The record establishes jurisdiction over the Quinault Reservation to be in the Quinault Tribe, an IRA tribe..... 561

INDIAN PROBATE—Continued**INDIAN REORGANIZATION ACT OF JUNE 18, 1934—Continued****Construction of Section 4—Continued**

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2. Sec. 4 of the Indian Reorganization Act of 1934 prior to amendment in 1980 did not permit devises of trust property found on reservations subject to the Act to persons who were neither heirs of the decedent allottee nor members of the tribe having jurisdiction over the reservation where the trust land is located. Thus, since appellee was neither a member of the Quinault tribe nor an heir of decedent, he was barred from taking trust property on the Quinault Reservation under the decedent's will.....

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KLAMATH TRIBE

1. While it is true that the Klamath Termination Act, Aug. 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1976), rendered inapplicable to Klamath tribal members the Secretary's usual jurisdiction over Indian heirship determinations as set forth in 25 U.S.C. §§ 372-373 (1976) (see 25 U.S.C. § 564h), Congress, by the more recent Act of Oct. 1, 1965, 79 Stat. 897, 25 U.S.C. §§ 565-565g (1976), specifically empowered the Secretary of the Interior to determine the rightful heirs of deceased Klamath enrollees entitled to a share of judgment funds payable from the United States for the limited purpose of seeing that such funds are distributed to the heir or heirs so determined.....
2. The Secretary has no statutory authority to pay creditors' claims against estates of deceased Klamath Indians out of judgment funds distributable by the Secretary under the Act of Oct. 1, 1965, 79 Stat. 897....

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MARRIAGE**Common Law and Indian Custom Distinguished**

1. A holding that decedent and appellee were married by operation of tribal custom based upon a conclusion that the birth of nine children to the couple required a finding they were married was erroneous where the record affirmatively showed decedent was married to another woman at the time of his cohabitation with appellee.....

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WILLS (See also CONTRACT TO MAKE WILL, INHERITING—if included in this index.)**Construction of**

1. Jurisdiction of Indian tribe over Quinault Reservation where estate trust property was located being material to a decision concerning the eligibility of a devisee to take property under an Indian will, it was error to hold that the General Allotment Act conferred jurisdiction over the reservation upon the tribes of persons allotted on the reservation without regard to the historical development of the reservation and the actual implementation of the treaty rights of the tribes concerned. The record demonstrates that since acceptance of the Indian Reorganization Act of 1934 (IRA) the Quinault Tribe exercised exclusive jurisdiction over the Quinault Reservation, and that the Quilleute Tribe (one of the tribes whose hereditary members accepted Quinault allotments) had earlier elected to forego any treaty rights it may have claimed in the Quinault Reservation in order to retain its ancestral village at LaPush. The record establishes jurisdiction over the Quinault Reservation to be in the Quinault Tribe, an IRA tribe.....

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INDIAN PROBATE—Continued

WILLS—Continued

Construction of—Continued

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2. Sec. 4 of the Indian Reorganization Act of 1934 prior to amendment in 1980 did not permit devises of trust property found on reservations subject to the Act to persons who were neither heirs of the decedent allottee nor members of the tribe having jurisdiction over the reservation where the trust land is located. Thus, since appellee was neither a member of the Quinault tribe nor an heir of decedent, he was barred from taking trust property on the Quinault Reservation under the decedent's will.....

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Disapproval of Will

1. Under the Supreme Court's holding in *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), the Department may not revoke or rewrite an otherwise valid will disposing of Indian trust or restricted property that reflects a rational testamentary scheme simply because the disposition does not comport with the deciding official's conception of equity and fairness.....

993

Failure to Mention Child

1. The failure of decedent's will to provide for two after-born children is insufficient to render the dispositive scheme irrational.....

993

INDIAN TRIBES

(See also Appeals, Indian Probate—if included in this Index.)

ALASKAN GROUPS

1. The provisions of the Alaska Native Claims Settlement Act defining the class of persons entitled to share in benefits under the Act are not ambiguous so as to require reference to the legislative history to determine whether persons becoming United States citizens after Dec. 18, 1971, the effective date of the Act, are entitled to be enrolled.....
2. The provisions of the Alaska Native Claims Settlement Act specifically exclude members of the Metlakatla Tribe of the Annette Islands Reserve from benefits under the Act. Where appellant and her children periodically resided at Metlakatla, accepted benefits from the Metlakatla Tribe as tribal members, were enrolled members since 1968, and did not initiate efforts to terminate tribal membership until 1974, appellants were enrolled members of Matlakatla within the meaning of the Alaska Native Claims Settlement Act and were properly excluded from enrollment under the Act.....
3. Exclusion of appellant members of the Metlakatla Community from benefits under provisions of the Alaska Native Claims Settlement Act held not to be precluded by a contrary result reached in a prior Administrative Law Judge's decision in a similar case. The determination by the agency factfinder in the separate but similar situation is not binding upon the Board of Indian Appeals, which renders final decision for the Department in disenrollment appeals referred on appeal to the Board.....

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FEDERAL RECOGNITION

1. Only those groups which have received Federal acknowledgement of their Indian tribal status constitute Indian tribes, for purposes of sec. 2 of the Bald Eagle Protection Act.....

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INDIAN TRIBES—Continued**HUNTING AND FISHING****Generally**

1. The prohibitions of the Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act are nondiscriminatory, reasonable and necessary conservation measures to which reserved Indian hunting rights are subject.-----

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JUDGMENT FUNDS

1. While it is true that the Klamath Termination Act, Aug. 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564-564x (1976), rendered inapplicable to Klamath tribal members the Secretary's usual jurisdiction over Indian heirship determinations as set forth in 25 U.S.C. §§ 372-373 (1976) (see 25 U.S.C. § 564h), Congress, by the more recent Act of Oct. 1, 1965, 79 Stat. 897, 25 U.S.C. §§ 565-565g (1976), specifically empowered the Secretary of the Interior to determine the rightful heirs of deceased Klamath enrollees entitled to a share of judgment funds payable from the United States for the limited purpose of seeing that such funds are distributed to the heir or heirs so determined.-----

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INDIANS**CRIMINAL JURISDICTION**

1. Six parcels of Bureau of Indian Affairs school land adjoining land held in trust for the Mississippi Band of Choctaw Indians are Indian country within the meaning of 18 U.S.C. § 1151(b) (1976)-----

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LACHES

1. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers.-----

915

MINERAL LANDS**PROSPECTING PERMITS**

1. Where, pursuant to 43 CFR Part 3510, BLM grants a 2-year permit for hardrock mineral prospecting on certain acquired national forest lands with the concurrence of the Forest Service and Geological Survey, and thereafter fails to approve the permittee's operating plan during the term of the permit and a 2-year extension, the permit will be considered to have been suspended during that period and the permittee granted a 2-year term for prospecting with the right to apply for an extension as provided by the regulations.-----

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MINERAL LEASING ACT

(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits—if included in this Index.)

APPLICABILITY

1. Although Congress revised the provision governing readjustment of federal coal leases in 1976, the deletion of the clause "unless otherwise provided by law at the time of expiration of such periods" from sec. 7 of the MLA (30 U.S.C. § 207) did not alter the Secretary's obligation not to establish any lease terms contrary to law in readjusting a coal lease.-----
2. The legislative history of sec. 6 of the Federal Coal Leasing Amendments Act shows that the revision of sec. 7 of the MLA (30 U.S.C. § 207) was

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MINERAL LEASING ACT—Continued**APPLICABILITY—Continued**

Page

not retroactive; but applied to new leases and to "old" leases upon readjustment. The ten-year production period and revised royalty rates of amended sec. 7 must be imposed on "old" coal leases at readjustment. The legislative history to the 1978 coal leasing revisions (Act of Oct. 30, 1978) discloses that Congress understood and acted on the assumption that the amended sec. 7 royalty rates did apply to all "old" leases upon readjustment.-----

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METHODS OF DEVELOPMENT

1. The MLA refers only to "gas" or "natural gas" without any qualifying adjectives; thus supporting a nonrestrictive reading of those terms to include coalbed gas. Coalbed gas is leasable under the oil and gas leasing provision of the MLA, 30 U.S.C. § 226 (1976)-----
2. Coalbed gas is not included in a coal lease under the MLA. In the coal leasing provision on the MLA, Congress did not provide for a coal lessee's extraction of minerals related to or associated with coal. 30 U.S.C. § 201 (Supp. II 1978). This provision does not authorize a coal lessee's extraction of coalbed gas, other than the venting of the gas required by mine health and safety laws and regulations-----

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MINING CLAIMS

(See also Hearings, Millsites, Multiple Mineral Development Act, Surface Resources Act—of included in this Index.)

GENERALLY

1. The Bureau of Land Management is directed by sec. 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that the continuation of existing mining uses in the same manner and degree in which they were being conducted on the date of enactment of FLPMA (Oct. 21, 1976) is allowed. Such grandfathered use is properly regulated to prevent unnecessary or undue degradation of the land and its resources.-----
2. The existence of mining operations actually being conducted on the land on Oct. 21, 1976, and not mere statutory right to use is required to authorize subsequent mining activities in the same manner and degree.-----
3. A mining claim located prior to the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976) on which a valid discovery has existed from Oct. 21, 1976, to the present constitutes a valid existing right. The owner of such a claim on land under wilderness review will be allowed to continue mining operations to full development even if operations will impair wilderness suitability, subject to regulation to preclude unnecessary or undue degradation of the land and its resources.-----

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ABANDONMENT

1. The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.-----

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MINING CLAIMS—Continued

ABANDONMENT—Continued

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2. Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and in fact did so, in enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases.....	370
3. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2(a), the owner of an unpatented mining claim located before Oct. 21, 1976, must file on or before Oct. 22, 1979, in the proper BLM office, a copy of the notice of location or the claim will be conclusively deemed to have been abandoned and declared void.....	557
4. Where an unpatented mining claim is located in Alaska near the dividing line separating the Anchorage and Fairbanks districts, indicated on the map in 43 CFR 1821.2-1, such that it is virtually impossible from the map to determine with substantial accuracy in which district the mining claim lies, the timely filing of the location notice by the owner of the claim in either the Alaska State Office or the Fairbanks District Office will be considered as satisfying the requirement of 43 CFR 3833.1-2(a) of filing in the proper BLM office.....	557
5. Deficiencies under the regulations in the content of an affidavit of assessment work or notice of intention to hold filed with the Bureau of Land Management with respect to an unpatented mining claim may be considered curable and do not result in a conclusive presumption of abandonment of the claim where the filing meets the requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).....	682
6. With respect to unpatented mining claims located after Oct. 21, 1976, the fact that the requirement for performing assessment work under the mining law has not yet accrued does not obviate the necessity of filing either notice of intention to hold the claim or evidence of assessment work with the local recording office where the notice of location is recorded and a copy thereof with the Bureau of Land Management prior to Dec. 31 of the year following the calendar year in which the claim was located under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).....	682
7. The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes an abandonment of the mining claim by the owner.....	874
8. Oil placer mining claims located pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526, and preserved by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (Supp. II 1978), are subject to the recordation requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976)---	918

MINING CLAIMS—Continued**ABANDONMENT—Continued**

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9. The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.----- 918
10. The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), applies to claims which rely on the provision of 30 U.S.C. § 38 (1976) to prove location and posting. Where such claims have not been duly recorded, they are a nullity----- 965

ASSESSMENT WORK

1. The legal presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them is rebuttable by probative evidence to the contrary. However, an affidavit that evidence of assessment work was timely filed with the proper BLM office must ordinarily be corroborated by other evidence to establish filing where there is no evidence of receipt of the documents in the file----- 874
2. Oil placer mining claims located pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526, and preserved by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (Supp. II 1978), are subject to the recordation requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976)----- 918
3. Failure to substantially comply with the requirements to annually perform assessment work on a claim which is located on withdrawn land results in a forfeiture of that claim to the United States----- 926

CONTESTS

1. Where, following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future----- 772

DETERMINATION OF VALIDITY

1. Pursuant to the Department Manual 601 DM 2, requirements in Secretary's Order No. 3029, as to adjudication of Federally created interests, do not apply to unpatented mining claims and the Bureau of Land Management is not required to adjudicate mining claims before conveyance. Pursuant to ANCSA and Secretary's Order No. 3029, *as amended*, lands selected by a Native corporation must be conveyed by the Bureau of Land Management notwithstanding the existence of an unpatented mining claim within such lands which has not been adjudicated for validity under the general mining laws----- 760

MINING CLAIMS—Continued**DISCOVERY****Marketability**

1. Land may be considered "chiefly valuable for building stone" where the building stone values of the mineral deposit sought are greater than any other mineral values or nonmineral values for which the land may be appropriated.....

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EXCESS RESERVES

1. Where, following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future.....

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LANDS SUBJECT TO

1. The President had nonstatutory authority to withdraw public land in addition to authority conferred upon him by the Pickett Act, 43 U.S.C. §§ 141, 142 (1970). Such nonstatutory authority was not limited by the terms of 43 U.S.C. § 142 (1970) which provided that withdrawn lands shall remain open to location for metalliferous minerals.....
2. Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals.....
3. A mining claim located on land which was segregated and closed to mineral entry is properly declared null and void ab initio.....

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LOCATION

1. While deposits of limestone chiefly valuable for building stone were subject to location only as placer claims, deposits of limestone valuable for their chemical or metallurgical properties are properly located according to the form of their deposition.....
2. All placer claims must conform "as near as practicable" with the system of rectangular public land surveys. Where a claim does not so conform and it is not possible to amend the claim so that it does, the entry must be canceled.....

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LODE CLAIMS

1. To constitute discovery upon a lode mining claim, there must be exposed within the claim a vein or lode of quartz or other rock in place, bearing gold or some other mineral deposit in such quality and quantity which would warrant a prudent man in the expenditure of his time and money with a reasonable prospect of success in developing a valuable mine.....
2. While deposits of limestone chiefly valuable for building stone were subject to location only as placer claims, deposits of limestone valuable for their chemical or metallurgical properties are properly located according to the form of their deposition.....

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MINING CLAIMS—Continued

MILLSITES

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1. The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976) to file an annual notice of intention to hold the millsite is a curable defect and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency..... 644
2. Since millsites may only be located on nonmineral land, a millsite claim is necessarily adverse to a mining claim. Thus, land embraced by a millsite claim is not open to the initiation of rights under 30 U.S.C. § 38 (1976)..... 925

PLACER CLAIMS

1. Oil placer mining claims located pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526, and preserved by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (Supp. II 1978), are subject to the recordation requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976)... 918
2. A placer mining claim has been defined as ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state..... 925
3. Under provisions of the Act of Aug. 4, 1892, 30 U.S.C. § 161 (1976), known as the Building Stone Act, land chiefly valuable for building stone can only be entered by mining claims in the placer form, regardless of the actual mode of occurrence of the deposit..... 925
4. While deposits of limestone chiefly valuable for building stone were subject to location only as placer claims, deposits of limestone valuable for their chemical or metallurgical properties are properly located according to the form of their deposition..... 926
5. Nothing in 30 U.S.C. § 38 (1976) alters the requirement limiting each individual claimant to 20 acres per location. Thus, for a single possessory claim of 85 acres to be sustained, it must be shown that five individuals held and worked the claim for the requisite period of time.. 926
6. All placer claims must conform "as near as practicable" with the system of rectangular public land surveys. Where a claim does not so conform and it is not possible to amend the claim so that it does, the entry must be canceled..... 926

POSSESSORY RIGHT

1. When an unpatented mining claim is situated within lands selected and approved for conveyance under ANCSA, the possessory interest of the mining claimant is protected under provisions of § 22(c) and 43 CFR 2650.3-2 as a valid existing right notwithstanding that the Bureau of Land Management has not adjudicated such unpatented mining claims prior to conveyance..... 761
2. Under the provisions of 30 U.S.C. § 38 (1976), the holding and working of a claim for the period of time equal to the State's statute of limitations is the legal equivalent of proofs of acts of location, recording, and transfer. This provision does not, however, alter other requirements of the mining laws, such as the necessity of a discovery or limitations on acreage which may be taken up in a claim..... 926
3. The requirements of 30 U.S.C. § 38 (1976), relating to "holding" and "working" a claim may be met where the assessment work requirements have been met and where there is actual possession or occupancy of the claim..... 926

MINING CLAIMS—Continued**POSSESSORY RIGHTS—Continued**

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4. Nothing in 30 U.S.C. § 38 (1976) alters the requirement limiting each individual claimant to 20 acres per location. Thus, for a single possessory claim of 85 acres to be sustained, it must be shown that five individuals held and worked the claim for the requisite period of time..... 926
5. Since millsites may only be located on nonmineral land, a millsite claim is necessarily adverse to a mining claim. Thus, land embraced by a millsite claim is not open to the initiation of rights under 30 U.S.C. § 38 (1976)..... 926
6. The recordation provisions of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), applies to claims which rely on the provision of 30 U.S.C. § 38 (1976) to prove location and posting. Where such claims have not been duly recorded, they are a nullity..... 926

POWERSITE LANDS

1. Under the Mining Claims Rights Restoration Act of 1955, it is proper to prohibit all placer mining operations on a mining claim on land withdrawn for power development or powersites, where unrestricted placer mining on such land would result in substantial interference with the use of the land for recreational purposes..... 453
2. The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or powersites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose on permission to mine is that the locator must restore the surface of the claim to its condition immediately prior to mining operations..... 453

RECORDATION

1. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void..... 369
2. Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional..... 370
3. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2(a), the owner of an unpatented mining claim located before Oct. 21, 1976, must file on or before Oct. 22, 1979, in the proper BLM office, a copy of the notice of location or the claim will be conclusively deemed to have been abandoned and declared void..... 557
4. Where an unpatented mining claim is located in Alaska near the dividing line separating the Anchorage and Fairbanks districts, indicated on the map in 43 CFR 1821.2-1, such that it is virtually impossible from the map to determine with substantial accuracy in which district the mining claim lies, the timely filing of the location notice by the owner of the

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claim in either the Alaska State Office or the Fairbanks District Office will be considered as satisfying the requirement of 43 CFR 3833.1-2(a) of filing in the proper BLM office.....	557
5. Oil placer mining claims located pursuant to the Petroleum and Mineral Oils Act of Feb. 11, 1897, c. 216, 29 Stat. 526, and preserved by sec. 37 of the Mineral Leasing Act of 1920, 30 U.S.C. § 193 (Supp. II 1978), are subject to the recordation requirements of sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976).....	918
6. Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.....	918
7. Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether the mining claims recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.....	919

SURFACE USES

1. Under the Mining Claims Rights Restoration Act of 1955, it is proper to prohibit all placer mining operations on a mining claim on land withdrawn for power development or powersites, where unrestricted placer mining on such land would result in substantial interference with the use of the land for recreational purposes.....	453
2. The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or powersites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose on permission to mine is that the locator must restore the surface of the claim to its condition immediately prior to mining operations.....	453

WITHDRAWN LAND

1. The President had nonstatutory authority to withdraw public land in addition to authority conferred upon him by the Pickett Act, 43 U.S.C. §§ 141, 142 (1970). Such nonstatutory authority was not limited by the terms of 43 U.S.C. § 142 (1970) which provided that withdrawn lands shall remain open to location for metalliferous minerals.....	31
2. Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals.....	31

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| 3. A mining claim located on land which was segregated and closed to mineral entry is properly declared null and void ab initio | 31 |
| 4. Failure to substantially comply with the requirements to annually perform assessment work on a claim which is located on withdrawn land results in a forfeiture of that claim to the United States..... | 926 |

MINING CLAIMS RIGHTS RESTORATION ACT

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|---|-----|
| 1. Under the Mining Claims Rights Restoration Act of 1955, it is proper to prohibit all placer mining operations on a mining claim on land withdrawn for power development or powersites, where unrestricted placer mining on such land would result in substantial interference with the use of the land for recreational purposes..... | 453 |
| 2. The Mining Claims Rights Restoration Act of 1955 gives the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or powersites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose on permission to mine is that the locator must restore the surface of the claim to its condition immediately prior to mining operations..... | 453 |

MULTIPLE MINERAL DEVELOPMENT ACT

(See also Hearings, Mining Claims—if included in this Index.)

GENERALLY

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|--|-----|
| 1. No mining claim located after the effective date of the Multiple Mineral Development Act can be adverse to any prospecting permit for coal or phosphate. No such claim renders the land unavailable for a prospecting permit for coal or phosphate under the restriction of prospecting permits to lands which are "unclaimed, undeveloped."--- | 247 |
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NOTICE**GENERALLY**

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| 1. All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations..... | 341 |
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OIL AND GAS LEASES

(See also Mineral Leasing Act, Outer Continental Shelf Lands Act—if included in this Index.)

GENERALLY

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|---|-----|
| 1. The MLA refers only to "gas" or "natural gas" without any qualifying adjectives, thus supporting a nonrestrictive reading of those terms to include coalbed gas. Coalbed gas is leasable under the oil and gas leasing provision of the MLA, 30 U.S.C. § 226 (1976)..... | 538 |
| 2. A determination by the Geological Survey of the known geologic structure of a producing oil and gas field will not be disturbed in the absence of a clear and definite showing that the determination was improperly made..... | 550 |

APPLICATIONS**Generally**

- | | |
|---|--|
| 1. When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment or sale of any rights obtained by the offeror; where the offeror | |
|---|--|

OIL AND GAS LEASES—Continued

APPLICATIONS—Continued

Generally—Continued

is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b), and the offeror is required to disclose this interest at the time of filing under 43 CFR 3102.7-----	236
2. The Department has authority to cancel leases administratively where the lease was granted pursuant to an underlying offer which violated the Departmental regulation requiring an offeror to disclose, at the time of filing, the existence of all parties holding interests in the offer.---	236
3. Where no application for BLM's approval of a transfer of any interest in an offer and lease (if issued) has ever been filed, BLM should issue the lease, if appropriate, to the offeror only-----	236
4. The regulations controlling transfer of oil and gas interests were amended on June 16, 1980, and the amended regulations govern where the interest holder has not sought approval of a transfer of his interest prior to this date. Under these amended regulations, BLM cannot consider any application for approval of a transfer of a lease interest until after the lease is issued.-----	237
5. When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b)-----	479
6. Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make a showing as to their respective interests under 43 CFR 3102.7-----	479
7. The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the Secretarial level.-----	480

OIL AND GAS LEASES—Continued**APPLICATIONS—Continued****Generally—Continued**

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| 8. An oil and gas lease application, Form 3112-1 (June 1980), is not completed in accordance with regulation 43 CFR 3112.2-1 or the instructions on the application itself where questions (d) through (f) are not answered by checking appropriate boxes in the application as the instructions require..... | 915 |
| 9. An applicant for a simultaneous oil and gas lease who is legally a minor at the time he executes and files the application is not qualified to hold a lease under the regulations, and the application is properly rejected.. | 111 |

Attorneys-in-Fact or Agents

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|---|-----|
| 1. 43 CFR 3102.6-1 sets forth the statements and evidence required when an attorney-in-fact or agent signs a simultaneous oil and gas lease drawing entry card on behalf of the applicant. Where an offer is signed and completed by a father acting as agent for his son, and where the father advises the son as to the selection of the parcel, the applicant cannot be considered "qualified" and the offer to lease drawn with first priority accepted, unless the statements required by 43 CFR 3102.6-1 have been filed with the drawing entry card..... | 341 |
| 2. Under 43 CFR 3102.2-1, a simultaneous oil and gas lease applicant may file for reference the statement of qualifications of his agent required by 43 CFR 3102.2-6 in any Bureau of Land Management office. Upon acceptance of the filing by BLM and assignment of a serial number, the applicant may properly reference the serial number on future oil and gas applications filed with any BLM office in lieu of resubmitting the statement..... | 870 |
| 3. Pursuant to 43 CFR 3112.2-1(b), a simultaneous oil and gas lease application must be manually signed in ink either by the applicant or someone authorized to sign on behalf of the applicant. Where applicant's agent has typed the applicant's name and manually signed as agent, the application conforms to the regulations..... | 871 |
| 4. An oil and gas lease application, Form 3112-1 (June 1980), is not completed in accordance with regulation 43 CFR 3112.2-1 or the instructions on the application itself where questions (d) through (f) are not answered by checking appropriate boxes in the application as the instructions require..... | 915 |

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| 1. 43 CFR 3102.6-1 sets forth the statements and evidence required when an attorney-in-fact or agent signs a simultaneous oil and gas lease drawing entry card on behalf of the applicant. Where an offer is signed and completed by a father acting as agent for his son, and where the father advises the son as to the selection of the parcel, the applicant cannot be considered "qualified" and the offer to lease drawn with first priority accepted, unless the statements required by 43 CFR 3102.6-1 have been filed with the drawing entry card..... | 341 |
| 2. A party which purchases a first-drawn simultaneous noncompetitive DEC lease offer is a bona fide purchaser of this interest where, at the time it agreed to purchase the offer, BLM's case records contained nothing to indicate that the DEC was defective or that a protest against the offer was ongoing; and where, at the time it consummated the agree- | |

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APPLICATIONS—Continued

Drawings—Continued

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ment by payment of consideration for the offer, these records showed that BLM had proceeded to issue the lease, thus indicating that there was no defect in the DEC, provided that the purchaser had no actual knowledge of any defect in the DEC.....

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3. An undated DEC lease offer is defective and must be rejected..... 480
4. A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. A regulation specifying a bank money order as an acceptable form of remittance requires the acceptance of a personal money order issued by a bank..... 625

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1. A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. A regulation specifying a bank money order as an acceptable form of remittance requires the acceptance of a personal money order issued by a bank..... 625
2. An applicant for a simultaneous oil and gas lease who is legally a minor at the time he executes and files the application is not qualified to hold a lease under the regulations, and the application is properly rejected.. 1110

Sole Party in Interest

1. When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b), and the offeror is required to disclose this interest at the time of filing under 43 CFR 3102.7..... 236
2. The Department has authority to cancel leases administratively where the lease was granted pursuant to an underlying offer which violated the Departmental regulation requiring an offeror to disclose, at the time of filing, the existence of all parties holding interests in the offer.. 236
3. When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b)..... 479

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4. Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make a showing as to their respective interests under 43 CFR 3102.7... 479

ASSIGNMENTS OR TRANSFERS

1. Where no application for BLM's approval of a transfer of any interest in an offer and lease (if issued) has ever been filed, BLM should issue the lease, if appropriate, to the offeror only..... 236
2. The regulations controlling transfer of oil and gas interests were amended on June 16, 1980, and the amended regulations govern where the interest holder has not sought approval of a transfer of his interest prior to this date. Under these amended regulations, BLM cannot consider any application for approval of a transfer of a lease interest until after the lease is issued..... 237
3. A noncompetitive oil and gas lease may only be issued to the first-qualified applicant therefor. An extension of time may be granted to supply necessary evidence of joinder in a unit agreement prior to lease issuance and a lease offer will not be rejected in favor of a junior offeror where an extension is timely requested and the requested evidence is provided in good faith and without unreasonable delay thereafter... 347
4. A party which purchases a first-drawn simultaneous noncompetitive DEC lease offer is a bona fide purchaser of this interest where, at the time it agreed to purchase the offer, BLM's case records contained nothing to indicate that the DEC was defective or that a protest against the offer was ongoing; and where, at the time it consummated the agreement by payment of consideration for the offer, these records showed that BLM had proceeded to issue the lease, thus indicating that there was no defect in the DEC, provided that the purchaser had no actual knowledge of any defect in the DEC..... 480
5. A "remote purchaser," that is, one who purchases an oil and gas lease interest from a bona fide purchaser, is protected just as is the latter, even where it is chargeable with knowledge that there may have been a legal discrepancy when the lease was initially issued..... 480

BONA FIDE PURCHASER

1. A party which purchases a first-drawn simultaneous noncompetitive DEC lease offer is a bona fide purchaser of this interest where, at the time it agreed to purchase the offer, BLM's case records contained nothing to indicate that the DEC was defective or that a protest against the offer was ongoing; and where, at the time it consummated the agreement by payment of consideration for the offer, these records showed that BLM had proceeded to issue the lease, thus indicating that there was no defect in the DEC, provided that the purchaser had no actual knowledge of any defect in the DEC..... 480
2. An overriding royalty interest retained by a lessee after he has assigned the lease to a bona fide purchaser is voidable and properly canceled where it

OIL AND GAS LEASES—Continued**BONA FIDE PURCHASER—Continued**

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is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly canceled, as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease. BLM should, on remand, sell these canceled overriding royalty interests as provided in 30 U.S.C. § 184(h) (1976) and 43 CFR 3102.1-2(b)-----

480

3. A "remote purchaser," that is, one who purchases an oil and gas lease interest from a bona fide purchaser, is protected just as is the latter, even where it is chargeable with knowledge that there may have been a legal discrepancy when the lease was initially issued-----

480

CANCELLATION

1. The Department has authority to cancel leases administratively where the lease was granted pursuant to an underlying offer which violated the Departmental regulation requiring an offeror to disclose, at the time of filing, the existence of all parties holding interests in the offer--
2. An overriding royalty interest retained by a lessee after he has assigned the lease to a bona fide purchaser is voidable and properly canceled where it is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly canceled, as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease. BLM should, on remand, sell these canceled overriding royalty interests as provided in 30 U.S.C. § 184(h) (1976) and 43 CFR 3102.1-2(b)-----

236

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COMPETITIVE LEASES

1. Where a competitive, fractional interest, oil and gas lease is issued with conflicting and confusing rental provisions recited in the lease terms and in an attachment to the lease, a deficient rental payment by the lessee in reasonable reliance on the section providing for rental based upon the pro rata fractional interest of the United States will be considered justified so as to qualify the terminated lease for reinstatement--

879

CONSENT OF AGENCY

1. Where public domain land is withdrawn or reserved for administration by another agency for a particular purpose, BLM should properly consider the recommendations of the surface management agency regarding lease issuance and any required stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values--

438

DISCOVERY

1. A determination by the Geological Survey of the known geologic structure of a producing oil and gas field will not be disturbed in the absence of a clear and definite showing that the determination was improperly made-----

550

DISCRETION TO LEASE

1. A decision of BLM refusing to issue an oil and gas lease in the exercise of the discretionary authority of the Secretary of the Interior over oil and gas leasing will be affirmed where it sets forth the reasons therefore and the facts of record support the conclusion that refusal to lease is in the public interest-----

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| 2. Rejection of an oil and gas lease offer is a more severe measure than the most stringent stipulations and the record supporting a decision rejecting a lease offer in the public interest should ordinarily reflect consideration of whether leasing subject to clear and reasonable stipulations would adequately protect the public interest concerns of the surface management agency..... | 438 |
| 3. Where public domain land is withdrawn or reserved for administration by another agency for a particular purpose, BLM should properly consider the recommendations of the surface management agency regarding lease issuance and any required stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values..... | 438 |

FIRST-QUALIFIED APPLICANT

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|---|-----|
| 1. When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b), and the offeror is required to disclose this interest at the time of filing under 43 CFR 3102.7..... | 236 |
| 2. A noncompetitive oil and gas lease may only be issued to the first-qualified applicant therefor. An extension of time may be granted to supply necessary evidence of joinder in a unit agreement prior to lease issuance and a lease offer will not be rejected in favor of a junior offeror where an extension is timely requested and the requested evidence is provided in good faith and without unreasonable delay thereafter..... | 347 |
| 3. When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b)..... | 479 |
| 4. Where an individual files an oil and gas lease offer through a leasing service under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make a showing as to their respective interests under 43 CFR 3102.7..... | 479 |
| 5. An undated DEC lease offer is defective and must be rejected..... | 480 |

OIL AND GAS LEASES—Continued**FUTURE AND FRACTIONAL INTEREST LEASES**

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1. Where a competitive, fractional interest, oil and gas lease is issued with conflicting and confusing rental provisions recited in the lease terms and in an attachment to the lease, a deficient rental payment by the lessee in reasonable reliance on the section providing for rental based upon the pro rata fractional interest of the United States will be considered justified so as to qualify the terminated lease for reinstatement. 879

KNOWN GEOLOGIC STRUCTURE

1. A determination by the Geological Survey of the known geologic structure of a producing oil and gas field will not be disturbed in the absence of a clear and definite showing that the determination was improperly made.----- 550

LANDS SUBJECT TO

1. Public domain land withdrawn or reserved is presumed to be available for oil and gas leasing unless the withdrawal or reservation specifically provides otherwise.----- 437
2. An offer to lease for oil and gas in the Arctic National Wildlife Refuge is properly rejected where the lands in the refuge have been withdrawn from the operation of the mineral leasing laws by either secs. 1002 or 1003 of the Alaska National Interest Lands Conservation Act. Standard offers to lease for oil and gas may not be construed as requests to undertake exploratory activities only. The only exploratory activities permitted in the Arctic National Wildlife Refuge are governed by sec. 1002 of the Act. Any requests to undertake exploratory activities are premature until Secretary of the Interior has issued guidelines governing exploration in the refuge.----- 601

NONCOMPETITIVE LEASES

1. A noncompetitive oil and gas lease may only be issued to the first-qualified applicant therefor. An extension of time may be granted to supply necessary evidence of joinder in a unit agreement prior to lease issuance and a lease offer will not be rejected in favor of a junior offeror where an extension is timely requested and the requested evidence is provided in good faith and without unreasonable delay thereafter.----- 347

OVERRIDING ROYALTIES

1. An overriding royalty interest retained by a lessee after he has assigned the lease to a bona fide purchaser is voidable and properly canceled where it is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly canceled, as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease. BLM should, on remand, sell these canceled overriding royalty interests as provided in 30 U.S.C. § 184(h) (1976) and 43 CFR 3102.1-2(b).----- 480

REINSTATEMENT

1. Failure to pay the annual rental for an oil and gas lease on or before the anniversary date results in the automatic termination of the lease by operation of law. The date of receipt of the rental and not the date of mailing is controlling in determining whether rental on an oil and gas lease was timely paid. A lease may be reinstated if the failure to pay the rental was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976).----- 38
2. Reasonable diligence normally requires sending the payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the payment. Mailing rental payments the afternoon of the day due does not constitute reasonable diligence.----- 38

OIL AND GAS LEASES—Continued

REINSTATEMENT—Continued

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3. In order for the failure to pay oil and gas lease rental timely to be considered justifiable, generally it must be caused by factors outside the lessee's control, which were the proximate cause of the failure. A lessee's ignorance of the law and regulations and reliance on the business practices of other Governmental agencies accepting a postmark as the date of delivery is not a justifiable excuse.----- 38
4. A lessee may be entitled to reinstatement of the lease if it is shown, among other things, that reasonable diligence was exercised in mailing the payment, or that the delay in remitting the rental is justifiable. Where a lessee is unable to make the requisite showing, a petition for reinstatement is properly denied.----- 420
5. Reasonable diligence generally requires mailing the rental payment sufficiently in advance of the anniversary or due date to account for normal delays in collection, transmittal, and delivery of the mail. Mailing the rental payment 1 day before or on the anniversary date of the lease does not constitute reasonable diligence.----- 420
6. A late rental payment or an insufficient tender of rental may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected his or her actions in paying the rental fee. Instances of simple forgetfulness, inadvertence, ignorance of the regulations, reliance on BLM courtesy notices, and similar occurrences do not excuse a failure to exercise due diligence.----- 420
7. Where a competitive, fractional interest, oil and gas lease is issued with conflicting and confusing rental provisions recited in the lease terms and in an attachment to the lease, a deficient rental payment by the lessee in reasonable reliance on the section providing for rental based upon the pro rata fractional interest of the United States will be considered justified so as to qualify the terminated lease for reinstatement.----- 879
8. A lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that the failure to make timely payment was "justifiable." In the absence of such proof, a petition for reinstatement is properly denied.----- 1012
9. A late rental payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee. However, where the lessee has entrusted payment to an employee who is hospitalized because of an injury, and another employee who assumes the injured employee's responsibilities fails to make timely payment, the injury of the employee is not the proximate cause of the late payment.----- 1013

RENTALS

1. Failure to pay the annual rental for an oil and gas lease on or before the anniversary date results in the automatic termination of the lease by operation of law. The date of receipt of the rental and not the date of mailing is controlling in determining whether rental on an oil and gas lease was timely paid. A lease may be reinstated if the failure to pay the rental was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976).----- 38

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2. Reasonable diligence normally requires sending the payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the payment. Mailing rental payments the afternoon of the day due does not constitute reasonable diligence..... 38
3. In order for the failure to pay oil and gas lease rental timely to be considered justifiable, generally it must be caused by factors outside the lessee's control, which were the proximate cause of the failure. A lessee's ignorance of the law and regulations and reliance on the business practices of other Governmental agencies accepting a postmark as the date of delivery is not a justifiable excuse..... 38
4. Where a competitive, fractional interest, oil and gas lease is issued with conflicting and confusing rental provisions recited in the lease terms and in an attachment to the lease, a deficient rental payment by the lessee in reasonable reliance on the section providing for rental based upon the pro rata fractional interest of the United States will be considered justified so as to qualify the terminated lease for reinstatement..... 879

ROYALTIES

1. The Secretary of the Interior has discretionary authority to determine the factors to be considered in computing transportation allowances for royalty valuation purposes. Where the Geological Survey applies a formula developed after appropriate research and consultation with affected oil companies and where the appellant does not provide convincing evidence that the 6 percent rate of return used in the formula is unreasonable as applied to appellant's production from 1968 to 1973, the transportation allowance will be upheld..... 1
2. In determining the amount of royalty due to the United States from an oil and gas lease, it is proper for the Geological Survey to use a base value which includes both the purchase price paid for the natural gas and the amount of severance taxes paid by the purchaser directly to the State where, under Oklahoma law, the purchaser is authorized to deduct the amount of taxes paid from the amount paid to the producer. Decision in *Wheless Drilling Co.*, 13 IBLA 21, 80 I.D. 599 (1973), cited and applied..... 7

STIPULATIONS

1. Rejection of an oil and gas lease offer is a more severe measure than the most stringent stipulations and the record supporting a decision rejecting a lease offer in the public interest should ordinarily reflect consideration of whether leasing subject to clear and reasonable stipulations would adequately protect the public interest concerns of the surface management agency..... 438

TERMINATION

1. Failure to pay the annual rental for an oil and gas lease on or before the anniversary date results in the automatic termination of the lease by operation of law. The date of receipt of the rental and not the date of mailing is controlling in determining whether rental on an oil and gas lease was timely paid. A lease may be reinstated if the failure to pay the rental was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976)..... 38

OIL AND GAS LEASES—Continued**TERMINATION—Continued**

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| 2. Upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law..... | 420 |
| 3. A lessee may be entitled to reinstatement of the lease if it is shown, among other things, that reasonable diligence was exercised in mailing the payment, or that the delay in remitting the rental is justifiable. Where a lessee is unable to make the requisite showing, a petition for reinstatement is properly denied..... | 420 |
| 4. Reasonable diligence generally requires mailing the rental payment sufficiently in advance of the anniversary or due date to account for normal delays in collection, transmittal, and delivery of the mail. Mailing the rental payment 1 day before or on the anniversary date of the lease does not constitute reasonable diligence..... | 420 |
| 5. A late rental payment or an insufficient tender of rental may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected his or her actions in paying the rental fee. Instances of simple forgetfulness, inadvertence, ignorance of the regulations, reliance on BLM courtesy notices, and similar occurrences do not excuse a failure to exercise due diligence..... | 420 |
| 6. Where a competitive, fractional interest, oil and gas lease is issued with conflicting and confusing rental provisions recited in the lease terms and in an attachment to the lease, a deficient rental payment by the lessee in reasonable reliance on the section providing for rental based upon the pro rata fractional interest of the United States will be considered justified so as to qualify the terminated lease for reinstatement..... | 879 |
| 7. A lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that the failure to make timely payment was "justifiable." In the absence of such proof, a petition for reinstatement is properly denied..... | 1012 |
| 8. A late rental payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee. However, where the lessee has entrusted payment to an employee who is hospitalized because of an injury, and another employee who assumes the injured employee's responsibilities fails to make timely payment, the injury of the employee is not the proximate cause of the late payment..... | 1013 |

UNIT AND COOPERATIVE AGREEMENTS

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| 1. A noncompetitive oil and gas lease may only be issued to the first-qualified applicant therefor. An extension of time may be granted to supply necessary evidence of joinder in a unit agreement prior to lease issuance and a lease offer will not be rejected in favor of a junior offeror where an extension is timely requested and the requested evidence is provided in good faith and without unreasonable delay thereafter..... | 348 |
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OUTER CONTINENTAL SHELF LANDS ACT*(See also Oil & Gas Leases—if included in this Index.)***GENERALLY**

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1. Use of consultation procedures of sec. 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344 (Supp. II 1978), are not required for annual review of an approved 5-year OCS leasing program under sec. 18(e) of the Act..... 20
2. Under sec. 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344 (Supp. II 1978), a reapproval must include a schedule of proposed lease sales for the full 5-year period following reapproval but may not include sales beyond the 5-year period. A revision permits changes within an existing approved schedule without requiring an extension of that schedule to include a full 5 years after revision..... 21
3. Under sec. 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344 (Supp. II 1978), a revision may add, delete, delay or advance sales and planning milestones within an approved 5-year program. A revision cannot be used to tack additional sales or milestones onto the end of an approved 5-year program. Only a reapproval can add sales beyond an existing approved program..... 21
4. Sec. 18(e) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344(e) (Supp. II 1978), states in discussing revisions and reapprovals that only a revision which is not significant may escape the requirement of sec. 18 consultation procedures. A fortiori, all reapprovals require use of these procedures. Therefore, the procedures must be followed to schedule any sales or milestones beyond the existing 5-year program.... 21
5. Under sec. 18 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1344 (Supp. II 1978), the Secretary has considerable discretion to determine whether or not the deletion, delay or advancement of sales or milestones within an approved 5-year program is a significant revision..... 21
6. Planning milestones and sale dates beyond the 5-year horizon can be made available as a matter of information, but final approval of a schedule containing such sales cannot occur until the procedures of sec. 18 have been followed. Those milestones occurring within the 5-year period that apply to sales expected beyond 5 years may be included in a reapproved schedule..... 21

OIL AND GAS INFORMATION PROGRAM**Generally**

1. 30 CFR 250.3, requiring the U.S. Geological Survey to release a lessee's well logs two years after they are submitted, is a reasonable exercise of the Secretary's discretion. It does not apply to the Survey's findings of producibility under OCS Order No. 4; such findings may consequently be released immediately..... 699
2. The history and text of the 1978 Amendments show that "privileged or proprietary information" is a term to be defined by the Secretary after balancing competing interests of disclosure and confidentiality..... 699

OIL AND GAS LEASES

1. The Secretary of the Interior has discretionary authority to determine the factors to be considered in computing transportation allowances for royalty valuation purposes. Where the Geological Survey applies a formula developed after appropriate research and consultation with affect-

OUTER CONTINENTAL SHELF LANDS ACT—Continued**OIL AND GASES LEASES—Continued**

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ed oil companies and where the appellant does not provide convincing evidence that the 6 percent rate return used in the formula is unreasonable as applied to appellant's production from 1968 to 1973, the transportation allowance will be upheld-----

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REFUNDS

1. Sec. 10 of the Outer Continental Shelf Lands Act does not authorize refunds to purchasers of royalty oil----- 1090
2. Sec. 10 of the Outer Continental Shelf Lands Act does not authorize refunds to persons who have paid a civil penalty under sec. 24 of the Act.----- 1090
3. Before allowing refunds or credits against future payments, the Secretary must report them to Congress----- 1090
4. The request for a refund or credit must be in writing, must ask for a specific amount, and must explain why the lessee considers the amount to have been excessive. Except under certain circumstances, the lessee must request the refund or credit within two years after making the payment. Those circumstances are when the lessee both has acted to verify his account within two years and has given the Department enough information to estimate the potential amount of the refund or credit----- 1090
5. An excess net profit share payment, to be credited under 10 CFR 390.034(c), must be reported to Congress before crediting----- 1090
6. Generally, when one co-lessee files a request for repayment, his request does not toll the two-year limit for other co-lessees. But if the co-lessee has the authority to make all lease payments for the other co-lessees, then his request protects all of them----- 1090
7. A lessee may receive a refund or credit of an overpayment even though he did not pay the excess under protest----- 1099
8. Upon discovering an overpayment and an underpayment in a lease account, the Secretary may properly offset the two without regard to sec. 10. But when an excess remains after the offset, the Secretary must comply with sec. 10 in giving a refund or credit----- 1090

PATENTS OF PUBLIC LANDS**EFFECT**

1. The effect of the issuance of a patent is to transfer legal title from the United States and to remove the land from jurisdiction of the Department of the Interior. Where BLM's records show lands have been patented, an Indian allotment application filed under the General Allotment Act of Feb. 8, 1887, for such lands is properly rejected.----- 244

RESERVATIONS

1. Patents issued pursuant to the Act of Mar. 3, 1909, or the Act of June 22, 1910, 30 U.S.C. §§ 81, 83-85 (1976) reserved to the United States "all coal" and the right to prospect for, mine and remove the "coal deposits" underlying the patented lands. Congress in the 1909 and 1910 Acts intended to, and did, reserve only the coal and not other minerals found in association with coal. Accordingly, all minerals other than coal, including coalbed gas, passed to the surface owner at the time a patent was issued pursuant to the 1909 or 1910 Acts----- 538
2. Should coalbed gas occur in lands in which "oil and gas" were reserved to the United States in agricultural patents issued under the Act of July 17, 1914, 30 U.S.C. § 121 (1976), that coalbed gas is reserved to the United States----- 538

PHOSPHATE LEASES AND PERMITS

(See also Mineral Leasing Act—if included in this Index.)

PERMITS

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1. Limitation of a phosphate prospecting permit to "unclaimed, undeveloped" lands restricts it to lands without valid, vested right, existing at the time of issuance of the permit, which are adverse to the prospecting permit which is sought, and any preference right lease which may be earned pursuant to such a permit..... 247
2. A prospecting permit may be issued for phosphate for which there is no valid, adverse claim at the time of issuance, notwithstanding the existence then of nonadverse claims, entries, or leases..... 247
3. Issuance of a prospecting permit is presumed to be regular if no valid, adverse interest appeared in the land office records at the time of issuance of the permit..... 247

PRACTICE BEFORE THE DEPARTMENT

(See also Rules of Practice—if included in this Index.)

PERSONS QUALIFIED TO PRACTICE

1. Qualifications to practice before the Department of the Interior are prescribed by regulations. Where an appeal is brought by a corporation that does not appear to fall within any of the categories of persons authorized to practice, the appeal is subject to dismissal..... 345

PUBLIC LANDS

(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands—if included in this Index.)

LEASES AND PERMITS

1. Public domain land withdrawn or reserved is presumed to be available for oil and gas leasing unless the withdrawal or reservation specifically provides otherwise..... 437
2. Where public domain land is withdrawn or reserved for administration by another agency for a particular purpose, BLM should properly consider the recommendations of the surface management agency regarding lease issuance and any required stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values.... 438

REGULATIONS

(See also Administrative Procedure—if included in this Index.)

GENERALLY

1. The Boards of Appeal of the Department of the Interior have no authority to declare invalid a duly promulgated regulation of this Department. Where, however, the regulation was not properly promulgated, is lacking in statutory basis, and has been consistently ignored in actual practice, that regulation will be accorded no force or effect..... 24
2. All persons dealing with the Government are presumed to have knowledge of duly promulgated rules and regulations regardless of their actual knowledge of what is contained in such regulations..... 38
3. The regulations controlling transfer of oil and gas interests were amended on June 16, 1980, and the amended regulations govern where the interest holder has not sought approval of a transfer of his interest prior to this date. Under these amended regulations, BLM cannot consider any application for approval of a transfer of a lease interest until after the lease is issued..... 237

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| 4. All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations..... | 341 |
| 5. The Board is bound by duly promulgated Departmental regulations as well as by Departmental policy expressed in Secretarial Orders published in the <i>Federal Register</i> or set forth in the Departmental Manual... | 760 |

APPLICABILITY

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| 1. An ambiguous regulation relating to "the proper office" in which to file a relinquishment of a coal lease should not be interpreted to the detriment of a coal lessee who sought to comply with its provisions..... | 24 |
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| 1. An ambiguous regulation relating to "the proper office" in which to file a relinquishment of a coal lease should not be interpreted to the detriment of a coal lessee who sought to comply with its provisions..... | 24 |
| 2. A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas lease applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. A regulation specifying a bank money order as an acceptable form of remittance requires the acceptance of a personal money order issued by a bank..... | 625 |
| 3. Departmental regulations at 43 CFR 2653.5, insofar as they prescribe a specified course of action including publication, referral, investigation, conferring, reporting, etc., by the Department with regard to selections of public lands made pursuant to § 14(h)(1) of the Alaska Native Claims Settlement Act, cannot apply when the selected lands are not public lands and the selection applications must be rejected at the outset..... | 886 |

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| 1. The Boards of Appeal of the Department of the Interior have no authority to declare invalid a duly promulgated regulation of this Department. Where, however, the regulation was not properly promulgated, is lacking in statutory basis, and has been consistently ignored in actual practice, that regulation will be accorded no force or effect..... | 24 |
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RIGHTS-OF-WAY

(See also Indian Lands, Reclamation Lands—if included in this Index.)

NATURE OF INTEREST GRANTED

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| 1. A right-of-way granted by Revised Statutes Sec. 2477 is a less-than-fee interest in the nature of an easement. Following the acceptance of a Revised Statutes Sec. 2477 grant of right-of-way, the Federal Government retains its fee interest in the land, subject to the right-of-way, and may dispose of it pursuant to law..... | 629 |
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REVISED STATUTES SEC. 2477

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| 1. A right-of-way granted by Revised Statutes Sec. 2477 is a less-than-fee interest in the nature of an easement. Following the acceptance of a Revised Statutes Sec. 2477 grant of right-of-way, the Federal Government retains its fee interest in the land, subject to the right-of-way, and may dispose of it pursuant to law..... | 629 |
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RULES OF PRACTICE

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(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department—if included in this Index.)

GENERALLY

1. "Service." Where BLM sends a copy of its decision to an adversely affected party at his address of record on Sept. 21; where additional information containing the party's more recent address is filed with BLM on Oct. 5; and where BLM receives the mailed copy back as undeliverable on Oct. 16 but does not mail another copy to the more recent address, BLM has not mailed a copy to the party's last address of record, and there is no "service" under 43 CFR 1810.2. Where BLM has never served a copy of its decision on an adversely affected party, the time for this party to appeal has never commenced, and the decision is not effective *per* 43 CFR 4.21(a) ----- 236
2. Where a party, in the course of various proceedings before the Department, asserts facts that would, if proven, entitle him or her to obtain patent to land owned by the United States, and the litigation proceeds on the assumption that the facts are as stated, appellant will not be heard in a subsequent hearing to deny that those facts existed----- 926

APPEALS

Generally

1. Outlining the treatment to be accorded voluminous exhibits, the Board states that in the event counsel for either side considers that information contained in a voluminous exhibit either proves or may be of material assistance in proving a particular point, it is incumbent upon counsel to specifically cite the portions of the voluminous exhibit relied upon by page number, by date, or by other appropriate reference. Absent specific citations to a voluminous exhibit or to an appropriate summary thereof in evidence, the Board will not undertake to determine the content of this type of exhibit in particular areas before reaching its decision.----- 42
2. The Board seriously questions the wisdom of the Government in not arranging for the audit of multimillion dollar claims apparently advanced in good faith by reputable contractors, noting that securing audits will not only facilitate the examination of witnesses with respect to quantum but are also likely to prove to be useful in establishing a basis for agreeing upon stipulations narrowing the issues in quantum areas or affording a basis for arriving at a settlement prior to the hearing, while it is in progress or after it has been concluded.----- 42
3. "Service." Where BLM sends a copy of its decision to an adversely affected party at his address of record on Sept. 21; where additional information containing the party's more recent address is filed with BLM on Oct. 5; and where BLM receives the mailed copy back as undeliverable on Oct. 16 but does not mail another copy to the more recent address, BLM has not mailed a copy to the party's last address of record, and there is no "service" under 43 CFR 1810 2. Where BLM has never served a copy of its decision on an adversely affected party, the time for this party to appeal has never commenced, and the decision is not effective *per* 43 CFR 4.21(a) ----- 236

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| 4. An appeal may be decided on the basis of a theory not advanced by the parties so long as the theory is consistent with the facts of record or legitimate inferences therefrom..... | 722 |
| 5. Where following the contest of a number of mining claims, a decision is rendered by an Administrative Law Judge holding certain claims and portions of claims to be valid and invalidating the remainder for lack of mineral or as embracing excess mineral reserves, and the Government appeals from that decision but the claimant does not, that decision will be set aside and the case remanded for rehearing on the basis of a judicial decision in another case, made while the subject appeal was pending, that there can be no invalidation of mining claims by this Department on a finding that the claimant has acquired claims for far more mineral than the market can absorb within the foreseeable future.. | 772 |
| 6. A finding by BLM that some statutory mechanism has been triggered which automatically divests a right does not and cannot mean that the adversely affected party is denied recourse to the appellate process. The Board of Land Appeals is the exclusive arbiter of its jurisdiction, and neither employees of BLM nor attorneys of the Office of the Solicitor may create or deny the right of appeal to the Board..... | 879 |

Burden of Proof

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| 1. In a case involving the assertion of a differing site conditions claim under a contract for the construction of concrete lined tunnels for the Navajo Indian Irrigation Project, the Board follows the Court of Claims in holding that it is not necessary for the "indications" in the contract to be explicit or specific, it being sufficient for there to be an indication on the face of the contract documents causing a bidder reasonably to expect that there were no "subsurface or latent" physical conditions at the site differing materially from those indicated in the contract.. | 41 |
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Dismissal

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| 1. A claim asserted under the Changes clause for increased costs resulting from actions of the President in decontrolling the price of heavy crude oil is dismissed as being outside the jurisdiction of the Board since the President's action was a sovereign act taken as part of the program to maintain or increase production of heavy crude oil..... | 431 |
| 2. A Government motion to dismiss an appeal is granted where no express contract between the parties exists, there is no evidence from which an implied in fact contract could be inferred, and the Board is without jurisdiction over contracts implied in law, assuming appellant is seeking full relief..... | 809 |

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| 1. Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final..... | 31 |
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| 1. Due process does not require notice and a prior right to be heard in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final..... | 31 |
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RULES OF PRACTICE—Continued

APPEALS—Continued

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2. The Board refuses to draw inferences adverse to the Government by reason of its failure to have its project engineer testify in important areas and by reason of its failure to call as witnesses two of its employees who attended the hearing where the Board finds that the action of the Government is consistent with the principal defenses made to the differing site conditions claims asserted and where under long-established Board practice, the appellant could have called any or all of the Government's employees concerned as witnesses without making them appellant's witnesses for the purposes of impeachment..... 41
3. The Board sustains the action of the hearing member in refusing to receive in evidence documents not identified by a witness through whose testimony their admission is being sought..... 42
4. A Government motion for summary judgment is granted and an appellant's request for a hearing is denied in a case where if all of appellant's factual allegations are accepted as true, there would still be no basis for granting the appellant relief for the claim asserted. The Board finds that to hold a hearing in such circumstances would not secure the just and inexpensive determination of the appeal without unnecessary delay..... 361

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1. A Government motion for summary judgment is granted and an appellant's request for a hearing is denied in a case where if all of appellant's factual allegations are accepted as true, there would still be no basis for granting the appellant relief for the claim asserted. The Board finds that to hold a hearing in such circumstances would not secure the just and inexpensive determination of the appeal without unnecessary delay..... 361
2. A claim asserted under the Changes clause for increased costs resulting from actions of the President in decontrolling the price of heavy crude oil is dismissed as being outside the jurisdiction of the Board since the President's action was a sovereign act taken as part of the program to maintain or increase production of heavy crude oil..... 431
3. A Government motion to dismiss an appeal is granted where no express contract between the parties exists, there is no evidence from which an implied in fact contract could be inferred, and the Board is without jurisdiction over contracts implied in law, assuming appellant is seeking full relief..... 809

Reconsideration

1. Upon a motion for reconsideration, the Board finds that the contentions of appellant challenging the principal decision are based on misstatements or misinterpretations of the principal decision or ask that the Board consider the merits of a claim deemed to have been properly dismissed for lack of proof of coercion or duress..... 521

Standing to Appeal

1. A Government motion to dismiss an appeal is granted where no express contract between the parties exists, there is no evidence from which an implied in fact contract could be inferred, and the Board is without jurisdiction over contracts implied in law, assuming appellant is seeking full relief..... 809

RULES OF PRACTICE—Continued**EVIDENCE**

Page

1. The Board refuses to draw inferences adverse to the Government by reason of its failure to have its project engineer testify in important areas and by reason of its failure to call as witnesses two of its employees who attended the hearing where the Board finds that the action of the Government is consistent with the principal defenses made to the differing site conditions claims asserted and where under long-established Board practice, the appellant could have called any or all of the Government's employees concerned as witnesses without making them appellant's witnesses for the purposes of impeachment.----- 41
2. In a case involving the assertion of a differing site conditions claim under a contract for the construction of concrete lined tunnels for the Navajo Indian Irrigation Project, the Board follows the Court of Claims in holding that it is not necessary for the "indications" in the contract to be explicit or specific, it being sufficient for there to be an indication on the face of the contract documents causing a bidder reasonably to expect that there were no "subsurface or latent" physical conditions at the site differing materially from those indicated in the contract.----- 41
3. Outlining the treatment to be accorded voluminous exhibits, the Board states that in the event counsel for either side considers that information contained in a voluminous exhibit either proves or may be of material assistance in proving a particular point, it is incumbent upon counsel to specifically cite the portions of the voluminous exhibit relied upon by page number, by date, or by other appropriate reference. Absent specific citations to a voluminous exhibit or to an appropriate summary thereof in evidence, the Board will not undertake to determine the content of this type of exhibit in particular areas before reaching its decision.----- 42
4. The Board sustains the action of the hearing member in refusing to receive in evidence documents not identified by a witness through whose testimony their admission is being sought.----- 42
5. The Board seriously questions the wisdom of the Government in not arranging for the audit of multimillion dollar claims apparently advanced in good faith by reputable contractors, noting that securing audits will not only facilitate the examination of witnesses with respect to quantum but are also likely to prove to be useful in establishing a basis for agreeing upon stipulations narrowing the issues in quantum areas or affording a basis for arriving at a settlement prior to the hearing, while it is in progress or after it has been concluded.----- 42

GOVERNMENT CONTESTS

1. The provisions of 25 U.S.C. § 194 (1976) relating to the placing of the burden of proof do not apply where the Government contests the qualifications of an allotment applicant. An allotment applicant in such a situation is the proponent of the rule and must show his or her entitlement to the land sought.----- 374

HEARINGS

1. The Board seriously questions the wisdom of the Government in not arranging for the audit of multimillion dollar claims apparently advanced in good faith by reputable contractors, noting that securing audits will not only facilitate the examination of witnesses with respect to quantum but are also likely to prove to be useful in establishing a basis for agreeing upon stipulations narrowing the issues in quantum areas or affording a basis for arriving at a settlement prior to the hearing, while it is in progress or after it has been concluded.----- 42

RULES OF PRACTICE—Continued

WITNESSES

Page

1. The Board refuses to draw inferences adverse to the Government by reason of its failure to have its project engineer testify in important areas and by reason of its failure to call as witnesses two of its employees who attended the hearing where the Board finds that the action of the Government is consistent with the principal defenses made to the differing site conditions claims asserted and where under long-established Board practice, the appellant could have called any or all of the Government's employees concerned as witnesses without making them appellant's witnesses for the purposes of impeachment. 41
2. The Board sustains the action of the hearing member in refusing to receive in evidence documents not identified by a witness through whose testimony their admission is being sought. 42
3. The Board seriously questions the wisdom of the Government in not arranging for the audit of multimillion dollar claims apparently advanced in good faith by reputable contractors, noting that securing audits will not only facilitate the examination of witnesses with respect to quantum but are also likely to prove to be useful in establishing a basis for agreeing upon stipulations narrowing the issues in quantum areas or affording a basis for arriving at a settlement prior to the hearing, while it is in progress or after it has been concluded. 42

SEGREGATION

1. Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals. 31

STATE EXCHANGES

(See also Exchanges of Land—if included in this Index.)

GENERALLY

1. A protest against approval of a state exchange application is properly dismissed where the exchange is shown to be in the public interest under sec. 206 of the Federal Land Policy and Management Act of 1976, and it is immaterial that the protestants may be permittees or licensees of the selected lands whose grazing privileges would have been lost upon completion of the exchange, in that neither a licensee nor a permittee has a vested right in the land covered by the license or permit and such land is available for selection by a state. 232

EFFECT OF APPLICATION

1. State exchange applications pending on Oct. 21, 1976, may be processed under sec. 8(c) of the Taylor Grazing Act, 43 U.S.C. § 315g(c) (1970), only if the state had complied with all the requirements necessary to vest rights to the exchange in the state; all other applications must be processed under sec. 206 of the Federal Land Policy and Management Act of 1976. 232

STATE SELECTIONS

Page

(See also School Lands, Swamplands—if included in this Index.)

1. Applications for Alaska Native allotments in "core" townships of Native villages are subject to the statutory approval contained in sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, notwithstanding a State selection or tentative approval thereof for the same lands prior to Dec. 18, 1971.----- 664

STATUTES

1. All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations----- 341

STATUTORY CONSTRUCTION**ADMINISTRATIVE CONSTRUCTION**

1. Interpretation of the Alaska Native Claims Settlement Act by the Bureau of Indian Affairs contemporaneous with the enactment of the statute and continued over the succeeding 9 years is relevant to a determination of the application to be given to the statute. The Agency refusal to enroll persons who were not United States citizens on Dec. 18, 1971, the effective date of the Act, is a reasonable application of the Act and of Departmental regulations implementing the Act, and gives the language of the statute (43 U.S.C. §1604 (1976)) its common and ordinary meaning.----- 262

LEGISLATIVE HISTORY

1. The legislative history of sec. 6 of the Federal Coal Leasing Amendments Act show that the revision of sec. 7 of the MLA (30 U.S.C. § 207) was not retroactive, but applied to new leases and to "old" leases upon readjustment. The ten-year production period and revised royalty rates of amended sec. 7 must be imposed on "old" coal leases at readjustment. The legislative history to the 1978 coal leasing revisions (Act of Oct. 30, 1978) discloses that Congress understood and acted on the assumption that the amended sec. 7 royalty rates did apply to all "old" leases upon readjustment.----- 1003

SUBMERGED LANDS

1. The Department of the Interior under provisions of ANCSA and regulations in 43 CFR has both the authority and responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.----- 636
2. The Bureau of Land Management under provisions of ANCSA and regulations in 43 CFR has both the authority and responsibility to determine which lands, including submerged lands, are "public lands" within the definition of § 3(e) of ANCSA and are therefore available for selection by a Native corporation.----- 1086, 1105

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977**ABATEMENT****Generally**

1. A permittee's noncompliance with an order by OSM to abate an alleged violation of the backfilling and grading requirements of 30 CFR 715.14 cannot serve to excuse the permittee's noncompliance with an order by OSM to abate an alleged violation of the revegetation requirements of 30 CFR 715.20.----- 737

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued**ABATEMENT—Continued****Remedial Actions**

- | | Page |
|---|------|
| 1. A notice of violation requiring a permittee to submit a drainage design for regulatory authority approval is proper even when such a design might include disturbance of an area within 100 feet of an intermittent or perennial stream because the regulatory authority could grant an exemption for that area under either 30 CFR 717.17(a) or 715.17(d) (3) . | 503 |
| 2. Under the circumstances of this case, the Board declines to uphold a cessation order that forces a permittee to take an illegal action. | 503 |
| 3. The Board declines to hold that the permit boundary, as identified in a state permit, protects a permittee in all cases from being required to abate the off-site detrimental consequences of its operations. | 660 |
| 4. The Board will not uphold a cessation order issued for a failure to abate a violation charged where that failure is premised on noncompliance with a remedial measure which has no rational relationship to the violation charged. | 831 |

ADMINISTRATIVE PROCEDURE**Generally**

- | | |
|--|-----|
| 1. Under 43 CFR 4.1153 OSM has an absolute right to submit an answer to a petition within 30 days of its receipt of a copy of the petition. After that time, an Administrative Law Judge has discretion to regulate the scope of OSM's answer in a manner reasonably related to any prejudice suffered by the opposing party as a result of OSM's delay. | 266 |
| 2. When an answer is filed by OSM after the time prescribed in 43 CFR 4.1153 but before any claim of prejudice from the delay is raised by the petitioner, it is an abuse of discretion for an Administrative Law Judge to issue, sua sponte, a summary decision in favor of the petitioner on the basis of presumed prejudice to the petitioner. | 267 |
| 3. Although an Administrative Law Judge has discretion to take appropriate action to correct the late filing of an answer in a proceeding to review a notice of violation or a cessation order, except in extreme circumstances it is not appropriate to vacate the notice or order. | 269 |
| 4. A determination by an Administrative Law Judge, sua sponte, that an application for review is not in compliance with 43 CFR 4.1164 relieves OSM of its obligation to answer the application, and, unless otherwise ordered, OSM is entitled to the full 20 days prescribed in 43 CFR 4.1165(a) to answer an amended application. | 273 |
| 5. An Administrative Law Judge has discretion to determine appropriate action to correct the late filing of an answer in a proceeding to review a notice of violation; however, vacation of the notice of violation is not appropriate action when the applicant has shown no prejudice resulting from a late answer. | 344 |
| 6. An applicant for review of a notice of violation who voluntarily failed to appear at the scheduled review hearing was properly deemed to have waived its right to a hearing, and the Administrative Law Judge could accept as true the allegations of fact contained in the notice of violation under review. | 406 |

Burden of Proof

- | | |
|--|-----|
| 1. In a civil penalty proceeding when OSM's prima facie case as to the fact of violation is effectively controverted by the person charged with the violation, the violation must be vacated because OSM has the ultimate burden of persuasion in accordance with 43 CFR 4.1155. | 449 |
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SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

APPEALS

Generally

Page

1. Once a right to appeal a decision of an OSM official has been granted, that right cannot be revoked without some express statement of and explanation for the revocation..... 571
2. Under 43 CFR 4.1282(b), an appeal of a decision of an OSM official must be filed within 30 days of the date of the decision, if the person filing the appeal did not receive a copy of the decision..... 571

APPLICABILITY

Generally

1. "Extraction of coal as an incidental part." For the purposes of 30 U.S.C. § 1278(3) (Supp. II 1978) and 30 CFR 700.11(d), which exclude the "extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction" from the coverage of Federal performance standards otherwise applicable to surface coal mining operations, the phrase "extraction of coal as an incidental part" means, in accordance with 30 CFR 707.5, the extraction of coal which is necessary, from an engineering standpoint, to enable the construction to be accomplished and does not mean the extraction of coal for the purpose of financing the construction..... 456
2. "Roads maintained with public funds." Under an agreement with the West Virginia Department of Highways whereby the right-of-way for a secondary road has been reopened and maintained by a coal company for its use and that of the general public, the resulting road is not one "maintained with public funds" that is excluded from the definition of "roads" in 30 CFR 710.5 and, thus, the road is subject to the construction standards in 30 CFR 715.17(1)(2)..... 492
3. Proof of the intention to mine coal and of a disturbance is sufficient to establish OSM's authority to regulate a site..... 498
4. Release of a portion of a permittee's performance bond by a state does not reduce OSM's authority to regulate that permittee..... 613
5. Where an operator removes coal in the process of rehabilitating a State road but there is no proof that the State expended funds to finance the project comprising at least 50 percent of the cost of the project, the project does not fall within the definition of "Government-financed construction" in 30 CFR 707.5, and the operator therefore cannot claim the exemption from applicability of the Act appearing in sec. 528(3)..... 831

Initial Regulatory Program

1. The initial program regulations are applicable to a surface coal mining operation immediately when a State permit for the operation is issued on or after Feb. 3, 1978..... 657
2. Compliance with State mining permit conditions does not excuse non-compliance with the initial Federal performance standards..... 847

APPROXIMATE ORIGINAL CONTOUR

Generally

1. "Appropriate contour." "Appropriate contour," as used in 30 CFR 715.14 (e), is not synonymous with "approximate original contour."..... 652

ATTORNEYS' FEES/COSTS AND EXPENSES

Bad Faith/Harassment

1. The fact that a permittee prevailed before the Hearings Division does not establish that OSM's enforcement action was undertaken in bad faith and for the purpose of harassing or embarrassing the permittee..... 743

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued**ATTORNEYS' FEES/COSTS AND EXPENSES—Continued****Final Order**

Page

1. A qualitative analysis of any order asserted to be a final order of the Office of Hearings and Appeals which is a prerequisite to an award of costs and expenses under the Act must be done before such an award may be considered further; the regulations contemplate that such a qualifying final order will have been issued by OHA setting forth a judgment on the merits of the resolution of the administrative proceeding. Here no such order has been issued and an award would thus be inappropriate.----- 394

Standards for Award

1. The Office of Hearings and Appeals will follow the standards for award of costs and expenses including attorneys' fees set out by the D.C. Circuit Court of Appeals in *Copeland v. Marshall*, ___ F. 2d ___ (1980)----- 394

Substantial Compliance

1. Where, largely due to what may have earlier appeared to have been a Board indication that it had resolved the compensation issue in petitioner's favor, petitioner made a substantial contribution to the determination of the standards to be used in cases for award of costs and expenses, it would be grossly unfair not to compensate petitioner for that contribution.----- 394

BACKFILLING AND GRADING REQUIREMENTS**Generally**

1. Backfilling and grading requirements of 30 CFR 715.14 are to be satisfied as contemporaneously as possible with surface coal mining operations to accomplish timely reclamation of disturbed areas----- 737
2. Whether particular backfilling and grading activity is timely must be determined taking into account the overall circumstances of a surface coal mining and reclamation operation.----- 737

Highwall Elimination

1. Elimination of that portion of a highwall created before May 3, 1978, will not be required when OSM, after negotiations with the permittee, agrees that pre-May 3 highwalls need not be eliminated and does not dispute that part of the highwall was created before that date, and when there is no evidence that post-May 3 operations had any adverse physical impact on the pre-May 3 highwall----- 477
2. Even where approval has been granted to construct a cut-and-fill terrace, 30 CFR 715.14(b)(2)(iii) requires that no highwalls be left.----- 613

Previously Mined Lands

1. The backfilling and grading requirements of 30 CFR 715.14 apply to previously mined lands where surface coal mining operations result in an adverse physical impact to the preexisting highwall which is reaffected by such operations.----- 861

BONDS**Release of**

1. Release of a portion of a permittee's performance bond by a state does not reduce OSM's authority to regulate that permittee.----- 613

CESSATION ORDERS**Generally**

1. OSM has established a prima facie case that a cessation order was properly issued when it shows a violation, practice, or condition that is causally connected to significant, imminent environmental harm or a reasonable expectation of such harm.----- 582

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued CESSATION ORDERS—Continued

Generally—Continued

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| 2. Cessation orders are extreme sanctions and should not be issued indiscriminately, but where the prerequisites for a cessation order are found, there need be no hesitation in closing the operation or its relevant portion..... | 582 |
| 3. Under the circumstances of this case, a cessation order requiring that all underground pumping of slurry be stopped was not overly broad.... | 582 |
| 4. The Board will not uphold a cessation order issued for a failure to abate a violation charged where that failure is premised on noncompliance with a remedial measure which has no rational relationship to the violation charged..... | 831 |

CIVIL PENALTIES

Generally

- | | |
|--|-----|
| 1. A civil penalty will not be disturbed when the person assessed does not seek review of the penalty amount, and the underlying violation is not vacated..... | 503 |
| 2. Although the Hearings Division is not bound to accept the OSM Assessment Branch's evaluation of the evidence in terms of assigning civil penalty points, where an Administrative Law Judge finds a violation occurred, he is required to adhere to the point system in 30 CFR 723.13 unless he determines that a waiver would further abatement of violations of the Act..... | 827 |

Amount

- | | |
|---|-----|
| 1. A civil penalty assessment based on a part of a cessation order that is vacated after administrative review cannot be upheld whether or not review was sought of the penalty amount..... | 503 |
|---|-----|

Hearings Procedure

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| 1. Under 43 CFR 4.1153 OSM has an absolute right to submit an answer to a petition within 30 days of its receipt of a copy of the petition. After that time, an Administrative Law Judge has discretion to regulate the scope of OSM's answer in a manner reasonably related to any prejudice suffered by the opposing party as a result of OSM's delay..... | 266 |
| 2. When an answer is filed by OSM after the time prescribed in 43 CFR 4.1153 but before any claim of prejudice from the delay is raised by the petitioner, it is an abuse of discretion for an Administrative Law Judge to issue, sua sponte, a summary decision in favor of the petitioner on the basis of presumed prejudice to the petitioner..... | 267 |
| 3. In a civil penalty proceeding when OSM's prima facie case as to the fact of violation is effectively controverted by the person charged with the violation, the violation must be vacated because OSM has the ultimate burden of persuasion in accordance with 43 CFR 4.1155..... | 449 |
| 4. Even where the petitioner, in a civil penalty proceeding, admits the validity of the issuance of a notice of violation and the hearing proceeds on the penalty amount issues only, the Administrative Law Judge is not bound to accept the admission when the penalty amount evidence raises a question in his mind whether the violation in fact occurred..... | 826 |
| 5. Where the parties have agreed to the existence of a violation and a penalty hearing is conducted on the basis of that agreement, if the Administrative Law Judge determines, either during or after the hearing, that the evidence may not support a violation, he shall make that determination known to the parties and, if necessary, reopen the hearing to allow OSM an opportunity to prove its case and the operator to counter that proof..... | 827 |

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued**CIVIL PENALTIES—Continued****Hearings Procedure—Continued**

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| 6. Where OSM fails to serve permittee with copy of a proposed assessment and of the worksheets showing the computation within 30 days of the issuance of the notice of violation, pursuant to regulation, such failure shall not result in administrative relief since the regulation is directory rather than mandatory..... | 1025 |

ENFORCEMENT PROCEDURES**Generally**

- | | |
|---|-----|
| 1. Because elapsed time is not a reason for failure to cite a violation of the Act and regulations discovered during an inspection, the fact that a permittee manages to complete an illegal action between inspections does not of itself protect it against a citation for the violation..... | 652 |
| 2. Filing an application for review of a notice of violation does not stay that notice..... | 824 |

ENVIRONMENTAL HARM**Generally**

- | | |
|---|-----|
| 1. OSM has established a prima facie case that a cessation order was properly issued when it shows a violation, practice, or condition that is causally connected to significant, imminent environmental harm or a reasonable expectation of such harm..... | 582 |
|---|-----|

EVIDENCE**Generally**

- | | |
|---|-----|
| 1. In a civil penalty proceeding when OSM's prima facie case as to the fact of violation is effectively controverted by the person charged with the violation, the violation must be vacated because OSM has the ultimate burden of persuasion in accordance with 43 CFR 4.1155..... | 449 |
| 2. Competent evidence that the person listed in state records as permittee over an area had no legal right under state law to mine or reclaim that area and that the person was not conducting mining or reclamation operations there as contemplated in 30 CFR 700.5 (1978) is sufficient to rebut a prima facie showing that the person is the permittee..... | 500 |
| 3. OSM is entitled to determine, on the basis of the evidence available to it, that a violation could not be proven, even if one had occurred..... | 653 |
| 4. A negative determination on the existence of prime farmlands issued by a state after the permittee has been cited by OSM for violating the prime farmlands regulations may be submitted as evidence of whether or not prime farmlands exist on the site, but it is not necessarily entitled to retroactive effect..... | 657 |

HEARINGS**Procedure**

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|---|-----|
| 1. Although an Administrative Law Judge has discretion to take appropriate action to correct the late filing of an answer in a proceeding to review a notice of violation or a cessation order, except in extreme circumstances it is not appropriate to vacate the notice or order..... | 269 |
| 2. A determination by an Administrative Law Judge, sua sponte, that an application for review is not in compliance with 43 CFR 4.1164 relieves OSM of its obligation to answer the application, and, unless otherwise ordered, OSM is entitled to the full 20 days prescribed in 43 CFR 4.1165(a) to answer an amended application..... | 274 |
| 3. An Administrative Law Judge has discretion to determine appropriate action to correct the late filing of an answer in a proceeding to review a notice of violation; however, vacation of the notice of violation is not appropriate action when the applicant has shown no prejudice resulting from a late answer..... | 344 |

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

HEARINGS—Continued

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| 4. An applicant for review of a notice of violation who voluntarily failed to appear at the scheduled review hearing was properly deemed to have waived its right to a hearing, and the Administrative Law Judge could accept as true the allegations of fact contained in the notice of violation under review..... | 406 |
| 5. Even where the petitioner, in a civil penalty proceeding, admits the validity of the issuance of a notice of violation and the hearing proceeds on the penalty amount issues only, the Administrative Law Judge is not bound to accept the admission when the penalty amount evidence raises a question in his mind whether the violation in fact occurred..... | 826 |
| 6. Where the parties have agreed to the existence of a violation and a penalty hearing is conducted on the basis of that agreement, if the Administrative Law Judge determines, either during or after the hearing, that the evidence may not support a violation, he shall make that determination known to the parties and, if necessary, reopen the hearing to allow OSM an opportunity to prove its case and the operator to counter that proof..... | 827 |

HYDROLOGIC SYSTEM PROTECTION

Generally

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|--|------|
| 1. "Underground operations." Because of the definition of "underground operations" in 30 CFR 717.11(a)(1), the ground water monitoring requirements of sec. 717.17(h)(1) and (h)(2) of 30 CFR do not apply to an inactive mine where the only underground activity is the mechanical removal of accumulated water..... | 685 |
| 2. Effluent limitations are applicable under 30 CFR 715.17 to discharges of drainage from areas disturbed by surface coal mining and reclamation operations, and not only to discharges of drainage from an "active mine area," as defined in the U.S. Environmental Protection Agency's regulations for effluent limitations under the coal mining point source category, set forth at 40 CFR Part 434..... | 1122 |
| 3. Under the provisions of 30 CFR 715.17, the effluent limitations are not applicable to any discharge or overflow caused by precipitation or snow-melt in accordance with the regulations of the U.S. Environmental Protection Agency in 40 CFR Part 434..... | 1122 |
| 4. Entitlement to an exemption from the application of effluent limitations to discharges from a sedimentation pond resulting from a precipitation event is conditioned on a demonstration that the sedimentation pond was constructed and has been maintained to contain or treat the volume of water which would run off into the pond during a 10-year 24-hour or greater precipitation event..... | 1122 |
| 5. The U.S. Environmental Protection Agency's provisions, at 40 CFR 122.63 (g) and (h), for a credit for pollutants in discharges attributable to intake waters, if applicable under 30 CFR 715.17, require that the credit be authorized in a permit for a surface coal mining and reclamation operation on the basis of a demonstration that the intake water is drawn from the same body of water into which discharges are made..... | 1122 |
| 6. Under 30 CFR 715.17, the effluent limitations are to be applied at the point of discharge from a sedimentation pond or the last pond in a series of sedimentation ponds, absent express prior approval to the contrary by the regulatory authority..... | 1122 |

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued**IMPOUNDMENTS****Generally**

- | | |
|---|------|
| | Page |
| 1. "Appropriate contour." "Appropriate contour," as used in 30 CFR 715.14(e), is not synonymous with "approximate original contour."----- | 652 |
| 2. Although, in general, a permanent impoundment should be contoured before it is filled with water, on the evidence available in this case, we decline to hold that the reclamation techniques used were illegal.--- | 652 |

INITIAL REGULATORY PROGRAM**Generally**

- | | |
|---|-----|
| 1. Because compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements, a decision by a state regulatory authority not to include a haul road within the area under state permit does not preclude application of the Federal requirements to the road.----- | 492 |
| 2. During the initial regulatory program, OSM may defer to the state for an initial determination on valid existing rights, but when that determination is properly questioned, OSM has an independent responsibility to review it to ensure that it was made in compliance with the initial program regulations.----- | 495 |
| 3. Compliance with state mining permit conditions does not excuse non-compliance with the initial Federal performance standards.----- | 861 |

INSPECTIONS**Generally**

- | | |
|--|------|
| 1. Prior presentation of credentials by an OSM inspector is not required when no employee of the operator is present on the minesite.----- | 613 |
| 2. OSM has a duty to investigate thoroughly a citizen's accusation that a state has failed to meet its obligations.----- | 652 |
| 3. OSM inspectors are not required by sec. 517(b)(3) of the Act and 30 CFR 721.12(a) to present their credentials prior to inspecting an inactive minesite at which no one associated with the mining operation is present.----- | 1112 |

NOTICES OF VIOLATION**Generally**

- | | |
|--|------|
| 1. A modification of a notice of violation can change obligations in any way necessary to ensure compliance with the Act and regulations so long as the specificity requirements of sec. 521(a)(5) of the Act are met.--- | 672 |
| 2. OSM does not have authority to extend the abatement period in a notice of violation beyond 90 days.----- | 672 |
| 3. Where OSM fails to serve permittee with copy of a proposed assessment and of the worksheets showing the computation within 30 days of the issuance of the notice of violation, pursuant to regulation, such failure shall not result in administrative relief since the regulation is directory rather than mandatory.----- | 1025 |

Permittees

- | | |
|--|-----|
| 1. OSM may rely on state records to determine the permittee of an area.----- | 500 |
| 2. Competent evidence that the person listed in state records as permittee over an area had no legal right under state law to mine or reclaim that area and that the person was not conducting mining or reclamation operations there as contemplated in 30 CFR 700.5 (1978) is sufficient to rebut a prima facie showing that the person is the permittee.----- | 500 |
| 3. During the initial regulatory program the person named in the state permit for a surface coal mining operation is the permittee with respect to that operation and, as such a proper person to be issued a notice of violation concerning the operation.----- | 867 |

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued**NOTICES OF VIOLATION—Continued****Remedial Actions**

Page

1. The remedial action required in a notice of violation may be modified in the document terminating the notice if the termination clearly shows in writing the remedial action accepted by OSM as an alternative abatement.....

474

PRIME FARMLANDS**Negative Determination**

1. When a state does not issue a negative determination on the existence of prime farmlands at the time the permit is issued and OSM alleges a violation of the prime farmland regulations, the permittee must demonstrate that prime farmlands do not exist on the site.....
2. A negative determination on the existence of prime farmlands issued by a state after the permittee has been cited by OSM for violating the prime farmlands regulations may be submitted as evidence of whether or not prime farmlands exist on the site, but it is not necessarily entitled to retroactive effect.....

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PUBLIC HEALTH AND SAFETY**Imminent Danger**

1. 30 CFR 710.11(a)(2)(ii) prohibits operations that "result in" imminent danger to the public.....
2. "Imminent danger." A condition constitutes an imminent danger to the health or safety of the public when it creates the possibility of substantial injury that a rational person, cognizant of the danger involved, would choose to avoid.....

660

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ROADS**Maintenance**

1. "Road." A "road" that leads from a coal stockpile of an underground mining operation to a state road and over which coal trucks travel in moving between the stockpile and the state road is a road within the meaning of 30 CFR 710.5 and is subject to the maintenance requirements of 30 CFR 717.17(j)(3)(i).....
2. The road maintenance requirement of 30 CFR 717.17(j)(3)(i) is a preventive measure and proof of the existence of the harm it is intended to prevent is not necessary to establish a violation of that requirement; proof of the road's condition and maintenance practices of the road is required.....

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SIGNS AND MARKERS**Generally**

1. Where a mine identification sign is located on one side of a highway and is clearly visible from the other side from which there is access to the mine's nearby processing facility, the Board is unwilling to say that that is insufficient to comply with the requirement of 30 CFR 715.12(b).....

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SPOIL AND MINE WASTES**Generally**

1. "Excess." When evidence does not support a finding that material removed from an underground mine is in excess of that which will be necessary to achieve approximate original contour, a violation of 30 CFR 717.15 cannot be upheld.....
2. "Excess spoil." When the evidence does not support a finding that spoil is being used to achieve the approximate original contour of the mined area, temporary relief will not be granted from an alleged violation of the requirements for the handling of excess spoil set forth in 30 CFR 715.15 (a).....

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2. There is a violation of 30 CFR 715.16(b) when topsoil is redistributed in a way that does not protect it from erosion and no other protective measures are taken..... 474

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1. "Underground operations." Because of the definition of "underground operations" in 30 CFR 717.11(a)(1), the ground water monitoring requirements of sec. 717.17(h)(1) and (h)(2) of 30 CFR do not apply to an inactive mine where the only underground activity is the mechanical removal of accumulated water..... 685

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3. The U.S. Environmental Protection Agency's provisions, at 40 CFR 122.63(g) and (h), for a credit for pollutants in discharges attributable to intake waters, if applicable under 30 CFR 715.17, require that the credit be authorized in a permit for a surface coal mining and reclamation operation on the basis of a demonstration that the intake water is drawn from the same body of water into which discharges are made.. 1122

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1. Under the provisions of 30 CFR 715.17, the effluent limitations are not applicable to any discharge or overflow caused by precipitation or snowmelt in accordance with the regulations of the U.S. Environmental Protection Agency in 40 CFR Part 434..... 1122
2. Entitlement to an exemption from the application of effluent limitations to discharges from a sedimentation pond resulting from a precipitation event is conditioned on a demonstration that the sedimentation pond was constructed and has been maintained to contain or treat the volume of water which would run off into the pond during a 10-year 24-hour or greater precipitation event..... 1122
3. The U.S. Environmental Protection Agency's provisions, at 40 CFR 122.63 (g) and (h), for a credit for pollutants in discharges attributable to intake waters, if applicable under 30 CFR 715.17, require that the credit be authorized in a permit for a surface coal mining and reclamation operation on the basis of a demonstration that the intake water is drawn from the same body of water into which discharges are made..... 1122

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4. Under 30 CFR 715.17, the effluent limitations are to be applied at the point of discharge from a sedimentation pond or the last pond in a series of sedimentation ponds, absent express prior approval to the contrary by the regulatory authority..... 1122
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2. "Contaminant." Where OSM shows that spoil materials have been mixed with topsoil it has made a prima facie case of a violation of 30 CFR 715.16 for failure to protect the topsoil from contaminants..... 826
3. "Downslope." The downslope in a multiple seam mining operation is the portion of the permit area below the actual and projected outcrop of the lowest seam being mined..... 368
4. "Excess." When evidence does not support a finding that material removed from an underground mine is in excess of that which will be necessary to achieve approximate original contour, a violation of 30 CFR 717.15 cannot be upheld..... 508
5. "Excess spoil." When the evidence does not support a finding that spoil is being used to achieve the approximate original contour of the mined area, temporary relief will not be granted from an alleged violation of the requirements for the handling of excess spoil set forth in 30 CFR 715.15(a)..... 892
6. "Extraction of coal as an incidental part." For the purposes of 30 U.S.C. § 1278(3) (Supp. II 1978) and 30 CFR 700.11(d), which exclude the "extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction" from the coverage of Federal performance standards otherwise applicable to surface coal mining operations, the phrase "extraction of coal as an incidental part" means, in accordance with 30 CFR 707.5, the extraction of coal which is necessary, from an engineering standpoint, to enable the construction to be accomplished and does not mean the extraction of coal for the purpose of financing the construction..... 456
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8. "Road." A "road" that leads from a coal stockpile of an underground mining operation to a state road and over which coal trucks travel in moving between the stockpile and the state road is a road within the meaning of 30 CFR 710.5 and is subject to the maintenance requirements of 30 CFR 717.17(j) (3) (i)..... 448

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9. "Roads maintained with public funds." Under an agreement with the West Virginia Department of Highways whereby the right-of-way for a secondary road has been reopened and maintained by a coal company for its use and that of the general public, the resulting road is not one "maintained with public funds" that is excluded from the definition of "roads" in 30 CFR 710.5 and, thus, the road is subject to the construction standards in 30 CFR 715.17(l)(2)----- 492
10. "Surface coal mining operations." Extraction of coal from a coal refuse pile is an activity which falls within the definition of "surface coal mining operations," as contained in revised Part 700, and OSM has authority to regulate such an operation during the initial regulatory program----- 617
11. "Surface coal mining operations." Mere evidence that a coal processing facility receives some undisclosed percentage of the coal production of two mines operated in connection with the facility, and located distances of 8 and 11 miles from the facility, is not sufficient to establish that the facility is "at or near" either of the mines, within the meaning of the definition of "surface coal mining operations" at 30 CFR 700.5-- 745
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13. "Topsoil." For purposes of the redistribution requirements of 30 CFR 715.16(b), topsoil means at least the same material as was required under 30 CFR 715.16(a) to be removed from areas to be disturbed by surface coal mining operations----- 474
14. "Underground operations." Because of the definition of "underground operations" in 30 CFR 717.11(a)(1), the ground water monitoring requirements of sec. 717.17 (h)(1) and (h)(2) of 30 CFR do not apply to an inactive mine where the only underground activity is the mechanical removal of accumulated water----- 685

TAYLOR GRAZING ACT

(See also Grazing Leases, Grazing Permits & Licenses—if included in this Index.)

GENERALLY

1. Neither FLPMA nor the Taylor Grazing Act authorizes appropriation of water or provide an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law----- 253

TRESPASS

GENERALLY

1. In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his or her conduct was so lacking in reasonableness or responsibility that it became reckless or negligent----- 276

WATER AND WATER RIGHTS**FEDERAL APPROPRIATION**

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1. Neither FLPMA nor the Taylor Grazing Act authorizes appropriation of water or provide an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law..... 253
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3. The National Park Service, Fish and Wildlife Service, Bureau of Land Management and Bureau of Reclamation must follow state substantive and procedural law when appropriating water except in the limited instances where water is necessary to accomplish the original purpose(s) of a Federal reservation or protect the navigation servitude..... 1055

STATE LAWS

1. The United States should comply with the substantive and procedural provisions of state law when acquiring and appropriating water except (1) where Congress or the Executive has reserved land or water for particular Federal purposes; (2) where Congress has clearly mandated that unappropriated water on the public lands is reasonably required for a Federal program or purpose and that water cannot be acquired in a manner conforming to all substantive requirements of state law; (3) the United States is entitled to a priority date as of its historic date of first use where water has been used historically for consumptive beneficial uses recognized by state law but without having conformed to procedural requirements prescribed by state law..... 253
2. The National Park Service, Fish and Wildlife Service, Bureau of Land Management and Bureau of Reclamation must follow state substantive and procedural law when appropriating water except in the limited instances where water is necessary to accomplish the original purpose(s) of a Federal reservation or protect the navigation servitude..... 1055

WILDERNESS ACT

1. Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered, with due regard for the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal..... 490

WILDLIFE REFUGES AND PROJECTS

(See also Exchanges of Land, Migratory Bird Conservation Act—if included in this Index.)

LEASES AND PERMITS

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1. An offer to lease for oil and gas in the Arctic National Wildlife Refuge is properly rejected where the lands in the refuge have been withdrawn from the operation of the mineral leasing laws by either secs. 1002 or 1003 of the Alaska National Interest Lands Conservation Act. Standard offers to lease for oil and gas may not be construed as requests to undertake exploratory activities only. The only exploratory activities permitted in the Arctic National Wildlife Refuge are governed by sec. 1002 of the Act. Any requests to undertake exploratory activities are premature until the Secretary of the Interior has issued guidelines governing exploration in the refuge.-----

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WITHDRAWALS AND RESERVATIONS**GENERALLY**

1. Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals.-----

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AUTHORITY TO MAKE

1. The President had nonstatutory authority to withdraw public land in addition to authority conferred upon him by the Pickett Act, 43 U.S.C. §§ 141, 142 (1970). Such nonstatutory authority was not limited by the terms of 43 U.S.C. § 142 (1970) which provided that withdrawn lands shall remain open to location for metalliferous minerals.-----

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EFFECT OF

1. The President had nonstatutory authority to withdraw public land in addition to authority conferred upon him by the Pickett Act, 43 U.S.C. §§ 141, 142 (1970). Such nonstatutory authority was not limited by the terms of 43 U.S.C. § 142 (1970) which provided that withdrawn lands shall remain open to location for metalliferous minerals.-----
2. A mining claim located on land which was segregated and closed to mineral entry is properly declared null and void ab initio.-----
3. Public domain land withdrawn or reserved is presumed to be available for oil and gas leasing unless the withdrawal or reservation specifically provides otherwise.-----
4. An offer to lease for oil and gas in the Arctic National Wildlife Refuge is properly rejected where the lands in the refuge have been withdrawn from the operation of the mineral leasing laws by either secs. 1002 or 1003 of the Alaska National Interest Lands Conservation Act. Standard offers to lease for oil and gas may not be construed as requests to undertake exploratory activities only. The only exploratory activities permitted in the Arctic National Wildlife Refuge are governed by sec. 1002 of the Act. Any requests to undertake exploratory activities are premature until the Secretary of the Interior has issued guidelines governing exploration in the refuge.-----

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WITHDRAWALS AND RESERVATIONS—Continued

TEMPORARY WITHDRAWALS

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1. Where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including location and entry under the mining laws and the application was duly noted on the official status plats, the lands were segregated from the date of notation to the extent that the withdrawal, if effected, would prevent such forms of appropriation. A protective withdrawal is not a temporary withdrawal under the Pickett Act, 43 U.S.C. § 141 (1970), and is not limited by the terms of 43 U.S.C. § 142 (1970) which provides that temporarily withdrawn lands shall remain open to location for metalliferous minerals-----

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WORDS AND PHRASES

1. "*Leasing.*" The word "leasing" in the phrase "no leasing * * * leading to production of oil and gas" in sec. 1003 of the Alaska National Interest Lands Conservation Act includes leasing for the purpose of exploratory activities-----
2. "*Mineral.*" Geothermal steam, as defined in sec. 2(c) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1001(c), is not a "mineral" as the term is used in the mineral leasing laws. Congress generally did not intend the Steam Act to be treated as a "mineral leasing law."-----
3. "*Service.*" Where BLM sends a copy of its decision to an adversely affected party at his address of record on Sept. 21; where additional information containing the party's more recent address is filed with BLM on Oct. 5; and where BLM receives the mailed copy back as undeliverable on Oct. 16 but does not mail another copy to the more recent address, BLM has not mailed a copy to the party's last address of record, and there is no "service" under 43 CFR 1810.2. Where BLM has never served a copy of its decision on an adversely affected party, the time for this party to appeal has never commenced, and the decision is not effective *per* 43 CFR 4.21(a)-----

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